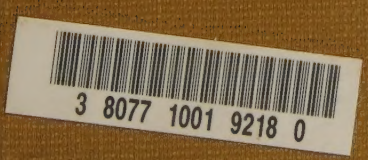
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THE
SUPREME COURT REPORTER

VOLUME 38

PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1917

WITH KEY-NUMBER ANNOTATIONS

NOVEMBER, 1917 — JULY, 1918

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JUSTICES

OF THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1917

CHIEF JUSTICE:

HON. EDWARD D. WHITE.

ASSOCIATES:

HON. JOSEPH McKENNA.
HON. OLIVER WENDELL HOLMES.
HON. WILLIAM R. DAY.
HON. WILLIS VAN DEVANTER.
HON. MAHLON PITNEY.
HON. JAMES C. McREYNOLDS.
HON. LOUIS D. BRANDEIS.
HON. JOHN H. CLARKE.

ATTORNEY GENERAL:

HON. THOMAS WATT GREGORY.

SOLICITOR GENERAL:

HON. JOHN WILLIAM DAVIS.

ALLOTMENT OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

FIRST CIRCUIT.

Comprising Maine, Massachusetts, New Hampshire, and Rhode Island.

JUSTICE OLIVER WENDELL HOLMES, of Massachusetts. Appointed December 4, 1902, by President Roosevelt.

SECOND CIRCUIT.

Comprising Connecticut, New York, and Vermont.

JUSTICE LOUIS D. BRANDEIS, of Massachusetts. Appointed June 1, 1916, by President Wilson.

THIRD CIRCUIT.

Comprising Delaware, New Jersey, and Pennsylvania.

JUSTICE MAHLON PITNEY, of New Jersey. Appointed March 13, 1912, by President Taft.

FOURTH CIRCUIT.

Comprising Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

JUSTICE EDWARD D. WHITE, of Louisiana. Appointed February 19, 1894, by President Cleveland; appointed Chief Justice December 12, 1910, by President Taft.

FIFTH CIRCUIT.

Comprising Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.

JUSTICE JAMES C. McREYNOLDS, of Tennessee. Appointed August 29, 1914, by President Wilson.

SIXTH CIRCUIT.

Comprising Kentucky, Michigan, Ohio, and Tennessee.

JUSTICE WILLIAM R. DAY, of Ohio. Appointed February 25, 1903, by President Roosevelt.

SEVENTH CIRCUIT.

Comprising Illinois, Indiana, and Wisconsin.

JUSTICE JOHN H. CLARKE, of Ohio. Appointed July 24, 1916, by President Wilson.

EIGHTH CIRCUIT.

Comprising Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming.

JUSTICE WILLIS VAN DEVANTER, of Wyoming. Appointed December 16, 1910, by President Taft.

NINTH CIRCUIT.

Comprising Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

JUSTICE JOSEPH McKENNA, of California. Appointed January 21, 1898, by President McKinley.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1917

(245 U. S. 1)

UNITED STATES v. LEARY et al.

(Argued Oct. 4, 1917. Decided Oct. 15, 1917.)

No. 194.

1. PRINCIPAL AND SURETY ⟸190½—INDEMNITY TO SURETY — RENEWAL OF SURETY'S OBLIGATION.

L. became a bondsman for a federal prisoner in a proceeding for his removal to another state on request of K., who wrote him that the prisoner had placed stock in his hands as indemnity to L. for becoming his bondsman. New bonds were given from time to time at different stages of the proceedings, not as additional security, but to take the place of the old bonds and on such occasions K. wrote L., referring at the time one bond was given to the security held for L.'s protection and stating in another letter that the reason for the matter was simply to enable the prisoner to carry the case to the Supreme Court. After the affirmance of an order refusing a writ of habeas corpus, a new bond was given, which was forfeited. *Held*, that the matter was plainly regarded by the parties as a continuing one, and the last bond was executed with the understanding that the security should continue, though the already repeated assurance was not again repeated, especially where K. settled with the prisoner for stock and bonds held by him, retaining only that held for L.'s security, and when sued respecting the stock asserted under oath that it was security.

2. PRINCIPAL AND SURETY ⟸190½—INDEMNITY TO SURETY—CHANGE IN SECURITY.

Though the prisoner was allowed to make changes and substitutions in the stock, where the proceeds of the sale of the stock originally held and other stock was invested in different stock part of which was selected and retained by K. in place of that originally held, this was enough, when taken with the agreement to render it subject to the pledge, without considering whether in the interest of good faith the stock so retained should be attributed to the portion of the funds coming from that previously pledged.

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

Suit by the United States against Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, and others, to charge defendant Luther Laflin Kellogg with a trust in respect of funds in his hands. A decree for complainant was reversed (229 Fed. 660, 144 C. C. A. 70), and complainant appeals. Affirmed.

Mr. Marion Erwin, of New York City, for the United States.

Mr. Aubrey E. Strode, of Amherst, Va., for Leary's Adm'rs.

Mr. Abram J. Rose, of New York City, for Kellogg.

*Mr. Justice HOLMES delivered the opinion of the court.

This proceeding began as a suit by the United States to charge the defendant Kellogg with a trust in respect of funds alleged to have been received by him from Greene and to have been obtained from the plaintiff by Greene through his participation in the well-known Carter frauds. United States v. Carter, 217 U. S. 286, 30 Sup. Ct. 515, 54 L. Ed. 769, 19 Ann. Cas. 594. After the evidence had been taken, leave to intervene was granted, on terms, to the administratrix of the estate of James D. Leary, predecessor of the present Leary appellees. 224 U. S. 567, 32 Sup. Ct. 599, 56 L. Ed. 889, Ann. Cas. 1913D, 1029. The fund now in question is four hundred shares of the stock of the Norfolk and Western Railway Company, which the Learys and Kellogg say were held by Kellogg as security to their intestate against his liability upon a bail bond for Greene. A judgment upon the bond has been paid by them. The Circuit Court of Appeals has sustained the Learys' claim and the United States appeals. 229 Fed. 660, 144 C. C. A. 70.

Although Kellogg argues the contrary, it may be assumed for the purposes of decision

that the United States traces its money into the stock, since Kellogg makes no personal claim to it. On the other hand it appears that before the intestate Leary became bondsman for Greene on December 14, 1899, Kellogg wrote to him on the same day, stating that Greene had placed in his hands three hundred shares of stock of the Delaware, Lackawanna and Western Railroad Company "as indemnity to you for becoming his bondsman in the matter of the United States against Greene, Gaynor and others, now pending in the district court" to hold until Leary was released from the said bond or to apply in payment of the obligation. We agree with the Circuit Court of Appeals that neither Kellogg nor Leary had notice of any defect in Greene's title. The only question requiring discussion is whether the present stock is held upon the same terms against a later bond that Leary signed.

[1, 2] The proceedings in which the bond of December, 1899, was given were for the removal of Greene from New York to Georgia. On February 20, 1900, the United States Commissioner found that there was probable cause. Greene was committed to the marshal and the bond was cancelled. On the same day another bond seems to have been given by Leary that was satisfied on May 28, 1901, when the district judge issued a warrant for removal. On May 21 Kellogg wrote to Leary that it would be necessary "to renew the bail given by you for Captain Greene, and for which I hold security for your protection," fixing a time, and adding "This new bond is to take the place of the old one without additional liability." The bond was given on May 28 and Greene was enlarged. On June 8 Greene was surrendered into the custody of the marshal in New York and a new bail bond was executed by Leary after having received a letter from Kellogg, dated June 6, saying "I am obliged to trouble you again to renew the bond in the Greene and Gaynor matter" fixing the time and adding "The reason for the matter is not that you have to incur any additional liability, but simply to enable them to carry their case to the United States Supreme Court."

The case was taken to this Court and an order of the Circuit Court refusing a writ of habeas corpus was affirmed on January 6, 1902. Greene v. Henkel, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. Ed. 177. Thereafter, on January 20, Leary signed, as surety for Greene, the bond for $40,000, conditioned for Greene's appearance in Georgia, which was forfeited and which the Learys have paid.

More words could not make it plainer than it is made by the letters that the "matter" was regarded by the parties as a continuing one and that the bond of June 8, 1901, was executed on the agreement that the security also should continue. The only natural inference as to the later one of 1902 that took its place is that the understanding remained in force without the requirement of a repetition of the already repeated assurance. This inference is confirmed by the conduct of Kellogg. He had held stocks and bonds for Greene and settled with him, retaining only this stock. Even if his original answer under oath filed before the Learys intervened is not evidence for them as a statement of facts, it was an act as well as a statement and showed that at that time he asserted that the stock was security given by Greene. It is true that the stock was not the same that was mentioned in the first letter. Greene was allowed to make changes and substitutions. But this and other purchases were made with the proceeds of the sale of the first and other stocks before the letters of May and June 1901 were written, and without considering whether in the interest of good faith the stock retained should or should not be attributed to the portion of the funds coming from that previously pledged, the selection and retention of it in place of the other is enough when taken with the agreement disclosed. See National Bank v. Insurance Co., 104 U. S. 54, 68, 26 L. Ed. 693; In re Hallett's Estate, 13 Ch. D. 696. It seems to us unnecessary to add more to the discussion by the Circuit Court of Appeals. Whether Kellogg should receive an allowance as trustee may be left to the District Court.

Decree affirmed.

(245 U. S. 6)

PENNSYLVANIA R. CO. v. TOWERS et al., Public Service Commission of Maryland.

(Argued April 25 and 26, 1917. Decided Oct. 15, 1917.)

No. 31.

1. Courts ⟸366(26)—Effect of Decisions of State Courts on United States Courts.

On writ of error to a state court, the Supreme Court must accept the state court's definition of the authority of the state Public Service Commission under the state law.

2. Constitutional Law ⟸62 — Powers of States.

The conceded authority of a state to regulate the intrastate rates of carriers engaged in both interstate and intrastate commerce may be exercised through duly authorized commissions.

3. Commerce ⟸62 — Regulation — Powers of States.

Where a railroad company has recognized the propriety and necessity of rendering a peculiar service to suburban communities by establishing commutation rates, a state may, without committing any violation of the federal Constitution, regulate such rates within the limitation of reasonableness, and may fix rates for the special services rendered commuters, different from those charged for the general service, as the service rendered a commuter, carrying little baggage and riding many times on a single ticket for short distances, is of a special

character, and different from that given the single way passenger.

The Chief Justice, Mr. Justice McKenna, and Mr. Justice McReynolds dissenting.

In Error to the Court of Appeals of the State of Maryland.

Suit by the Pennsylvania Railroad Company, lessee of the Northern Central Railway Company, against Albert G. Towers and others, constituting the Public Service Commission of Maryland, for an injunction to restrain the Public Service Commission from enforcing an order requiring the sale of commutation tickets at certain specified rates. A decree denying an injunction was affirmed, and plaintiff brings error. Affirmed.

For opinion below, see 126 Md. 59, 94 Atl. 330, Ann. Cas. 1917B, 1144.

Mr. F. D. McKenney, of Washington, D. C., for plaintiff in error.

Mr. W. Cabell Bruce, of Baltimore, Md., for defendant in error.

*Mr. Justice DAY delivered the opinion of the Court.

This was an action in the circuit court No. 2 of Baltimore City, Maryland, to enjoin the Public Service Commission of Maryland from enforcing an order to sell commutation tickets at certain rates specified. The injunction was refused, and on appeal the Court of Appeals of Maryland affirmed the decree and held that although the order fixing the rates declared the same to be in force for ten years, there should be reserved to the railroad company the right to apply to the Commission after the lapse of a reasonable time for a rescission or modification of its order if experience demonstrated that the revenue derived under the tariff as established by the Commission was not properly compensatory for the services performed. 126 Md. 59, 94 Atl. 330, Ann. Cas. 1917B, 1144.

The order of the Commission required the Pennsylvania Railroad Company, lessee of the Northern Central Railway, to sell tickets for the transportation of passengers between Baltimore and Parkton within the state of Maryland on the line of the Northern Central Railway.

A table appearing in the opinion of the Court of Appeals shows the relative rates under the former schedules and the new order of the Public Service Commission to be as follows:

Rates Prior to Nov. 25, 1914.	Rates as per Schedule Filed Nov. 25, 1914.	Rates under Order P. S. Com Dec. 23, 1914.
1. Round trip, 10 day, 2¼¢ per M.	Round trip, no limit, 2½¢ per M.	Round trip, 2¼¢ per M.
2. Exc. 2-10 days, 2¼¢ per M.	Discontinued.	No ruling made.
3. 10-trip ticket, 1 yr., 1 8/10¢ per M.	10-trip, 3 mos., 2¼¢ per M.	10-trip, 3 mos. 2¢ per M.
4. 60-trip 1 mo., 2¢ for first 3 M., ¼¢ for ea. addl. ½ M.	60-trip, 1 mo. former rate plus 25¢ flat.	60-trip, 1 mo. former rate plus 25¢.
5. 100-trip 1 yr. at double 60-trip.	Discontinued.	100-trip, 4 mos., former rate, plus $1.
6. 180-trip 3 mos. same as 4, less 10%.	180-trip, 3 mos. at 3 times 60-trip.	180-trip, 3 mos., former rate plus 75¢.
7. 46-trip School, 1 mo., 46/60 of 60-trip.	46-trip School, 1 mo., 46/60 of 60-trip.	46-trip School, 1 mo., 46/60 of 6 trip.

The attack upon the order of the Commission in this court, is based upon the contention that its effect is to take the property of the railroad company without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. It is also averred in the bill that the order, if enforced, will work a discrimination against interstate travel in favor of travel within the state, and is otherwise unreasonable and void.

[1] The Court of Appeals of Maryland stated the question to be whether it is within the power of the Public Service Commission to require the establishment of a schedule of commutation rates by the railroad company, not where no such rates had theretofore been established, but where a new system of commutation rates had been proposed by the railroad company and submitted to the Commission. Whether commutation rates should be established was declared to be a question of policy to be decided by the company. The court found authority in the Commission under the statutes of Maryland to revise commutation rates where such rates had already been established by the action of the company. We must accept this definition of authority in the Commission, so far as the state law is concerned, and direct our inquiry to the federal question presented.

The question, as counsel for plaintiff in error states it, is whether a state Legislature, either directly or through the medium of a Public Service Commission, under the guise of regulating commerce, may compel carriers engaged in both interstate and intrastate commerce to establish and maintain intrastate rates at less than both the interstate and intrastate standard and legally established maxima. It is asserted that there is no constitutional authority to compel railroad companies to continue the sale of commutation or special class tickets at rates less than the legally established standard or normal one-way single passenger fare upon terms more favorable than those extended to the single one-way traveler.

To maintain this proposition plaintiff in error relies upon and quotes largely from the opinion of this court in Lake Shore & Michigan Southern Ry. Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. In that case a majority of this court held a statute of the state of Michigan to be invalid.

previous statute of the state had fixed a maximum passenger rate of three cents per mile. The statute in controversy required the issuing of mileage books for a thousand miles, good for two years, at a less rate. This court held that a maximum rate for passengers having been established, that rate was to be regarded as the reasonable compensation for the service, and that the fixing of the less rate to particular individuals was an arbitrary exercise of legislative power and an unconstitutional interference with the business of the carrier, the effect of which was to violate the provisions of the Fourteenth Amendment to the federal Constitution by depriving the railroad company of its property without due process of law and denying to it the equal protection of the law.

The Lake Shore Case did not involve, as does the present one, the power of a state commission to fix intrastate rates for commutation tickets where such rates had already been put in force by the railroad company of its own volition, and we confine ourselves to the precise question presented in this case, which involves the supervision of commutation rates when rates of that character have been voluntarily established by the carrier. The rates here involved are wholly intrastate. The power of the states to fix reasonable intrastate rates is too well settled at this time to need further discussion or a citation of authority to support it.

In Interstate Commerce Commission v. B. & O. R. R., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699, this court held that a "party rate ticket" for the transportation of ten or more persons at a less rate than that charged a single individual did not make a discrimination against an individual charged more for the same service or amount to an unjust or unreasonable discrimination within the meaning of the act to regulate commerce. In the course of the opinion the right to issue tickets at reduced rates good for limited periods upon the principle of commutation was fully recognized. See 145 U. S. 277, 278, 279, 280, 12 Sup. Ct. 844, 36 L. Ed. 699.

[2] Having the conceded authority to regulate intrastate rates, we perceive no reason why such power may not be exercised through duly authorized commissions and rates fixed with reference to the particular character of the service to be rendered.

In Norfolk & Western Ry. v. West Virginia, 236 U. S. 605, 608, 35 Sup. Ct. 437 (59 L. Ed. 745), after making reference to Northern Pacific Ry. v. North Dakota, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. Ed. 735, Ann. Cas. 1916A, 1, this court said:

"It was recognized [in the North Dakota case] that the state has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services."

[3] That the state may fix maximum rates governing one-way passenger travel is conceded. Having the general authority to fix rates of a reasonable nature, we can see no good reason for denying to the state the power to exercise this authority in such manner as to fix rates for special services different from those charged for the general service. In our opinion the rate for a single fare for passengers generally may be varied so as to fit the particular and different service which involves, as do commutation rates, the disposition of tickets to passengers who have a peculiar relation to the service. The service rendered in selling a ticket for one continuous trip is quite different from that involved in disposing of commutation tickets where a single ticket may cover 100 rides or more within a limited period. The labor and cost of making such tickets as well as the cost of selling them is less than is involved in making and selling single tickets for single journeys to one-way passengers.

The service rendered the commuter, carrying little baggage and riding many times on a single ticket for short distances, is of a special character and differs from that given the single-way passenger.

It is well known that there have grown up near to all the large cities of this country suburban communities which require this peculiar service, and as to which the railroads have themselves, as in this instance, established commutation rates. After such recognition of the propriety and necessity of such service, we see no reason why a state may not regulate the matter, keeping within the limitation of reasonableness.

On the strength of these commutation tariffs, it is a fact of public history that thousands of persons have acquired homes in city suburbs and nearby towns in reliance upon this action of the carriers in fixing special rates and furnishing particular accommodations suitable to the traffic. This fact has been recognized by the courts of the country, by the Interstate Commerce Commission, and quite generally by the Railroad Commissions of the states.[1]

The question of the power of the Public Service Commission of the State of New

[1] Forty-Fourth Annual Report of the Railroad Commission for the year 1912 (Massachusetts) pp. 67, 107, 113; Public Utilities Reports, 1915B (Massachusetts) p. 362; Public Utilities Reports, 1915E (Rhode Island) p. 269; Public Service Commission Reports, Second District of N. Y. (New York) vol. III, pp. 212, 461; Idem, vol. IV, p. 11; Public Utilities Reports, 1915B (New Jersey) p. 161; Public Utilities Commission Reports, 1914 (Illinois) vol. I, pp. 553, 590; Public Utilities Commission Reports, 1913-1914 (Colorado) p. 131; Public Utilities Reports, 1915D (Idaho) p. 742; Opinions and Orders of the Railroad Commission (California) vol. I, pp. 451, 855; Idem, vol. II, p. 910; Idem, vol. III, pp. 5, 30, 32, 749, 800, 807, 973; Idem, vol. V, p. 555; Idem, vol. VI, pp. 853, 1008; Idem, vol. VII, pp. 179, 894; The Commutation Rate Case, 21 Interst. Com. Com'n R. 428.

*13 York in this respect was before the Appellate Division of the Supreme Court of *that state in People ex rel. New York, New Haven & Hartford Railroad Co. v. Public Service Commission, 159 App. Div. 546, 145 N. Y. Supp. 513. In that case it was said:

"Subdivision 4 of section 33 of the Public Service Commissions Law (Consol. Laws, c. 48 [Laws of 1910, c. 480], as amended by Laws of 1911, c. 546) empowers the Commission to fix reasonable and just rates for such service. It is urged, however, that the statute is invalid under the rule of Lake Shore, etc., R. Co. v. Smith, 173 U. S. 684 [19 Sup. Ct. 565, 43 L. Ed. 858]. In that case the statute of Michigan had fixed a maximum passenger rate at three cents per mile. A subsequent enactment required the issuing of mileage books for 1,000 miles, good for two years, at a less rate. The court held that having fixed a uniform maximum rate as to all passengers, such rate was the reasonable compensation for the service, and that the fixing of a less rate to particular individuals was an unreasonable and arbitrary exercise of legislative power; that it was not for the convenience of the public and thus within the police power, but was for the convenience of certain individuals who were permitted to travel upon the railroads for less than the reasonable rate prescribed by law; that the law was, therefore, in violation of the Fourteenth Amendment of the federal Constitution in depriving the company of its property without due process of law and by depriving it of the equal protection of the laws.

"In Beardsley v. N. Y., L. E. & W. R. R. Co., 162 N. Y. 230 [56 N. E. 488], the Court of Appeals felt constrained by the Smith Case to declare the Mileage Book Law of this state invalid as to companies in existence at the time of its passage, but in Purdy v. Erie R. R. Co., 162 N. Y. 43 [56 N. E. 508, 48 L. R. A. 669], that law was held valid as to companies organized after the statute was passed.

"In Louisville & Nashville R. R. Co. v. Kentucky, 183 U. S. 503 [22 Sup. Ct. 95, 46 L. Ed. 298], after citing the Smith Case and like *14 cases, the court says (at page 511): 'Nor, yet, are we ready to carry the *doctrine of the cited cases beyond the limits therein established.'

"In the Minnesota Rate Case (Simpson v. Shepard) 230 U. S. 352 [33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18], the legality of an order of the Commission of that state was recognized which fixed a maximum freight rate and passenger rate, the latter at two cents a mile as the maximum fare for passengers twelve years of age or over, and one cent a mile for those under twelve years of age.

"In Interstate R. Co. v. Massachusetts, 207 U. S. 79 [28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555], the Massachusetts law prescribing special rates less than the maximum for school children was held valid. These cases indicate that the Smith Case is not to be extended beyond the facts upon which it rests.

"The Smith Case distinguishes itself from this case where the court (at page 693 [of 173 U. S., at page 569 of 19 Sup. Ct., 43 L. Ed. 858]) says: 'This act is not like one establishing certain hours in the day during which trains shall be run for a less charge than during the other hours. In such case it is the establishing of maximum rates of fare for the whole public during those hours, and it is not a discrimination in favor of certain persons by which they can obtain lower rates by purchasing a certain number of tickets by reason of which the company is compelled to carry them at the reduced rate, and thus, in substance, to part with its property at a less sum than it would be otherwise entitled to charge. The power to compel the company to carry persons under the circumstances as provided for in this act, for less than the usual rates does not seem to be based upon any reason which has hitherto been regarded as sufficient to authorize an interference with the corporation, although a common carrier and a railroad.'

"Our flourishing cities owe their position and prosperity, in part, to the commutation rates for suburban service; the health and welfare of the public are concerned that people doing business in the large cities may live in the *country *15 where the surroundings are pleasanter, more healthy and to the advantage of themselves and their families. It is a known fact that such rates exist upon all railways entering large cities, and have usually been established by the companies voluntarily in the interest of themselves and the public. The service is different in its nature from the other passenger service. It is so universal, of such large proportion, has become so necessary to the public that it cannot be said that the fixing of reasonable and just rates for it is unusual or unreasonable, or the granting of a benefit to individuals and not for convenience to the public.

"Nearly one-half of the passengers handled by the relator at the Grand Central Terminal were of this class. Perhaps the same ratio would exist upon the other railroads serving the city. We conclude that the statute in question is valid as conferring a power on the Commission to regulate rates for the public convenience and welfare."

That decision was affirmed by the Court of Appeals of New York on the opinion of the Appellate Division. 215 N. Y. 689, 109 N. E. 1089.

The subject was elaborately considered by the Interstate Commerce Commission in the Commutation Rate Case, 21 Interst. Com. Com'n R. 428, in which the authority of the Commission to fix reasonable rates was sustained. In the course of the opinion, Commissioner Harlan, speaking for a unanimous Commission, said:

"Another case strongly relied upon by the defendants is L. S. & M. S. R. R. Co. v. Smith, 173 U. S. 699 [19 Sup. Ct. 565, 43 L. Ed. 858]. It there appeared that the Legislature of the state of Michigan had fixed the maximum passenger fare to be charged by railroad companies for local journeys within the state. By a subsequent enactment it required the carriers to sell 1,000-mile tickets for use within the lower peninsula at a price not exceeding $20 and in the upper peninsula at a price not exceeding $25. *16 Various conditions affecting the use of the * tickets were also fixed by the act, and among others that they should be valid for two years after the date of purchase. It was held that in the exercise of its general police power a state may fix maximum fares, but that it may not fix a rate for 1,000-mile tickets that involves a discrimination in favor of those who buy them. The statute was held to be invalid. The case, however, involved mileage tickets which, we must repeat, differ very essentially in character from commutation tickets.

"We have been referred to no other adjudication by the courts and are left to conclude that the precise point now before us has not been passed upon by the courts.

"It will not be necessary to dwell here upon the importance of the question not only to the particular suburban communities involved on the record before us, but to many other such communities throughout the country, the prosperity and growth of which largely depend upon an efficient and reasonable commutation service. Many such communities have not only been en-

couraged by the carriers, but were, in fact, originally established largely on their initiative. Suburban property has been bought, homes have been established, business relations made, and the entire course of life of many families adjusted to the conditions created by a commutation service. This may not have been done on the theory that the fares in effect at any particular time would always be maintained as maximum fares, but countless homes have been established in suburban communities in the belief that there would be a reasonable continuity in the fares and that the carriers in any event would perform the service at all times for a reasonable compensation.

"Nor need we stop to point out the distinction between commutation tickets on the one hand and excursion and mileage tickets on the other. Compared with the normal one-way fare all such tickets may be said to be abnormal. But the resemblance stops at that point. Although they are mentioned together in section 22, the force and effect of that provision must necessarily differ with the differing character of the several kinds of tickets. It seems to be settled under that section that a carrier may enter upon the policy and practice of issuing mileage books and excursion tickets at less than its regular normal fare for the one-way journey, and, having adopted such a policy, may subsequently withdraw from it and refuse longer to issue such tickets. That has been the view of this Commission, and is the view generally entertained, although there may be exceptional circumstances where a different conclusion would be required. It by no means follows, however, that a carrier under section 22 may exercise the same scope and freedom of action with respect to commutation tickets."

The reasoning of these decisions is sound and involves no violation of the federal Constitution. True it is that it may not be possible to reconcile these views with all that is said in the opinion delivered for the majority of the court in the case of Lake Shore & Michigan Southern Ry. Co. v. Smith, supra. The views therein expressed which are inconsistent with the right of the states to fix reasonable commutation fares when the carrier has itself established fares for such service, must be regarded as overruled by the decision in this case.

We find no error in the decree of the Court of Appeals of Maryland, and the same is Affirmed.

The CHIEF JUSTICE, Mr. Justice McKENNA, and Mr. Justice McREYNOLDS dissent.

(245 U. S. 13)

BRUCE et al. v. TOBIN.

(Submitted Oct. 1, 1917. Decided Oct. 22, 1917.)

No. 645.

1. COURTS ⊂=393—REVIEW OF DECISIONS OF STATE COURTS — FINALITY OF DETERMINATION.

Under Act Sept. 6, 1916, c. 448, 39 Stat. 726, authorizing the Supreme Court by certiorari or otherwise to review causes wherein a final judgment or decree has been rendered by the highest court of a state, where the federal Constitution, laws, or treaties are drawn in question, the judgment of a state Supreme Court, reversing the judgment of the trial court and granting a new trial in an action to recover a share in the amount paid by a railroad company for the death of an employé while engaged in interstate commerce, is not reviewable by writ of certiorari, though the state Supreme Court determined the ultimate right of plaintiff to recover and the general principles by which that right was to be measured, as the right of review is still limited, as it was prior to the act of 1916, to final judgments, and the finality of the judgment is to be determined by the face of the record and the formal character of the judgment rendered.

2. STATUTES ⊂=225¾—ADOPTION OF PROVISIONS PREVIOUSLY CONSTRUED.

The re-enactment of the requirement of finality, with respect to judgments of state courts reviewable by the federal Supreme Court, in Act Sept. 6, 1916, was an adoption of the construction on that subject which had long prevailed.

On Petition for a Writ of Certiorari to the Supreme Court of the State of South Dakota.

Action by William Tobin against W. L. Bruce, as administrator of John T. Tobin, deceased, and Catherine Tobin. Judgment for defendants was reversed by the Supreme Court of South Dakota (162 N. W. 933), and the defendants petition for a writ of certiorari. Petition denied.

Messrs. E. A. Burgess and B. I. Salinger, both of Sioux City, Iowa, for petitioners.

Memorandum opinion by Mr. Chief Justice WHITE, by direction of the Court.

A railroad in whose service Tobin lost his life while actually engaged in carrying on interstate commerce,* admitting liability under the act of Congress, paid the conceded loss to his administrator. A father and mother, but no widow or children, survived. The father, the respondent, sued in a state court to recover half the amount as his share of the loss. Setting aside the action of the trial court rejecting the claim, but not specifically fixing the amount of the father's recovery, the Supreme Court of South Dakota directed a new trial to accomplish that result. Application for certiorari was then made by the petitioner on the ground that such decision involved questions under the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]) reviewable by certiorari under the Act of Congress of September 6, 1916, c. 448, 39 Stat. 726.

[1] The act in question, although it deprived of the right of review by writ of error which had hitherto obtained in certain cases and substituted as to such cases the right of petitioning for review by certiorari subjected this last right to the same limitation as to the finality of the judgment of the state court sought to be reviewed which had prevailed from the beginning under section 709, Rev. Stat. (section 237, Judicial Code [Comp. St. 1916, § 1214]). Finality, therefore, continues to be an essential for the purposes of the remedy by certiorari conferred by the act of 1916.

[2] It may be indeed said that although the case was remanded by the court below for a new trial, the action of the court was in a sense final because it determined the ultimate right of the father to recover and the general principles by which that right was to be measured. But that contention is not open as it was settled under section 709, Rev. Stat. (section 237, Judicial Code), that the finality contemplated was to be determined by the face of the record and the formal character of the judgment rendered—a principle which excluded all conception of finality for the purpose of review in a judgment like that below rendered. Haseltine v. Bank, 183 U. S. 130, 22 Sup. Ct. 49, 46 L. Ed. 117; Schlosser v. Hemphill, 198 U. S. 173, 25 Sup. Ct. 654, 49 L. Ed. 1000; Louisiana Navigation Co. v. Oyster* Commission of Louisiana, 226 U. S.* 99, 33 Sup. Ct. 78, 57 L. Ed. 138; Coe v. Armour Fertilizer Works, 237 U. S. 413, 418, 419, 35 Sup. Ct. 625, 59 L. Ed. 1027. The reenactment of the requirement of finality in the act of 1916 was in the nature of things an adoption of the construction on the subject which had prevailed for so long a time.

There being then no final judgment within the contemplation of the act of 1916, the petition for a writ of certiorari is denied.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

MEMORANDUM DECISIONS

Disposed of at October Term, 1917

No. 1. DETROIT UNITED RAILWAY, plaintiff in error, v. CITY OF DETROIT. Oct. 1, 1917. In error to the Supreme Court of the State of Michigan. Messrs. John C. Donnelly and Henry L. Lyster, both of Detroit, Mich., for Detroit United Ry. Messrs. Richard I. Lawson and Harry J. Dingeman, both of Detroit, Mich., for City of Detroit. Dismissed without costs to either party per stipulation.

No. 21. KANSAS CITY STOCK YARDS COMPANY OF MISSOURI, plaintiff in error, v. STATE OF KANSAS ex rel. John S. DAWSON, Attorney General. Oct. 1, 1917. In error to the Supreme Court of the State of Kansas. Mr. L. W. Keplinger, of Kansas City, Kan., for Kansas City Stock Yards Co. Dismissed with costs, on motion of counsel for the plaintiff in error.

No. 135. SHILL ROLLING CHAIR COMPANY, plaintiff in error, v. ATLANTIC CITY;
No. 136. Hannah M. CLOWNEY, trading as Smith's Rolling Chairs, plaintiff in error, v. ATLANTIC CITY; and
No. 137. Thomas E. LASSITER, plaintiff in error, v. ATLANTIC CITY. Oct. 1, 1917. In error to the Court of Errors and Appeals of the State of New Jersey. For opinion below, see 87 N. J. Law, 399, 94 Atl. 314, judgments affirmed 88 N. J. Law, 739, 96 Atl. 293; 88 N. J. Law, 703, 704, 723, 96 Atl. 1102. Messrs. George A. Bourgeois and Harry R. Coulomb, both of Atlantic City, N. J., for plaintiffs in error. Dismissed with costs, on motion of counsel for the plaintiffs in error, and mandates granted.

No. 149. ST. LOUIS IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, plaintiff in error, v. STATE OF LOUISIANA ex rel. CITY OF LAKE CHARLES. Oct. 1, 1917. In error to the Supreme Court of the State of Louisiana. For opinion below, see 138 La. 714, 70 South. 621. Mr. Henry Bernstein, of Monroe, La., for plaintiff in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

No. 258. MIDLAND VALLEY RAILROAD COMPANY, plaintiff in error, v. Della OGDEN, administratrix, etc. Oct. 1, 1917. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 159 Pac. 256. Mr. Norman R. Haskell, of Oklahoma City, Okl., for plaintiff in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

No. 717. Martiniano M. VELOSO, appellant, v. Vicente Francisco AGEO et al. Oct. 1, 1917. Appeal from the Supreme Court of the Philippine Islands. Mr. Evans Browne, of Washington, D. C., for appellees. Docketed and dismissed with costs, on motion of Mr. Evans Browne for the appellees.

No. 54. The UNITED STATES, appellant, v. The GREAT LAKES TOWING COMPANY et al. Oct. 2, 1917. Appeal from the District Court of the United States for the Northern District of Ohio. For opinion below, see 217 Fed. 656. Mr. Solicitor General Davis, for appellant. Dismissed on motion of Mr. Solicitor General Davis for the appellant.

No. —, Original. Ex parte In the matter of John E. READE, petitioner. Oct. 8, 1917. Motion for leave to file petition for writ of habeas corpus denied.

No. —. Robert D. KINNEY, petitioner, v. Elmer C. RICE. Oct. 8, 1917. See, also, 37 Sup. Ct. 742, 61 L. Ed. 1378. Petition for reconsideration of motion denied June 4, 1917, or for leave to amend application, and petition for an order to amend the journal entry, denied.

No. —, Original. STATE OF TENNESSEE, complainant, v. STATE OF ARKANSAS et al. Oct. 8, 1917. Motion for leave to file bill of complaint granted, and process ordered to issue returnable on the first Monday in January, 1918.

No. 173. Ricardo ASCARATE, plaintiff in error, v. STATE OF NEW MEXICO. Oct. 8, 1917. In error to the Supreme Court of the State of New Mexico. For opinion below, see 21 N. M. 191, 153 Pac. 1036. Messrs. Edward C. Wade, Jr., of El Paso, Tex., and Edward C. Wade and W. H. H. Llewellyn, both of Las Cruces, N. M., for plaintiff in error. Mr. Frank W. Clancy, Atty. Gen., for State of New Mexico.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97; Ensign v. Pennsylvania, 227 U. S. 592, 597, 598, 33 Sup. Ct. 321, 57 L. Ed. 658; Frank v. Mangum, 237 U. S. 309, 342, 35 Sup. Ct. 582, 59 L. Ed. 969.

No. 385. MOBILE TOWING & WRECKING COMPANY, petitioner, v. THE Steamship SAN CRISTOBAL, etc. Oct. 8, 1917. For opinion below, see 230 Fed. 599, 144 C. C. A. 653. Mr. Palmer Pillans, of Mobile, Ala., for petitioner. Mr. Gregory L. Smith, of Mobile, Ala., for the San Cristobal. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 487. Bob BRAZIEL, petitioner, v. The UNITED STATES. Oct. 8, 1917. For opinion below, see 237 Fed. 1015, 150 C. C. A. 664. Mr. Theodore Mack, of Ft. Worth, Tex., for petitioner. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 488. NORTHWESTERN CONSOLIDATED MILLING COMPANY, petitioner, v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY. Oct. 8, 1917. For opinion below, see 135 Minn. 363, 160 N. W. 1028. Mr. William Furst, of Minneapolis, Minn., for petitioner. Messrs. Morton Barrows, A. A. Stewart, and L. P. Ordway, all of St. Paul, Minn., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied.

No. 511. BANK OF INVERNESS, petitioner, v. William T. HAYDEN. Oct. 8, 1917. For opinion below, see 239 Fed. 1020, 152 C. C. A. 663. Messrs. J. W. Cutrer and O. G. Johnston, both of Clarksdale, Miss., for petitioner. Messrs. Geo. F. Maynard and Gerald Fitz-Gerald, both of Clarksdale, Miss., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 515. TWEEDIE TRADING COMPANY, petitioner, v. The UNITED STATES. Oct. 8, 1917. Mr. Ralph James M. Bullowa, of New York City, for petitioner. Mr. John W. Davis, Sol. Gen., of Washington, D. C., and Mr. Huston Thompson, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 528. John E. ROLLER, petitioner, v. Mary H. MURRAY et al. Oct. 8, 1917. Mr. E. Hilton Jackson, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

No. 529. The NORTHERN CENTRAL RAILWAY COMPANY, petitioner, v. The UNITED STATES of America. Oct. 8, 1917. For opinion below, see 241 Fed. 25. Messrs. Francis I. Gowen, of Philadelphia, Pa., and Frederic D. McKenney, of Washington, D. C., for petitioner. Mr. G. Carroll Todd, Asst. Atty. Gen., and Mr. Henry S. Mitchell, Sp. Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 530. SAFETY CAR HEATING & LIGHTING COMPANY, petitioner, v. GOULD COUPLER COMPANY. Oct. 8, 1917. See, also, 229 Fed. 429; 239 Fed. 861, 152 C. C. A. 645. Mr. Thomas J. Johnston, of New York City (Messrs. L. E. Varney, R. S. Blair, and Delos G. Haynes, all of New York City, of counsel), for petitioner. Messrs. Wm. Houston Kenyon and Richard Eyre, both of New York City, for respondent. Petition for a writ of certiorari to the District Court of the United States for the Western District of New York denied.

No. 531. Charles W. ANDERSON, as collector of internal revenue, etc., petitioner, v. LA ROSE CONSOLIDATED MINES COMPANY. Oct. 8, 1917. For decision below, see 240 Fed. 1022, 153 C. C. A. 665. Mr. John W. Davis, Sol. Gen., of Washington, D. C., for petitioner Messrs. Greene, Hurd & Stowell, of New York City (Mr. Richard T. Greene, of New York City, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 537. Noah PARNOSKI, by Thomas Tiger, guardian, etc., petitioner, v. Lucinda LUMKIN, for the use and benefit of Robert Fry et al. Oct. 8, 1917. For opinion below, see 163 Pac. 527. Mr. R. C. Allen, of Muskogee, Okl. (Messrs. W. A. Brigham, of Coweta, Okl., S. A. Horton, of Oklahoma City, Okl., and James C. Davis, of Muskogee, Okl., of counsel), for petitioner. Mr. A. J. Biddison, of Tulsa, Okl., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

No. 538. E. T. THURSTON, petitioner, v. The UNITED STATES. Oct. 8, 1917. For opinion below, see 241 Fed. 335. Messrs. Geo. G. Clough and W. E. Price, both of Galveston, Tex., for petitioner. Mr. John W. Davis, Sol. Gen., of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 548. William T. ABBOTT, petitioner, v. WAUCHULA MANUFACTURING & TIMBER COMPANY et al. Oct. 8, 1917. For opinion below, see 240 Fed. 938, 153 C. C. A. 624. Messrs. George H. Lamar, of Washington, D. C., and Howard P. Macfarlane, of Tampa, Fla., for petitioner. Messrs. James F. Glen, W. F. Himes, and H. S. Phillips, all of Tampa, Fla., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 549. Thomas J. SCULLY, claimant of THE barge I. F. CHAPMAN, petitioner, v. Jacob KAZARIAN. Oct. 8, 1917. For opinion below, see 241 Fed. 836. Mr. James J. Macklin, of New York City (Mr. Frank V. Barns, of New York City, of counsel), for petitioner. Mr. Alexander L. Churchill, of Providence, R. I. (Messrs. George T. Marsh and Frank Healy, both of Providence, R. I., of counsel), for libelant. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

No. 552. Fred B. JONES, petitioner, v. BOUKER CONTRACTING COMPANY, claimant, etc. Oct. 8, 1917. For opinion below, see 241 Fed. 831. Mr. Fayette B. Dow, of Washington, D. C., for petitioner. Mr. Francis Martin, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 553. FREDERICK LEYLAND & COMPANY (Ltd.) et al., petitioners, v. The BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS. Oct. 8, 1917. Mr. Henry P. Dart, of New Orleans, La., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 557. GUERINI STONE COMPANY, petitioner, v. P. J. CARLIN CONSTRUCTION COMPANY. Oct. 8, 1917. For opinion below, see 241 Fed. 545. Mr. Edward S. Paine, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted.

No. 568. INTERNATIONAL NEWS SERVICE, petitioner, v. The ASSOCIATED PRESS. Oct. 8, 1917. For opinion below, see 245 Fed. 244. Messrs. Samuel Untermyer and Henry A. Wise, both of New York City, for petitioner. Mr. F. B. Jennings, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

No. 197. The DELAWARE, LACKAWANNA & WESTERN RAILROAD CO., plaintiff in error, v. George D. FISH. Oct. 9, 1917. In error to the Supreme Court of the State of New York. For opinions below, see 79 Misc. Rep. 636, 141 N. Y. Supp. 245; 158 App. Div. 92, 143 N. Y. Supp. 365; 211 N. Y. 374, 105 N. E. 661. Mr. Austin J. McMahon, of New York City, for plaintiff in error. Mr. Walter A. Fullerton, of Saratoga Springs, N. Y., for defendant in error. Dismissed without costs to either party, per stipulation of counsel.

No. 547. Adah B. WALTON, administratrix, etc., plaintiff in error, v. Edward B. PRYOR et al., receivers, etc. Oct. 9, 1917. In error to the Supreme Court of the State of Illinois. For opinion below, see 276 Ill. 563, 115 N. E. 2. Mr. Charles C. Le Forgee, of Decatur, Ill., for plaintiff in error. Dismissed with costs on motion of counsel for the plaintiff in error.

No. 159. Frank R. WILLIAMS, appellant, v. Charles POTTER et al. Oct. 12, 1917. Appeal from the United States Circuit Court of Appeals for the Second Circuit. For opinion below, see 223 Fed. 423, 139 C. C. A. 17. Mr. Frank R. Williams, of Pasadena, Cal., in pro. per. Dismissed with costs, on motion of counsel for the appellant.

No. 3. TREMONT LUMBER COMPANY, plaintiff in error, v. Mrs. Nora REAGAN. Oct. 15, 1917. In error to the Supreme Court of the State of Louisiana. For opinion below, see 134 La. 199, 63 South. 874. Mr. John C. Theus, of Monroe, La., for plaintiff in error. Messrs. H. Garland Dupre, of New Orleans, La., and S. D. Pearce, of Ruston, La., for defendant in error.

PER CURIAM. Judgment affirmed with costs upon the authority of: 1. Knoxville Iron Co. v. Harbison, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55; 2. Missouri, Kansas & Texas Railway Co. v. Cade, 233 U. S. 642, 34 Sup. Ct. 678, 58 L. Ed. 1135; Missouri, Kansas & Texas Railway Co. v. Harris, 234 U. S. 412, 34 Sup. Ct. 790, 58 L. Ed. 1377, L. R. A. 1915E, 942.

No. 236. CITY OF CHELSEA, plaintiff in error, v. CITY OF BOSTON. Oct. 15, 1917. In error to the Supreme Judicial Court of the State of Massachusetts. For opinion below, see 221 Mass. 468, 109 N. E. 389. See, also, 223 Mass. 36, 111 N. E. 412. Messrs. Wilton J. Lambert, of Washington, D. C., Samuel R. Cutler, of Boston, Mass., and Louis R. Kiernan, of Chelsea, Mass., for plaintiff in error. Mr. John A. Sullivan, Corp. Counsel, of Boston, Mass., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of: 1. Equitable Life Assurance Society v. Brown, 187 U. S. 308, 314, 28 Sup. Ct. 123, 47 L. Ed. 190; Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123, 137, 34 Sup. Ct. 874, 58 L. Ed. 1245; Easterling Lumber Co. v. Pierce, 235 U. S. 380, 35 Sup. Ct. 133, 59 L. Ed. 279; 2. Worcester v. Worcester Consolidated Street Railway, 196 U. S. 539, 25 Sup. Ct. 327, 49 L. Ed. 591; Kies v. Lowrey, 199 U. S. 233, 26 Sup. Ct. 27, 50 L. Ed. 167; Stewart v. Kansas City, 239 U. S. 14, 36 Sup. Ct. 15, 60 L. Ed. 120.

No. 485. Clara A. WHEELER et al., Appellants, v. CITY AND COUNTY OF DENVER et al. Oct. 15, 1917. Appeal from the United States Court of Appeals for the Eighth Circuit. For opinion below, see 231 Fed. 8, 145 C. C. A. 196. Messrs. Edwin H. Park, Henry A. Lindsley, and Clayton C. Dorsey, all of Denver, Colo., for appellants. Messrs. James A. Marsh and Norton Montgomery, both of Denver, Colo., for appellees.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of: 1. Hannis Distilling Co. v. Baltimore, 216 U. S. 285, 30 Sup. Ct. 326, 54 L. Ed. 482; Fay v. Crozer, 217 U. S. 455, 30 Sup. Ct. 568, 54 L. Ed. 837; Hendricks v. United States, 223 U. S. 178, 184, 32 Sup. Ct. 313, 56 L. Ed. 394. See City and County of Denver v. New York Trust Co., 229 U. S. 123, 33 Sup. Ct. 657, 57 L. Ed. 1101; Wheeler v. City and County of Denver, 229 U. S. 342, 352, 33 Sup. Ct. 842, 57 L. Ed. 1219; 2. Robinson v. Caldwell, 165 U. S. 359, 17 Sup. Ct. 343, 41 L. Ed. 745; Loeb v. Columbia Tp., 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280; Macfadden v. United States, 213 U. S. 288, 29 Sup. Ct. 490, 53 L. Ed. 801; Boise, etc., Water Co. v. Boise City, 230 U. S. 98, 33 Sup. Ct. 1003, 57 L. Ed. 1409.

No. 555. Daisy M. LINKOUS, administratrix of J. M. Linkous, deceased, petitioner, v. The VIRGINIAN RAILWAY COMPANY. Oct. 15, 1917. For opinion below, see 242 Fed. 916. Messrs. Welborn & Jamison and Hoge & Darnall, all of Roanoke, Va., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

No. 556. Morris HERRMANN, as surviving partner of Morris Herrmann & Company, petitioner, v. HENRY ROWER CHEMICAL MANUFACTURING COMPANY. Oct. 15, 1917. For opinion below, see 242 Fed. 59. Mr. Louis Marshall, of New York City, for petitioner. Messrs. George Wharton Pepper, of Philadelphia, Pa., and James Piper and Francis J. Carey, both of Baltimore, Md., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

No. 559. EL MONTE de PIEDAD y CAHA de AHORROS de MANILA, petitioner, v. The GOVERNMENT of the PHILIPPINE ISLANDS, represented by the treasurer of the Philippine Islands. Oct. 15, 1917. Messrs. Thomas L. Hartigan, of Manila, P. I., and Alex. Britton and Evans Brown, both of Washington, D. C., for petitioner. Messrs. Samuel T. Ansell and Edward S. Bailey, both of Washington, D. C., for respondent. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

No. 561. AMERICAN MANUFACTURING COMPANY, petitioner, v. Hon. George D. REYNOLDS et al., judges of the St. Louis

Court of Appeals, and Louis Alt. Oct. 15, 1917. For opinion below, see 194 S. W. 878. Messrs. S. Mayner Wallace and Shepard Barclay, both of St. Louis, Mo., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied.

No. 562. The CHICAGO & ALTON RAILWAY COMPANY et al., petitioners, v. PRESSED STEEL CAR COMPANY. Oct. 15, 1917. For opinion below, see 243 Fed. 883. Messrs. Silas H. Strawn, John D. Black, and Franklin M. Warden, all of Chicago, Ill., for petitioners. Messrs. Lewis H. Freedman, of New York City, Andrew R. Sheriff, of Chicago, Ill., and Alfred W. Kiddle, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 564. J. W. CHAPMAN and P. R. Thompson, copartners doing business under the firm name of Chapman & Thompson, petitioners, v. JAVA PACIFIC LINE, STOOMVART-MAAT-SCHAPPY NEDERLAND et al. Oct. 15, 1917. For opinion below, see 241 Fed. 850. Messrs. Eustace Cullinan, Thomas W. Hickey, and Alfred J. Harwood, all of San Francisco, Cal., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 565. William E. WALLACE, petitioner, v. The UNITED STATES. Oct. 15, 1917. For opinion below, see 243 Fed. 300. Mr. Roger L. Foote, of Chicago, Ill., for petitioner. Mr. John W. Davis, Sol. Gen., of Washington, D. C., and Mr. Charles F. Clyne, of Chicago, Ill., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 572. Lewis H. STANTON et al., petitioners, v. The CITY OF PITTSBURGH. Oct. 15, 1917. For opinion below, see 257 Pa. 361, 101 Atl. 822. Messrs. Richard Townsend, of Pittsburgh, Pa., James T. Lloyd, of Washington, D. C., and Asa L. Carter, of Pittsburgh, Pa., for petitioners. Mr. Charles A. O'Brien, of Pittsburgh, Pa., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied.

No. 573. Alex. H. SANDS, jr., as trustee, etc., petitioner, v. Fred W. ESTABROOK. Oct. 15, 1917. For opinion below, see 242 Fed. 225. Mr. J. Granville Meyers, of New York City (Messrs. John W. H. Crim and H. L. Brown, both of New York City, of counsel), for petitioner. Mr. Perry D. Trafford, of New York City (Mr. Nathan A. Smyth, of New York City, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 582. WILLIAM R. MOORE DRY GOODS COMPANY et al., petitioners, v. Eli BROOKS, bankrupt, and J. M. JARMAN, trustee. Oct. 15, 1917. For opinion below, see 240 Fed. 943, 153 C. C. A. 629. Mr. Fred C. Mullinix, of Jonesboro, Ark., for petitioners. Messrs. T. W. Campbell, of Little Rock, Ark., and W. L. Pope, of Pocahontas, Ark., for respondent, Eli Brooks. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 584. MISSOURI DISTRICT TELEGRAPH COMPANY, petitioner, v. MORRIS & COMPANY. Oct. 15, 1917. For opinion below, see 243 Fed. 481. Messrs. Rush Taggart, of New York City, Percy B. Eckhart, of Chicago, Ill., and Edwin Camack and P. E. Reeder, both of Kansas City, Mo., for petitioner. Messrs. Luther M. Walter and M. W. Borders, both of Chicago, Ill., Frank P. Sebree, of Kansas City, Mo., and Henry G. Conrad, of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 585. PARKER-WASHINGTON COMPANY et al., petitioners, v. The CITY OF ST. LOUIS to the use of CARROLL-PORTER BOILER & TANK COMPANY. Oct. 15, 1917. For opinion below, see 196 S. W. 767. Messrs. S. Mayner Wallace and Shepard Barclay, both of St. Louis, Mo., for petitioners. Messrs. Frederick N. Judson and John F. Green, both of St. Louis, Mo., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied.

No. 589. BALL ENGINEERING COMPANY, petitioner, v. J. G. WHITE & COMPANY. Oct. 15, 1917. For opinion below, see 241 Fed. 989. Mr. Homer S. Cummings, of Stamford, Conn., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

No. 593. The UNITED STATES of America, petitioner, v. The CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY. Oct. 15, 1917. For opinion below, see 242 Fed. 18. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted.

No. 594. The UNITED STATES of America, petitioner, v. BIWABIK MINING COMPANY. Oct. 15, 1917. For opinion below, see 242 Fed. 9. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted.

No. 595. Jacob NELLEMENN et al., petitioners, v. THE Steamship LONDON, Christian Larsen, master. Oct. 15, 1917. For opinion below, see 241 Fed. 863. Messrs. David E. Finley, Jr., and Joseph Hill Brinton, both of Philadelphia, Pa., for petitioners. Mr. Bruce A. Metzger, of Philadelphia, Pa., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

No. 596. SOCIETE NAPUTES TRANSPORTS, petitioner, v. BISSO TOWBOAT COMPANY et al. Oct. 15, 1917. For opinion below, see 241 Fed. 463. Mr. Richard B. Montgomery, of New Orleans, La., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 597. Rolla DE BORD, petitioner, v. CHICAGO, ROCK ISLAND & GULF RAILWAY COMPANY. Oct. 15, 1917. For opinion below, see 192 S. W. 767. Mr. C. B. Reeder, of Amarillo, Tex. (Messrs. F. A. Williams, of Galveston, Tex., N. A. Stedman, of Austin, Tex., and J. B. Dooley, of Amarillo, Tex., of counsel), for petitioner. Messrs. Hiram Glass, of Austin, Tex., N. H. Lassiter and Robert Harrison, both of Ft. Worth, Tex., and Turner & Wharton, of Amarillo, Tex., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Texas denied.

No. 599. Margaret C. HARRISON et al., petitioners, v. Florence A. CAMPBELL et al. Oct. 15, 1917. Mr. L. Frank Ottofy, of St. Louis, Mo., for petitioners. Messrs. Morton Jourdan, Samuel A. Mitchell, and F. N. Judson, all of St. Louis, Mo., Clarke M. Rosecrantz, of New York City, and Benjamin Schnurmacher, of St. Louis, Mo., for respondents. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied.

No. 600. CAPITOL TRANSPORTATION COMPANY, petitioner, v. CAMBRIA STEEL COMPANY. Oct. 15, 1917. Mr. Frank S. Masten, of Cleveland, Ohio, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted.

No. 601. MIDLAND VALLEY RAILROAD COMPANY, plaintiff in error, v. Mrs. Maude GRIFFITH, administratrix, etc. Oct. 15, 1917. For opinion below, see 100 Kan. 500, 166 Pac. 467. Messrs. O. E. Swan, of Muskogee, Okl., Albert Faulconer and C. Ward Wright, both of Arkansas City, Kan., and L. T. Michener, of Washington, D. C., for petitioner. Messrs. W. L. Cunningham and C. T. Atkinson, both of Arkansas City, Kan., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied.

No. 602. MIDLAND VALLEY RAILROAD COMPANY, petitioner, v. Armor BELL, administratrix, etc. Oct. 15, 1917. For opinion below, see 242 Fed. 803. Messrs. L. T. Michener, of Washington, D. C., Farrar L. McCain, of Tulsa, Okl., and Oscar E. Swan, of Muskogee, Okl., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 604. NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, petitioner, v. LANSING STEAMSHIP COMPANY (Inc.). Oct. 15, 1917. For opinion below, see 243 Fed. 174. Mr. Charles M. Sheafe, Jr., of New York City (Messrs. E. G. Buckland, of New Haven, Conn., and James T. Kilbreth, of New York City, of counsel), for petitioner. Mr. Edward E. Blodgett, of Boston, Mass. (Mr. Robinson Leech, of New York City, of counsel), for Lansing S. S. Co., Inc., and Seaconnet Coal Co. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 605. Mark J. GRETSCH, petitioner, v. The UNITED STATES. Oct. 15, 1917. For opinion below, see 242 Fed. 897. Messrs. Harry Joelson, of Paterson, N. J., and Mark J. Gretsch, for petitioner. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

No. 606. Percival WILDS, as trustee in bankruptcy, etc., petitioner, v. DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK. Oct. 15, 1917. For opinion below, see In re Midtown Contracting Co., 243 Fed. 56. Mr. Irving L. Ernst, of New York City, for petitioner. Mr. Terence Farley, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 608. The ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, petitioner, v. Elsie WESTLING, administratrix, etc. Oct. 15, 1917. For opinion below, see 101 Kan. 87, 165 Pac. 669. Messrs. Robert Dunlap, of Chicago, Ill., and William R. Smith and Alfred A. Scott, both of Topeka, Kan. (Mr. Gardiner Lathrop, of Chicago, Ill., of counsel), for petitioner. Messrs. Alfred M. Jackson and Albert L. Noble, both of Winfield, Kan., and Carrol L. Swarts, of Arkansas City, Kan., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied.

No. 619. J. M. KELLOGG, executor, estate of Mrs. Mary H. Miles, deceased, plaintiff in error, v. Letitia KING, administratrix, estate of Charles L. King, deceased. Oct. 15, 1917. In error to the Supreme Court of the State of Mississippi. For opinion below, see 75 South. 134. Mr. E. F. Noel, of Lexington, Miss., for plaintiff in error. Mr. Wm. H. Watkins, of Jackson, Miss. (Messrs. Joseph W. George, of Jackson, Miss., and E. L. Brown, of Yazoo, Miss., of counsel), for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of: 1. Telluride Power & Transmission Co. v. Rio Grande Western Railway Co., 175 U. S. 639, 20 Sup. Ct. 245, 44 L. Ed. 305; First National Bank v. Estherville, 215 U. S. 341, 30 Sup. Ct. 152, 54 L. Ed. 223; 2. Chouteau v. Gibson, 111 U. S. 200, 4 Sup. Ct. 340, 28 L. Ed. 400; San Francisco v. Itsell, 133 U. S. 65, 10 Sup. Ct. 241, 33 L. Ed. 570; Wood v. Chesborough, 228 U. S. 672, 33 Sup. Ct. 706, 57 L. Ed. 1018.

No. 620. Abram H. PREEMAN et al., petitioners, v. The UNITED STATES of America. Oct. 15, 1917. For opinion below, see 244 Fed. 1. Mr. Benjamin C. Bachrach, of Chicago, Ill., for petitioners. Mr. John W. Davis, Sol. Gen., and Mr. William C. Fitts, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 622. Donatto FILLIPPON, petitioner, v. ALBION VEIN SLATE COMPANY. Oct. 15, 1917. For opinion below, see 242 Fed. 258. Messrs. J. Willard Paff and Calvin F. Smith, both of Easton, Pa., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

No. 632. TEXAS & PACIFIC RAILWAY COMPANY et al., petitioners, v. B. LEATH-

ERWOOD. Oct. 15, 1917. Mr. George Thompson, of Ft. Worth, Tex., for petitioners. Petition for a writ of certiorari to the Court of Civil Appeals, Second Supreme Judicial District, of the State of Texas granted.

No. 1133, October Term, 1916. John Frederick WALLACH et al., petitioners, v. Cornelius K. G. BILLINGS. Oct. 15, 1917. For former opinion, see 244 U. S. 659, 37 Sup. Ct. 745, 61 L. Ed. 1376. Motion for leave to present a petition for rehearing herein denied.

No. 13. P. J. HAMILL, plaintiff in error, v. The JOSEPH SCHLITZ BREWING COMPANY. Oct. 16, 1917. In error to the Supreme Court of the State of Iowa. For opinions below, see 165 Iowa, 266, 143 N. W. 99, 145 N. W. 511. Messrs. Benj. I. Salinger, of Sioux City, Iowa, and Frederick S. Tyler, of Washington, D. C., for plaintiff in error. Messrs. George P. Miller, Edwin S. Mack, and Arthur W. Fairchild, all of Milwaukee, Wis., for defendant in error. Dismissed with costs pursuant to the tenth rule.

No. 4. C. J. OLSON, plaintiff in error, v. The STATE OF NORTH DAKOTA. Oct. 17, 1917. In error to the Supreme Court of the State of North Dakota. For opinion below, see 26 N. D. 304, 144 N. W. 661. Mr. Edward Engerud, of Fargo, N. D., for plaintiff in error. Mr. William Langer, of Mandan, N. D., for the State of North Dakota. Dismissed with costs pursuant to the sixteenth rule, on motion of Mr. William Langer for the defendant in error.

No. 15. The KEETOOWAH SOCIETY et al., appellants, v. Franklin K. LANE, Secretary of the Interior. Oct. 17, 1917. Appeal from the Court of Appeals of the District of Columbia. Mr. C. C. Calhoun, of Washington, D. C., for appellants. Dismissed pursuant to the tenth rule.

No. 636. B. H. DREES, petitioner, v. Sarah J. ARMSTRONG et al. Oct. 22, 1917. For opinion below, see 161 N. W. 40. Mr. B. H. Drees, in pro. per. Petition for a writ of certiorari to the Supreme Court of the State of Iowa denied.

No. 637. The MORSE DRY DOCK & REPAIR COMPANY, owner, etc., petitioner, v. CONRON BROTHERS COMPANY et al. Oct. 22, 1917. For opinion below, see The Oceana, 244 Fed. 80. Mr. Pierre M. Brown, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 638. Eugene L. YOUNGE, petitioner, v. The UNITED STATES of America. Oct. 22, 1917. For opinion below, see 242 Fed. 788. Mr. James W. Vandervort, of Parkersburg, W. Va., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

No. 640. CHICAGO & ALTON RAILROAD COMPANY, petitioner, v. The UNITED STATES of America. Oct. 22, 1917. For opinion below, see 244 Fed. 945. Mr. William L. Patton, of Springfield, Ill., for petitioner. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted.

No. 642. Steamship QUEENSMORE (Ltd.), claimant, etc., petitioner, v. HENRY NANNINGA COMPANY et al. Oct. 22, 1917. For opinion below, see 245 Fed. 855. Messrs. J. Parker Kirlins and Charles R. Hickox, both of New York City (Messrs. Kirlin, Woolsey & Hickox, of New York City, of counsel), for petitioner. Messrs. William Garrard and A. Minis, both of Savannah, Ga., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 646. The NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, petitioner, v. Samuel GOLDBERG. Oct. 22, 1917. For opinion below, see 164 App. Div. 389, 149 N. Y. Supp. 629, judgment affirmed 116 N. E. 1047. Petition for a writ of certiorari to the Supreme Court of the State of New York granted.

No. 647. The PEOPLE OF PORTO RICO et al., plaintiffs in error, v. Jose MURATTI. Oct. 22, 1917. Petition for a writ of certiorari herein granted.

No. 657. Peter CHELENTIS, petitioner, v. LUCKENBACH STEAMSHIP COMPANY, etc. Oct. 22, 1917. For opinion below, see 243 Fed. 536. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

No. 659. KANSAS CITY, MEXICO & ORIENT RAILWAY COMPANY OF TEXAS, petitioner, v. C. A. FINKE. Oct. 22, 1917. For opinion below, see 190 S. W. 1143. Mr. Herbert S. Garrett, of San Angelo, Tex., for petitioner. Mr. Ocie Speer, of Ft. Worth, Tex., for respondent. Petition for a writ of certiorari to the Court of Civil Appeals, Eighth Judicial District of the State of Texas, denied.

No. 675. GULF, COLORADO & SANTA FE RAILWAY COMPANY et al., petitioners, v. J. P. NELSON. Oct. 22, 1917. For opinion below, see 192 S. W. 1056. Messrs. Evans Browne, of Washington, D. C., Robert Dunlap, of Chicago, Ill., and J. W. Terry, of Galveston, Tex. (Mr. Gardiner Lathrop, of Chicago, Ill., of counsel), for petitioners. Messrs. Thos. H. Franklin and Floyd McGown, both of San Antonio, Tex., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Texas denied.

No. 682. BARBER & COMPANY (Inc.), petitioner, v. SULZBERGER & SONS COMPANY. Oct. 22, 1917. For opinion below, see 242 Fed. 888. Messrs. J. Parker Kirlin, John M. Woolsey, and D. Roger Englar, all of New York City (Messrs. Kirlin, Woolsey & Hickox, of New York City, of counsel), for petitioner. Messrs. Paul D. Cravath and Stuart McNamara, both of New York City, for respondent. Petition for a writ of certiorari to

the United States Circuit Court of Appeals for the Second Circuit denied.

No. 687. Florence McDONALD et al., petitioners, v. John F. RALSTON et al. Oct. 22, 1917. For opinion below, see 166 Pac. 405. Mr. F. A. Rittenhouse, of Chandler, Okl., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

No. 691. Richard WATSON, master, etc., et al., petitioners, v. Mattie KRESZEWSKI, administratrix, etc., et al. Oct. 22, 1917. For opinion below, see The Student, 243 Fed. 807. Messrs. George Forbes and John Phelps, both of Baltimore, Md., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

No. 692. IOWA STATE TRAVELLING MEN'S ASSOCIATION v. Alma M. RUGE. Oct. 22, 1917. For opinion below, see 242 Fed. 762. Messrs. John B. Sullivan, of Des Moines, Iowa, and Robert A. Holland, Jr., Thomas G. Rutledge, and Jacob M. Lashly, all of St. Louis, Mo., for petitioner. Messrs. Jesse H. Schaper, of Washington, Mo., Hugo Muench, Lambert E. Walther, Julius Muench, and Muench, Walther & Muench, all of St. Louis, Mo., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 698. P. D. CAMP et al., petitioners, v. Morgan V. GRESS. Oct. 22, 1917. For opinion below, see 244 Fed. 121. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted.

No. 707. BARNES-AMES COMPANY, petitioner, v. W. & C. T. JONES STEAMSHIP COMPANY (Ltd.). Oct. 22, 1917. For opinion below, see 244 Fed. 116. Messrs. Charles S. Haight and John W. Griffin, both of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 718. The CITY OF NEW ORLEANS et al., petitioners, v. PENN BRIDGE COMPANY. Oct. 22, 1917. For opinion below, see 241 Fed. 672. Messrs. Edgar H. Farrar, I. D. Moore, John F. C. Waldo, and H. Generes Dufour, all of New Orleans, La., for petitioners. Messrs. Grant & Grant and Foster, Milling, Saal & Milling, all of New Orleans, La. (Messrs. William Grant, Robert E. Milling, and Robert C. Milling, all of New Orleans, La., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 723. POCAHONTAS CONSOLIDATED COLLIERIES COMPANY (Inc.), petitioner, v. F. L. JOHNSON, administrator, etc. Oct. 22, 1917. For opinion below, see 244 Fed. 368. Messrs. S. C. Graham, of Tazewell, Va., E. M. Fulton, O. M. Vicars, and Edward L. Barr, all of Wise, Va., and Hugh R. Hawthorne, of Tazewell, Va., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(245 U. S. 82)

Ex parte PARK & TILFORD.

(Argued Oct. 15, 16, 1917. Decided Nov. 5, 1917.)

No. 24.

1. MANDAMUS ⟸26—SUBJECTS OF RELIEF—COMPELLING PARTICULAR DECISION.

Where the Secretary of the Treasury refused to reliquidate entries of goods entered at a value higher than the foreign market value in order to meet advances by the appraiser in similar cases then pending on appeal for reappraisement, as permitted by Act Oct. 3, 1913, c. 16, § 3, par. I, 38 Stat. 184 (Comp. St. 1916, § 5527), on the ground that the final reappraised value was not as low as the value contended for by the importer, and, a protest having been overruled by the Board of General Appraisers, an appeal was taken to the Court of Customs Appeals, which took jurisdiction, but affirmed the decision of the Board on the ground that the assessment by the collector was right, in the absence of a direction to the contrary by the Secretary of the Treasury, and that neither such court nor the Board of General Appraisers could review the discretion lodged in the Secretary, mandamus would not lie to compel that court to decide the case on the merits, as it had already decided it according to its interpretation of the statute, and mandamus will not issue to require a court to make a particular decision.

2. MANDAMUS ⟸4(1) — ABSENCE OF OTHER REMEDY—EFFECT.

That the law made the decision of the Court of Customs Appeals final did not broaden the authority of the Supreme Court to issue a writ of mandamus.

Original petition by Park & Tilford for a writ of mandamus. Rule discharged.

Mr. Vincent P. Donihee, of New York City, for petitioner.

Mr. Assistant Attorney General Warren, for respondent.

*83 *Mr. Justice DAY delivered the opinion of the Court.

This is a petition for a writ of mandamus to require the Judges of the United States Court of Customs Appeals to take jurisdiction of a certain cause, and to consider and decide the same upon its merits. The rule to show cause having issued, the judges made return, and set forth the proceedings in the Court of Customs Appeals, and averred that the court had decided the case of the petitioner, and if the writ of mandamus issued, it would only require the court to do that which it had already done.

From the return and the record attached to the petition it appears: Park & Tilford, petitioner, imported certain merchandise at the port of New York under the Tariff Act of 1913. The collector of customs assessed and liquidated the duties at the entered value. The importer claimed assessment at the
*84 value decided upon on final reappraisement, *which was less than the amount of the *entered value. This claim was made under paragraph I of section 3 of the act of 1913, which provides:

"The duty shall not, however, be assessed in any case upon an amount less than the entered value, unless by direction of the Secretary of the Treasury in cases in which the importer certifies at the time of entry that the entered value is higher than the foreign market value and that the goods are so entered in order to meet advances by the appraiser in similar cases then pending on appeal for reappraisement, and the importer's contention shall subsequently be sustained by a final decision on reappraisement, and it shall appear that the action of the importer on entry was taken in good faith, after due diligence and inquiry on his part, and the Secretary of the Treasury shall accompany his directions with a statement of his conclusions and his reasons therefor." Comp. St. 1916, § 5527.

The importers entered the goods upon an invoice which stated the gross price and allowed 15 per cent. deduction therefrom; at entry the importers advanced the value by reducing the deduction to 6 per cent. At the time of entry the importer, in each case, made an addition to the invoice value to make market value, stating the additions were made to meet advances in similar cases then pending upon appeal for reappraisement.

On appeal for reappraisement the goods were appraised at a value which differed from the invoice value, being 2½ per cent. more than invoice price of the goods, and 6½ per cent. less than the entered value.

The petitioner requested the Secretary of the Treasury to reliquidate the entries, this the Secretary refused to do, stating his reasons as follows:

"You are advised that in all cases where the importer has failed to make a specific contention as to market value, the department regards the contention as being for the invoice value; and where the final reappraised value is below the
*85 entered value, but not as low as the value *contended for by the importer, it is the practice of the department to decline to authorize a reduction of the entered value, on the ground that the importer's contention has not been sustained. This practice is based upon the department's knowledge of the purpose and intent of the law, and is of such long standing that it will not make any change therein.

"You are advised therefore that if the entries enumerated within your petition come within the class mentioned above, the department's final action with reference thereto would necessarily be in accordance with its practice outlined above."

In a subsequent letter the Secretary reiterated this view, the petitioner protested, and the protest was submitted to the Board of General Appraisers, and was overruled, and the importer appealed to the Court of Customs Appeals.

An inspection of the opinion of the court, which accompanies the petition, makes it apparent that the court did take jurisdiction of the case and decided it, placing its decision upon the ground that the statute requires the assessment made by the collector in the absence of a direction of the Secretary of the Treasury to the contrary. The court held that the Secretary's refusal to so direct the collector was not reviewable by the Board of General Appraisers nor by the Court of Customs Appeals, that neither the board nor the court could control the discretion lodged by the

statute in the Secretary, and affirmed the decision of the Board.

[1] It is elementary that the writ of mandamus will not issue to require the court to make a particular decision, and may only be invoked where the purpose is to require action of a court of competent jurisdiction, where such court has refused to exercise the power of decision with which it is invested by law. We think it clear that the Court of Customs Appeals did take jurisdiction of the case of the petitioner on appeal from the order of the Board of General Appraisers, and decided it according to its interpretation of the statutes of the United States. These facts warrant the statements of the respondents in their return—that if the writ should issue, requiring a decision of the case, they could only repeat the decision which they have already made.

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[2] The fact that the law makes the decision of the United States Court of Customs Appeals final in this class of cases does not broaden the authority of this court to issue writs of the character now invoked; it follows that the rule must be discharged.

And it is so ordered.

(245 U. S. 60)

BUCHANAN v. WARLEY.

(Argued April 10 and 11, 1916. Restored to Docket, April 17, 1916, for Reargument. Reargued April 27, 1917. Decided Nov. 5, 1917.)

No. 33.

1. CONSTITUTIONAL LAW ⟸42—PERSONS ENTITLED TO URGE CONSTITUTIONAL QUESTIONS.

Where specific performance of a contract for the sale of real estate to a colored person, which provided that he should not be required to accept a deed unless he had a right under the laws of the state and the city to occupy the property as a residence, was denied because of the existence of an ordinance making it unlawful for any white or colored person to move into and occupy as a residence any house upon any block upon which a greater number of houses were occupied by persons of the opposite color, the vendor, though a white man, was entitled to attack the constitutionality of such ordinance notwithstanding the rule that only persons whose rights are directly affected may attack the constitutionality of a law or ordinance, as his right to sell his property was directly involved and necessarily impaired.

2. CONSTITUTIONAL LAW ⟸81—POLICE POWER—SCOPE AND EXTENT.

Though the exercise of the police power is not to be interfered with where it is within the scope of legislative authority, and the means adopted reasonably tend to accomplish a lawful purpose, such power, broad as it is, cannot justify the passage of a law or ordinance running contrary to the limitations of the federal Constitution.

3. CONSTITUTIONAL LAW ⟸277(1)—DUE PROCESS OF LAW — "PROPERTY" AND RIGHTS PROTECTED.

Within Const. U. S. Amend. 14, protecting life, liberty, and property from invasion without due process of law, "property" is more than the mere thing which a person owns and includes the right to acquire, use, and dispose of it, and these essential attributes of property are protected by the Constitution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

4. CONSTITUTIONAL LAW ⟸278(1)—MUNICIPAL CORPORATIONS ⟸600 — POLICE ORDINANCES—DUE PROCESS OF LAW.

A municipal ordinance prohibiting any white or colored person from moving into and occupying as a residence or place of abode, or to establish and maintain as a place of public assembly any house upon any block upon which a greater number of houses are occupied by persons of the opposite race, denies due process of law in violation of Const. U. S. Amend. 14, as property owners are denied the right to dispose of their property by prohibiting the occupation of it for the sole reason that the purchaser is a person of a particular race intending to occupy the premises as a place of residence.

5. CONSTITUTIONAL LAW ⟸215 — DISCRIMINATION BECAUSE OF COLOR—PURCHASE AND ENJOYMENT OF PROPERTY.

Colored persons are citizens of the United States, and have the right to purchase property and enjoy and use it without laws discriminating against them solely on account of color.

In Error to the Court of Appeals of the State of Kentucky.

Action by Charles H. Buchanan against William Warley. A decree for defendant was affirmed by the Court of Appeals of Kentucky (165 Ky. 559, 177 S. W. 472, Ann. Cas. 1917B, 149), and plaintiff brings error. Reversed and remanded.

Messrs. Clayton B. Blakey, of Louisville, Ky., and Moorfield Storey, of Boston, Mass., for plaintiff in error.

Messrs. Pendleton Beckley and Stuart Chevalier, both of Louisville, Ky., for defendant in error.

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*Mr. Justice DAY delivered the opinion of the Court.

Buchanan, plaintiff in error, brought an action in the chancery branch of Jefferson circuit court of Kentucky for the specific performance of a contract for the sale of certain real estate situated in the city of Louisville at the corner of Thirty-seventh street and Pflanz avenue. The offer in writing to purchase the property contained a proviso:

"It is understood that I am purchasing the above property for the purpose of having erected thereon a house which I propose to make my residence, and it is a distinct part of this agreement that I shall not be required to accept a deed to the above property or to pay for said property unless I have the right under the laws of the state of Kentucky and the city of Louisville to occupy said property as a residence."

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This offer was accepted by the plaintiff.

To the action for specific performance the defendant by way of answer set up the condition above set forth, that he is a colored person, and that on the block of which the lot in controversy is a part, there are ten residences, eight of which at the time of the making of the contract were occupied by white people, and only two (those nearest

the lot in question) were occupied by colored people, and that under and by virtue of the ordinance of the city of Louisville, approved May 11, 1914, he would not be allowed to occupy the lot as a place of residence.

In reply to this answer the plaintiff set up, among other things, that the ordinance was in conflict with the Fourteenth Amendment to the Constitution of the United States, and hence no defense to the action for specific performance of the contract.

In the court of original jurisdiction in Kentucky, and in the Court of Appeals of that state, the case was made to turn upon the constitutional validity of the ordinance. The Court of Appeals of Kentucky, 165 Ky. 559, 177 S. W. 472, Ann. Cas. 1917B, 149, held the ordinance valid and of itself a complete defense to the action.

The title of the ordinance is:

"An ordinance to prevent conflict and ill-feeling between the white and colored races in the city of Louisville, and to preserve the public peace and promote the general welfare, by making reasonable provisions requiring, as far as practicable, the use of separate blocks, for residences, places of abode, and places of assembly by white and colored people respectively."

By the first section of the ordinance it is made unlawful for any colored person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly any house upon any block upon which a greater number of houses are occupied as residences, places of abode, or places of public assembly by white people than are occupied as residences, places of abode, or places of public assembly by colored people.

Section 2 provides that it shall be unlawful for any white person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly any house upon any block upon which a greater number of houses are occupied as residences, places of abode or places of public assembly by colored people than are occupied as residences, places of abode or places of public assembly by white people.

Section 4 provides that nothing in the ordinance shall affect the location of residences, places of abode or places of assembly made previous to its approval; that nothing contained therein shall be construed so as to prevent the occupancy of residences, places of abode or places of assembly by white or colored servants or employés of occupants of such residences, places of abode or places of public assembly on the block on which they are so employed, and that nothing therein contained shall be construed to prevent any person who, at the date of the passage of the ordinance, shall have acquired or possessed the right to occupy any building as a residence, place of abode or place of assembly from exercising such a right; that nothing contained in the ordinance shall prevent the owner of any building, who when the ordinance became effective, leased, rented, or occupied it as a residence, place of abode or place of public assembly for colored persons, from continuing to rent, lease or occupy such residence, place of abode or place of assembly for such persons, if the owner shall so desire; but if such house should, after the passage of the ordinance, be at any time leased, rented or occupied as a residence, place of abode or place of assembly for white persons, it shall not thereafter be used for colored persons, if such occupation would then be a violation of section 1 of the ordinance; that nothing contained in the ordinance shall prevent the owner of any building, who when the ordinance became effective, leased, rented or occupied it as a residence, place of abode, or place of assembly for white persons from continuing to rent, lease or occupy such residence, place of abode or place of assembly for such purpose, if the owner shall so desire, but if such household, after the passage of the ordinance, be at any time leased, rented or occupied as a residence, place of abode or place of assembly for colored persons, then it shall not thereafter be used for white persons, if such occupation would then be a violation of section 2 thereof.

The ordinance contains other sections and a violation of its provisions is made an offense.

The assignments of error in this court attack the ordinance upon the ground that it violates the Fourteenth Amendment of the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States to acquire and enjoy property, takes property without due process of law, and denies equal protection of the laws.

[1] The objection is made that this writ of error should be dismissed because the alleged denial of constitutional rights involves only the rights of colored persons, and the plaintiff in error is a white person. This court has frequently held that while an unconstitutional act is no law, attacks upon the validity of laws can only be entertained when made by those whose rights are directly affected by the law or ordinance in question. Only such persons, it has been settled can be heard to attack the constitutionality of the law or ordinance. But this case does not run counter to that principle.

The property here involved was sold by the plaintiff in error, a white man, on the terms stated, to a colored man; the action for specific performance was entertained in the court below, and in both courts the plaintiff's right to have the contract enforced was denied solely because of the effect of the ordinance making it illegal for a colored person to occupy the lot sold. But for the ordinance the state courts would have enforced the contract, and the defendant would have been compelled to pay the purchase price and take a conveyance of the premises. The

right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property, and had obligated himself to take it. This case does not come within the class wherein this court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own, and not rest the attack upon the alleged violation of another's rights. In this case the property rights of the plaintiff in error are directly and necessarily involved. See Truax v. Raich, 239 U. S. 33, 38, 36 Sup. Ct 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283.

We pass then to a consideration of the case upon its merits. This ordinance prevents the occupancy of a lot in the city of Louisville by a person of color in a block where the greater number of residences are occupied by white persons; where such a majority exists colored persons are excluded. This interdiction is based wholly upon color; simply that and nothing more. In effect, premises situated as are those in question in the so-called white block are effectively debarred from sale to persons of color, because if sold they cannot be occupied by the purchaser nor by him sold to another of the same color.

This drastic measure is sought to be justified under the authority of the state in the exercise of the police power. It is said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color.

[2] The authority of the state to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare is very broad as has been affirmed in numerous and recent decisions of this court. Furthermore the exercise of this power, embracing nearly all legislation of a local character is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases.

[3] The federal Constitution and laws passed within its authority are by the express terms of that instrument made the supreme law of the land. The Fourteenth Amendment protects life, liberty, and property from invasion by the states without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden v. Hardy, 169 U. S. 366, 391, 18 Sup. Ct. 383, 42 L. Ed. 780. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Commentaries (Cooley's Ed.) 127.

True it is that dominion over property springing from ownership is not absolute and unqualified. The disposition and use of property may be controlled in the exercise of the police power in the interest of the public health, convenience, or welfare. Harmful occupations may be controlled and regulated. Legitimate business may also be regulated in the interest of the public. Certain uses of property may be confined to portions of the municipality other than the resident district, such as livery stables, brickyards and the like, because of the impairment of the health and comfort of the occupants of neighboring property. Many illustrations might be given from the decisions of this court, and other courts, of this principle, but these cases do not touch the one at bar.

[4] The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded. The question now presented makes it pertinent to inquire into the constitutional right of the white man to sell his property to a colored man, having in view the legal status of the purchaser and occupant.

Following the Civil War certain amendments to the federal Constitution were adopted, which have become an integral part of that instrument, equally binding upon all the states and fixing certain fundamental rights which all are bound to respect. The Thirteenth Amendment abolished slavery in the United States and in all places subject to their jurisdiction, and gave Congress power to enforce the amendment by appropriate legislation. The Fourteenth Amendment made all persons born or naturalized in the United States, citizens of the United States and of the states in which they reside, and provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the laws.

The effect of these amendments was first dealt with by this court in Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394. The rea-

sons for the adoption of the amendments were elaborately considered by a court familiar with the times in which the necessity for the amendments arose and with the circumstances which impelled their adoption. In that case Mr. Justice Miller, who spoke for the majority, pointed out that the colored race, having been freed from slavery by the Thirteenth Amendment, was raised to the dignity of citizenship and equality of civil rights by the Fourteenth Amendment, and the states were prohibited from abridging the privileges and immunities of such citizens, or depriving any person of life, liberty, or property without due process of law. While a principal purpose of the latter amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the states. This is now the settled law. In many of the cases since arising the question of color has not been involved and the cases have been decided upon alleged violations of civil or property rights irrespective of the race or color of the complainant. In Slaughter House Cases it was recognized that the chief inducement to the passage of the amendment was the desire to extend federal protection to the recently emancipated race from unfriendly and discriminating legislation by the states.

In Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664, this court held that a colored person charged with an offense was denied due process of law by a statute which prevented colored men from sitting on the jury which tried him. Mr. Justice Strong, speaking for the court, again reviewed the history of the amendments, and among other things, in speaking of the Fourteenth Amendment, said:

*77 *"It [the Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the states. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. * * * It ordains that no state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States. * * * It ordains that no state shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

"What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily designed that no discrimination shall be made against them by law because of their color? * * *

"The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any state action that denies this immunity to a colored man is in conflict with the Constitution."

Again this court in Ex parte Virginia, 100 U. S. 339, 347, 25 L. Ed. 676, speaking of the Fourteenth Amendment, said:

"Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty * without due process of * law or denies or takes away the equal protection of the laws violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state."

In giving legislative aid to these constitutional provisions Congress enacted in 1866, chapter 31, § 1, 14 Stat. 27 (Comp. St. 1916, § 3931), that:

"All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

And in 1870, by chapter 114, § 16, 16 Stat. 144 (Comp. St. 1916, § 3925), that:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and none other."

In the face of these constitutional and statutory provisions, can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?

[5] The statute of 1866, originally passed under sanction of the Thirteenth Amendment, 14 Stat. 27, and practically re-enacted after the adoption of the Fourteenth Amendment, 16 Stat. 144, expressly provided that all citizens of the United States in any state shall have the same right to purchase property as is enjoyed by white citizens. Colored persons are citizens of the United States and have the right to purchase property and enjoy and *use the same without laws discriminating against them solely on account of color. Hall v. De Cuir, 95 U. S. 485, 508, 24 L. Ed. 547. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. Civil Rights Cases, 109 U. S. 3, 22, 3 Sup. Ct. 18, 27 L. Ed. 835. The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.

The defendant in error insists that Plessy

v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256, is controlling in principle in favor of the judgment of the court below. In that case this court held that a provision of a statute of Louisiana requiring railway companies carrying passengers to provide in their coaches equal but separate accommodations for the white and colored races did not run counter to the provisions of the Fourteenth Amendment. It is to be observed that in that case there was no attempt to deprive persons of color of transportation in the coaches of the public carrier, and the express requirements were for equal though separate accommodations for the white and colored races. In Plessy v. Ferguson, classification of accommodations was permitted upon the basis of equality for both races.

In the Berea College Case, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81, a state statute was sustained in the courts of Kentucky, which, while permitting the education of white persons and negroes in different localities by the same incorporated institution, prohibited their attendance at the same place, and in this court the judgment of the Court of Appeals of Kentucky was affirmed solely upon the reserved authority of the Legislature of Kentucky to alter, amend, or repeal charters of its own corporations, and the question here involved was neither discussed nor decided.

In Carey v. City of Atlanta, 143 Ga. 192, 84 S. E. 456, L. R. A. 1915D, 684, Ann. Cas. 1916E, 1151, the Supreme Court of Georgia, holding an ordinance, similar in principle to the one herein involved, to be invalid, dealt with Plessy v. Ferguson, and Berea College Case, in language so apposite that we quote a portion of it:

"In each instance the complaining person was afforded the opportunity to ride or to attend institutions of learning, or afforded the thing of whatever nature to which in the particular case he was entitled. The most that was done was to require him as a member of a class to conform to reasonable rules in regard to the separation of the races. In none of them was he denied the right to use, control, or dispose of his property, as in this case. Property of a person, whether as a member of a class or as an individual, cannot be taken without due process of law. In the recent case of McCabe v. Atchison, etc., Ry. Co., 235 U. S. 151 [35 Sup. Ct. 69, 59 L. Ed. 169], where the court had under consideration a statute which allowed railroad companies to furnish dining cars for white people and to refuse to furnish dining cars altogether for colored persons, this language was used in reference to the contentions of the Attorney General: 'This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one.' * * *

"The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy, and dispose of his property. Being of this character it was void as being opposed to the due process clause of the Constitution."

That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.

As we have seen, this court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given. But in view of the rights secured by the Fourteenth Amendment to the federal Constitution such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution. We think these limitations are exceeded in laws and ordinances of the character now before us.

It is the purpose of such enactments, and, it is frankly avowed it will be their ultimate effect, to require by law, at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races, although it is to be noted in the ordinance under consideration that the employment of colored servants in white families is permitted, and nearby residences of colored persons not coming within the blocks, as defined in the ordinance, are not prohibited.

The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.

It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution. It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results.

We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the state, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case, the ordinance cannot stand. Booth v. Illinois, 184 U. S. 425, 429, 22 Sup. Ct. 425, 46 L. Ed. 623; Otis v. Parker,

187 U. S. 606, 609, 23 Sup. Ct. 168, 47 L. Ed. 323.

Reaching this conclusion it follows that the judgment of the Kentucky Court of Appeals must be reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

(245 U. S. 24)

LEE WILSON & CO. v. UNITED STATES.

(Argued Oct. 4 and 5, 1917. Decided Nov. 5, 1917.)

No. 110.

1. Waters and Water Courses ⟸109—Riparian Rights—Meandered Lakes.

Where in a survey of the public domain a body of water or lake is found to exist and is meandered, the result of such meander is to exclude the area from the survey and to cause it, as thus separated, to become subject to the riparian rights of the respective owners abutting on such line in accordance with the laws of the state.

2. Public Lands ⟸26—Errors in Surveys—Effect.

Where through fraud or error a meander line is run upon the assumption of the existence of a body of water or lake which does not exist, riparian rights do not attach, and upon the discovery of the mistake the Land Department has power to deal with the area excluded and cause it to be surveyed and dispose of it.

3. Public Lands ⟸59—Grants of Swamp Lands—Lands Included.

The survey of a township showed a body of water excluded therefrom by a meander line, thereby diminishing the acreage surveyed and the area of surveyed land within the exterior boundaries of the township, when in fact there was no lake within such meander line. Thereafter the state of Arkansas selected such township under the grant to it of swamp lands by the Swamp Land Act of 1850 (Act Sept. 28, 1850, c. 84, 9 Stat. 519 [Comp. St. 1916, §§ 4958–4960]), stating the acreage conformably to the reduction so made by the meander line. This selection was confirmed by Congress and a patent issued for such township, described as containing a specified number of acres substantially conforming to the reduction brought about by excluding the area included within the meander line. *Held*, that though the land within the meander line was within the exterior boundaries of the township and was eligible to be selected under the Swamp Land Act, it did not pass under the grant to the state, as the meander line excluded it absolutely from the township and its nature and character depended, not upon the exterior lines of the township, but upon the condition existing within those lines.

4. Public Lands ⟸59—Grants of Swamp Lands—Lands Included.

Title to the land within such meander line was not vested in the state by the Compromise Act 1898 (Act April 29, 1898, c. 229, 30 Stat. 367), by which as a part of a compromise it was provided that the title of all persons who had purchased any unconfirmed swamp land and held deeds therefor was confirmed as against any claim of the United States.

5. Estoppel ⟸62(2) — Estoppel Against Government—Public Lands.

No estoppel against the United States arose from the fact that its administrative officers, before the discovery of the fraud or error, treated the area meandered as subject to the riparian rights of abutting owners and consequently not subject to be disposed of by the United States.

6. Public Lands ⟸26—Errors in Surveys—Time for Correction.

The power of the Land Department to survey and dispose of public land excluded upon a survey by the drawing of a meander line on the mistaken assumption of the existence of a body of water was not barred by the five-year limitation on the right to vacate or annul a patent prescribed by Act March 3, 1891, c. 561, 26 Stat. 1095, especially as the correction of such a mistake is not an attempt to vacate or annul a patent.

7. Estoppel ⟸62(2) — Estoppel Against Government—Public Lands.

That one holding under the state acquired its rights in land excluded from a survey of the public land by the drawing of a meander line on the mistaken assumption of the existence of a body of water in reliance upon the actions and representations of the officers of the United States as to the existence of riparian rights as a result of the meander line did not prevent the United States from correcting the mistake and thus protecting its title, since relief based on such equitable considerations must be sought from the legislative department of the government.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States against Lee Wilson & Co. A decree for the United States (214 Fed. 630) was affirmed by the Circuit Court of Appeals for the Eighth Circuit (227 Fed. 827, 142 C. C. A. 351), and defendant appeals. Affirmed.

Messrs. Charles T. Coleman, of Little Rock, Ark., and Henry D. Ashley, of Kansas City, Mo., for appellant. Mr. Solicitor General Davis, of Washington, D. C., for appellee.

*Mr. Chief Justice WHITE delivered the opinion of the Court.

The United States, asserting that designated parcels of land were part of its public domain, sought a decree quieting its title. Sustaining the title thus asserted and rejecting a claim to the contrary on the part of the defendant, the trial court awarded the relief prayed ([D. C.] 214 Fed. 630), and the appellant, who was defendant, seeks on this appeal to reverse the decree of the court below sustaining the trial court (227 Fed. 827, 142 C. C. A. 351). A reference to the origin and subject-matter of the controversy and a statement of some undisputed and indisputable facts will clarify and limit the issues to be passed upon.

The public survey of the United States concerning the area in which the land was situated (township 12 north, range 9 east of the fifth principal meridian, county of Mississippi, state of Arkansas) was filed in 1841. By that survey and the plat and field notes thereof it appeared that in sections 22, 26 and 27 there was stated to be a body of water styled a lake which was excluded from the survey by means of a meander line, diminishing to the extent of the excluded area the acreage surveyed in the sections in question

and thereby causing them to become fractional. As a matter of course also the meander line to the extent that it excluded the body of water from the survey diminished the area of surveyed land lying within the exterior boundaries of the township. In 1853 the state of Arkansas, it may be assumed, complying with legal requisites and conforming to the administrative regulations of the Land Department, filed a list of selections under the grant made to it of swamp and overflowed lands by the Act of Congress of 1850. 9 Stat. 519. The selections included township 12 and stated the acreage which it embraced conformably to the reduction of such acreage made by the meander line. In 1857 Congress confirmed "the selection of swamp and overflowed lands granted to the several states * * * heretofore made and reported to the Commissioner of the General Land Office" and provided that such selection "shall be approved and patented to the said several states. * * *" Chapter 117, 11 Stat. 251 [Comp. St. 1916, § 4963]. In 1858 a patent was issued by the United States to the state of Arkansas, the land patented being described as follows:

"Township twelve (12) north, range nine (9) east. The whole of the township except section sixteen (16) containing fourteen thousand five hundred and sixty-five acres and three hundredths of an acre, according to the official plat of survey of the said lands returned to the General Land Office, by the Surveyor General."

The acreage thus stated substantially conformed to the reduction brought about by the omission of section 16 which had already been given to the state and of the area of the lake which had been meandered and excluded from the survey.

Undoubtedly following the patent for a considerable period of time the officers of the Land Department treated the meandered and *226 excluded surface of the lake as not *being part of the public domain subject to survey and to disposal by the United States, upon the theory that the same by the operation of the meander had been excluded from the survey and made subject to the riparian rights of the several abutting owners under the state law. And it may be admitted that the state of Arkansas acted upon the assumption that all the land, whether surveyed or unsurveyed, within the exterior limits of the township had passed to it. In 1907 or thereabouts, growing out of some asserted right to have the meandered and unsurveyed area surveyed and disposed of as part of the public domain, on the ground that through fraud, error or mistake, the area in question had been stated in the survey to be a lake when in fact it was not and was on the contrary land which should have been surveyed, the Land Department after due notice undertook an investigation of the subject. Without stating the proceedings which ensued, it suffices to say that in 1909 it was definitely found that the alleged fraud, error or mistake of the survey was established because there was no lake to meander at the time the survey was made, it being found that all the evidence conclusively so established. Giving effect to this the unsurveyed area was ordered surveyed and homestead entries were initiated thereon. This controversy arose between the rights of the United States and such entrymen and those asserted by the defendant below who held the rights of the state of Arkansas, if any, to the area in question as evidenced by the patent or as embraced by the grant of swamp and overflowed lands and the action of the United States authorities taken on the subject.

It thus becomes apparent that the subject of the controversy relates solely to the unsurveyed area resulting from the erroneous assumption as to the existence of a lake and embraces only 853.60 acres. It also is certain that as the result of the concurrent findings of fact by the two courts and the admission made by the parties *there is no controversy as to the facts concerning the error committed as to the supposed lake, leaving therefore to be decided only the legal questions which arise from the admitted facts. As a means of putting out of view questions which are not debatable we at once state two legal propositions which are indisputable because conclusively settled by previous decisions. *227

[1] First. Where in a survey of the public domain a body of water or lake is found to exist and is meandered, the result of such meander is to exclude the area from the survey and to cause it as thus separated to become subject to the riparian rights of the respective owners abutting on the meander line in accordance with the laws of the several states. Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; Kean v. Calumet Canal Co., 190 U. S. 452, 459, 23 Sup. Ct. 651, 47 L. Ed. 1134; Hardin v. Shedd, 190 U. S. 508, 519, 23 Sup. Ct. 685, 47 L. Ed. 1156.

[2] Second. But where upon the assumption of the existence of a body of water or lake a meander line is through fraud or error mistakenly run because there is no such body of water, riparian rights do not attach because in the nature of things the condition upon which they depend does not exist and upon the discovery of the mistake it is within the power of the Land Department of the United States to deal with the area which was excluded from the survey, to cause it to be surveyed and to lawfully dispose of it. Niles v. Cedar Point Club, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 171; French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 22 Sup. Ct. 563, 46 L. Ed. 800; Security Land & Exploration Co. v. Burns, 193 U. S. 167, 24 Sup. Ct. 425, 48 L. Ed. 662; Chapman & Dewey v. St. Francis Levee District, 232 U. S. 186, 34 Sup. Ct. 297, 58 L. Ed. 564.

Coming to test the questions for decision in the light of these propositions there can be no doubt that the case is taken out of the

reach of the first and is brought under the control of the second, as the result of the conclusive finding as to the mistake committed concerning the existence of the lake *30 and the consequent error in the survey,* unless it be that for some reason the unquestioned rule which the second proposition embodies is inapplicable. Indeed, putting aside a contention made as to the face of the patent, which we are of opinion is sufficiently disposed of by what we have already said, all the other contentions proceed not upon a challenge of the doctrine embodied in the second proposition but upon the erroneous theory that it is inapplicable to the case in hand—an error which we shall briefly demonstrate by separately considering the contentions.

[3] a. In the first place it is in many forms of statement insisted that although the patent expressly referred to the plat and survey and purported only to grant the acreage surveyed as reduced by the exclusion from the survey of the body of the lake, that becomes negligible since the right of the state depended upon the grant made by the Swamp Land Act, the selection made under that act and the approval of that selection by the act of Congress of 1857, all of which must be considered in determining the grant made to the state and give rise when considered to the irresistible implication that all the land embraced in township 12 passed to the state. Concretely stated the proposition is this: That as the selection made by the state was of township 12, the exterior bounds of that township became the measure of the state's title irrespective of what was surveyed or unsurveyed within those exterior lines. But it is at once obvious that this proposition rests upon a contradictory assumption, since it treats the designation of township 12 as the measure of the rights conferred and immediately proceeds to exclude from view the criteria by which alone the existence and significance of the insisted upon designation (township 12) is to be determined. Aside from this, however, it is further apparent that the contention disregards the very basis upon which the decided cases upholding the doc- *31 trine stated in the second proposition* rest, which is that the effect of a meander line is to exclude absolutely from the township the area meandered and to cause therefore its nature and character to depend not upon the exterior lines of the township but upon the condition existing within those lines made manifest and fixed by the necessary legal consequences resulting from the meander line. This conclusive view is clearly pointed out in Chapman & Dewey v. St. Francis Levee District, 232 U. S. 196, 197, 34 Sup. Ct. 297, 58 L. Ed. 564. And that case also (232 U. S. 198, 34 Sup. Ct. 297, 58 L. Ed. 564) completely answers the argument that although the land was not embraced in the selection, was not included in the township because unsurveyed and did not pass by the patent or the selection independently considered, it yet must be treated as having passed to the state under the Swamp Land Act of 1850 because it was eligible to be selected under that act.

[4] b. The proposition that title to the land must be considered as being in the state because of the Compromise Act of 1898 (chapter 229, 30 Stat. 367) is on the face of that act, we think, in view of what we have said, devoid of merit. We say this because the contention rests upon the assumption which we have already disposed of that the land excluded by the meander line was embraced by the selection approved by the act of Congress of 1857.

[5] c. The assertion that an estoppel against the United States arose from the fact that the administrative officers of the government before the discovery of the fraud or error as to the existence of the lake had treated the area meandered as subjected to the riparian rights of the abutting owners under the state law and consequently not subject to be disposed of by the United States, in substance but disregards the right to correct such error conclusively recognized as existing in the administrative officers of the Land Department by the decisions which we have previously cited.

[6] d. The contention that power did not *32 exist on the* discovery of a mistake to survey and dispose of public land which had been excluded from a survey by the drawing of a meander line on the mistaken assumption of the existence of a body of water, because of the five years' limitation on the right of the United States to vacate or annul a patent (Act of March 3, 1891, 26 Stat. 1095), again but disputes the settled doctrine as to the existence of such power and besides rests upon the unsound assumption that the correction of such a mistake is an attempt to vacate or annul the patent. When rightly considered we think, as pointed out by the United States in argument, the ruling in United States v. Chandler-Dunbar Co., 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881, instead of sustaining, is in conflict with the proposition.

[7] Finally, the suggestion that as the defendant holding under the state acquired its rights before the mistake was discovered in reliance upon the actions and representations of the officers of the United States as to the existence of riparian rights in accordance with the state law as the result of the meander line, the United States should not be permitted to correct the mistake committed as to the meander line and thus protect its title, but in a different form restates the argument which we have already disposed of. Besides if for the sake of the argument we assume the existence of the equitable considerations insisted upon, it is manifest that the prayer for their enforcement is in the nature of things beyond the sphere of

judicial authority however much relief on the subject may be appropriately sought from the legislative department of the government.

There being then no error, it follows that the decree below must be and it is

Affirmed.

(245 U. S. 89)

UNITED STATES v. CHASE.

(Argued Oct. 2, 1917. Decided Nov. 5, 1917.)

No. 146.

1. INDIANS ⟸13 — LANDS — ALLOTMENT OR PARTITION—PRACTICAL CONSTRUCTION.

The treaty of March 6, 1865 (14 Stat. 667), between the United States and the Omaha Indians, provided that a portion of the reservation of such Indians should be set aside for assignments in severalty to the members of the tribe, that there should be assigned therefrom to each head of a family not exceeding 160 acres, etc., that the whole of the lands assigned or unassigned in severalty should constitute the Omaha reservation, within which laws regulating the trade with Indian tribes should have full force, and no white person, except such as should be in the employ of the United States, should be allowed to reside or go without permission, that the division and assignment of lands, when approved by the Secretary of the Interior, should be final and conclusive, that certificates should be issued for the exclusive use and benefit of the individual Indians, their heirs and descendants, and that such tracts should not be alienated in fee, leased, or otherwise disposed of, except to the United States or to other members of the tribe. The certificates so issued declared that the assignee was entitled to take possession of the land allotted and occupy it, and that the United States guaranteed such possession and would hold the title in trust for the assignee and his heirs. In 1882 a number of the assignees memorialized Congress to grant to each Indian a full and clear title to the land on which he had worked. Act Aug. 7, 1882, c. 434, § 4, 22 Stat. 341, provided relative to sales of a part of the reservation that any right in severalty acquired by any Indian under existing treaties should not be affected by that act. Section 5 provided that with the consent of the Indians all unsold lands, including those theretofore assigned should be allotted to the members of the tribe in general, including those holding assignments under the treaty, that such allotments were to be deemed and held to be in lieu of the assignments under the treaty, but that each assignee was to have a preferential right to select the tract embracing his improvements; and section 6 provided for the issue of trust patents for 25 years and full patents at the end of that period. These provisions were consented to by the tribe and allotments thereunder made. *Held*, that the treaty apparently provided only for an apportionment of the Indian possessory right, leaving the fee in the United States as before; but, if its terms were uncertain on this point, the government and the tribe had in practice placed that construction upon it.

2. INDIANS ⟸13 — LANDS — ALLOTMENT OR PARTITION—TERMINATION OF RIGHTS.

Where the heir of an Indian to whom land was assigned did not assert his right to select the assigned tract for his allotment under the act of 1882, and it did not appear that he was denied the right to do so, or that he received less than a full allotment without this tract, his rights under the assignment were terminated by the act of 1882; the proviso of section 4 not being intended to interfere with or qualify the plan of allotment as defined in section 5, but only to prevent a sale under section 4 of land to which an Indian had a right in severalty.

3. INDIANS ⟸13 — LANDS — ALLOTMENT OR PARTITION—VALIDITY OF PATENT.

Rev. St. § 2448 (Comp. St. 1916, § 5098), provides that, where the person to whom a patent issues is dead at the time, the title shall inure to and become vested in his heirs, devisees, or assigns as if the patent had issued in his lifetime. An Indian, in whose name a patent was issued for land allotted to him under the act of August 7, 1882, died after selecting his allotment and before the issue of the patent. *Held* that, if the selection had not advanced before his death to a point where the patent properly could be issued thereafter, this was a matter of which only the United States and the tribe could complain, and where they made no complaint a third party could not make the objection; the patent being only voidable, and not void.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Action by the United States, as trustee and guardian, etc., against Hiram Chase. A judgment for plaintiff was reversed by the Circuit Court of Appeals for the Eighth Circuit (222 Fed. 593, 138 C. C. A. 117), and the United States brings certiorari. Reversed, and judgment of the District Court affirmed.

Mr. Solicitor General Davis, of Washington, D. C., for petitioner.

Mr. Hiram Chase, of Pender, Neb., and Mr. Thomas L. Sloan, of Washington, D. C., for respondent.

*91 * Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is an action to recover for the wrongful use and occupancy of 40 acres of land in Nebraska to which two Omaha Indians assert conflicting claims. The land is within the Omaha Indian reservation, was assigned in 1871 under the treaty of March 6, 1865, 14 Stat. 667, to Clarissa Chase, a member of the Omaha tribe, and was allotted in 1899 under the Act of August 7, 1882, c. 434, 22 Stat. 341, to Reuben Setter, another member of the tribe. The defendant, who has been using and occupying the land for some time, claims as the sole heir of Clarissa Chase, and the other claimant—for whom the United States sues as trustee and guardian—claims as the sole heir of Reuben Setter. In the District Court judgment went against the defendant, but he prevailed in the *Circuit *92 Court of Appeals. 222 Fed. 593, 138 C. C. A. 117. Whether the assignment to Clarissa Chase under the treaty passed the full title in fee or only the Indian right of occupancy, and whether all right under the assignment was extinguished prior to the allotment to Reuben Setter under the act of 1882, are the controlling questions.

[1] The reservation was established and maintained under early treaties as the tribal home. The Indian right of possession was in the tribe and the fee in the United States.

The possessory right was enjoyed by all the members in common, none having a several right in any part of the reservation. While this was so the treaty of 1865 was negotiated. By it the tribe ceded a portion of the reservation to the United States and the latter, in consideration of the cession, engaged to make certain payments to the Indians and to take certain measures, not material here, for their benefit. The treaty then proceeded:

"Article IV. The Omaha Indians being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purposes; and that out of the same there shall be assigned to each head of a family not exceeding one hundred and sixty acres, and to each male person, eighteen years of age and upwards, without family, not exceeding forty acres of land—to include in every case, as far as practicable, a reasonable proportion of timber; six hundred and forty acres of said lands, embracing, and surrounding the present agency improvements, shall also be
*93 set apart and appropriated to the occupancy and
* use of the agency for said Indians. * The lands to be so assigned, including those for the use of the agency, shall be in as regular and compact a body as possible, and so as to admit of a distinct and well-defined exterior boundary. The whole of the lands, assigned or unassigned, in severalty, shall constitute and be known as the Omaha reservation, within and over which all laws passed or which may be passed by Congress regulating trade and intercourse with the Indian tribes shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said reservation without the written permission of the superintendent of Indian affairs or the agent for the tribe. Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him, shall be final and conclusive. Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of the individuals to whom they have been assigned respectively, and that they are for the exclusive use and benefit of themselves, their heirs, and descendants; and said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale, or forfeiture, until otherwise provided for by Congress."

Some of the Omahas sought and received assignments under this article, while others, although having the requisite status, neither sought nor received anything under it. Clarissa Chase was among those who obtained an assignment of 160 acres as the head of a family, and in 1871 a certificate evidencing her assignment was issued to her by the Commissioner of Indian Affairs. The 160 acres included the 40 acres now in ques-
*94 tion.

*Without any doubt the fourth article contains provisions which, in other situations, would suggest a purpose to pass the full title in fee. This is true of the provisions that the assignments, when approved by the Secretary of the Interior, "shall be final and conclusive," that the certificates to be issued by the Commissioner of Indian Affairs shall specify that the tracts assigned are for the exclusive use and benefit of the assignees, "their heirs and descendants," and that the tracts shall not be "alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe." But as applied to the situation then in hand these provisions are consistent with a purpose to apportion the Indian possessory right, leaving the fee in the United States as before. The assignments, when approved, could well operate as a final and conclusive apportionment of that right without affecting the fee; and the right of each assignee to occupy and use the tract assigned to him, to the exclusion of other members, could well pass to his heirs and descendants, upon his death, without his being invested with the fee. If not invested with it, he, of course, could not alienate it, and a cautious provision intended to prevent him from attempting to do so hardly would enlarge his right. True, the provision says, "except to the United States or to other members of the tribe," but, as the restriction is also directed against leasing or other disposal, it is not improbable that the real purpose of the excepting clause is to qualify this part of the restriction. In any event, the implication attributed to the provision is too uncertain to afford a substantial basis for thinking the assignee was to take the fee.

Other provisions and considerations suggest that an apportionment of the tribal possessory right is all that was intended. The article directly provides for a change in tenure—an "assignment or division" in severalty of communal property. Nothing is said about
95 passing the fee held by the United States, and
there is no provision for patents. The assignees are neither relieved from federal guardianship nor subjected to state laws. And there is no dissolution of the tribal organization, nor any abridgment of the accustomed power of the tribe, as such, to speak and act for its members. But there is express provision that all the lands, assigned and unassigned, shall remain an Indian reservation over which the Indian trade and intercourse laws of Congress shall be in force, and upon which no white person, not in the employ of the United States, shall be allowed to reside or go without written permission from the Indian agent or a superior officer. All this persuasively points to the absence of any purpose to do more than to individualize the existing tribal right of occupancy.

A like question was presented and considered in Veale v. Maynes, 23 Kan. 1, a case arising out of the treaties of 1861 (12 Stat. 1191) and 1867 (15 Stat. 531) with the Pot-

tawatomie Indians. The earlier treaty provided in language similar to that now under consideration for the assignment of portions of the tribal reservation to individual members in severalty and for the issue by the Commissioner of Indian Affairs of certificates for the assigned tracts, "specifying the names of the individuals to whom they have been assigned respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs." Assignments were made and certificates issued under that treaty and thereafter the treaty of 1867 was negotiated. Following its provisions a tract assigned under the earlier treaty to one member was conveyed by a patent in fee to another. This was claimed to be violative of the right conferred by the assignment, but the right under the patent was sustained. Speaking for the Supreme Court of Kansas, and particularly referring to the earlier treaty, Mr. Justice Brewer, then a member of that court, said:

90 * "Now what was intended by this division—that the title be thus divided up, or the mere matter of occupancy? Of course either was within the power of the contracting parties. They might provide for a division among the several Indians which should vest an absolute title in each, beyond the power of the tribe or the government to disturb without the personal consent of the individual; or they might provide for an individualizing of the right of occupancy, giving to each person a sole right of occupancy in a particular tract, a right guaranteed against invasion by any individual, but still within the power of the tribe as a tribe to convey by treaty. In other words, while that remained the tribal home each individual desiring it should have separate control of certain lands, yet subject to the ultimate power of the tribe to change their home and to make absolute conveyance of the whole body of lands. The power of the tribe, *as a tribe*, remained undisturbed over both the allotted lands and those held in common. That this was the intent and effect of the treaty, we are constrained to hold, and this notwithstanding many expressions which, if used in ordinary contracts between individuals, would have marked significance to the contrary.

"* * * At present it is enough to notice that the allottee remained a member of the tribe, and if the intention had been to enlarge his title from the ordinary Indian title, one of occupancy, to that of a fee simple, the intention would, it seems, have been expressed in unmistakable terms. If, on the other hand, a difference was to be made in the mere manner in which the various Indians occupied the tribal home, it was enough that that difference was made clear, and language used to indicate that should not be carried to some further meaning."

In Wiggan v. Conolly, 163 U. S. 56, 63, 16 Sup. Ct. 914, 917 (41 L. Ed. 69) where the rights of an allottee, who was still a tribal Indian, were restricted by treaty after the allotment was made, this court said:

92 * "The land and the allottee were both still under the charge and care of the Nation and the tribe, and they could agree for still further protection, a protection which no individual was at liberty to challenge."

But if the terms of the treaty of 1865 be regarded as confused or uncertain the question still must be resolved in the same way, for the parties—the United States and the tribe—have in practice placed upon the treaty the construction to which we are inclined. In the certificates issued by the Commissioner of Indian Affairs and accepted by the assignees it was declared that:

"The said [assignee] is entitled to and may take immediate possession of said land and occupy the same, and the United States guarantees such possession, and will hold the title thereto in trust for the exclusive use and benefit of [the assignee] and ——— heirs so long as such occupancy shall continue."

The obvious import of this is that the assignee was to have a right of occupancy, but not the fee. In January, 1882, a considerable number of the assignees, some being chiefs who had participated in the negotiation of the treaty and whose names were signed to it, memorialized Congress as follows (Sen. Mic. Doc., No. 31, 47th Cong., 1st Sess.):

"We, the undersigned, members of the Omaha tribe of Indians, have taken out certificates of allotment of land, or entered upon claims within the limits of the Omaha reserve. We have worked upon our respective lands from three to ten years; each farm has from five to fifty acres under cultivation; many of us have built houses on these lands, and all have endeavored to make permanent homes for ourselves and our children.

"We therefore petition your honorable body to grant to each one a *clear and full title* to the land on which he has worked.

"We earnestly pray that this petition may re- 93
ceive* your favorable consideration, for we now*
labor with discouragement of heart, *knowing that our farms are not our own, and that any day we may be forced to leave* the lands on which we have worked. We desire to live and work on these farms where we have made homes, that our children may advance in the life we have adopted. To this end, and that we may go forward with hope and confidence in a better future for our tribe, *we ask of you titles to our lands.*"

Shortly after the presentation of this memorial a bill providing for the sale of the western part of the Omaha reservation passed the Senate. At that time the only provision in the bill having any possible reference to the existing assignments was a saving clause in its fourth section declaring that "any right in severalty acquired by any Indian under existing treaties shall not be affected by this act." In the House of Representatives four new sections were added, and in that form the bill became the Act of August 7, 1882, before cited. The new sections, 5 to 8, contain elaborate provisions for making allotments in severalty out of the unsold portion of the reservation, for adjusting the situation to which the Indian memorial invited attention, for the issue of trust patents and patents carrying the fee, for disposing of the surplus lands in the reservation and for ultimately bringing the Indians within the operation of state laws. The fifth section, the one providing for allotments and dealing with the existing assignments, was both comprehensive and easily understood. It was in the nature of a proposal and in terms required "the consent of the Omaha tribe of Indians, expressed in open council," to make it operative. Shortly stated, what it propos-

ed was this: All unsold lands, including those theretofore assigned under the treaty of 1865, were to be available for allotments. The right to receive allotments was to be accorded to the members generally, including those holding assignments under the treaty. The allotments were to be on a scale[1] of 160 acres to each head of a family, 80 acres to each single person over 18 years of age, 80 acres to each orphan child under 18 years and 40 acres to each other person under 18 years. The Indians were severally to select the lands to be allotted to them, heads of families selecting for their children and the agent selecting for orphan children. These allotments were to be "deemed and held to be in lieu of" the assignments under the treaty of 1865, but each assignee, when selecting the lands to be allotted to him, was to be accorded "a preference right" to select the tract embracing his improvements. In short, all rights under the assignments, as such, were to be extinguished, and each assignee was to have the same right to take an allotment as was accorded to other members, but with a preferred right to make his selection in such way that his allotment would include his improvements. The sixth section provided for the issue of trust patents covering a period of 25 years, and for full patents conveying the fee at the end of that period.

The tribe, in open council, gave its consent to this plan of allotment and adjustment, and, through the co-operation of the administrative officers and the tribe, the plan was carried to completion. The report of the allotting agent shows that of the 297 outstanding certificates of assignment 230 were produced and surrendered and 67 were accounted for as lost by fire, flood or other accident, and that most of the certificate holders took the assigned tracts for their allotments—others selecting different lands. Thus it is apparent that the parties to the treaty—the United States and the tribe—have in all their dealings relating to the subject proceeded upon the theory that what was intended by article IV and what was accomplished by the assignments under it was merely a distribution or apportionment of the tribal right of occupancy, leaving the fee in the United States and leaving the United States and the tribe free to take such measures for the ultimate and permanent disposal of the lands, including the fee, as might become essential or appropriate in view of changing conditions, the welfare of the Indians and the public interests. This construction of the treaty by those who entered into it and to whom its proper administration and application were of obvious importance has become practically a part of it and could not be rejected now, after the lapse of many years, without seriously disturbing the titles of those who, not unreasonably, relied upon it.

[1] The quantity of some of the allotments was subsequently enlarged with the consent of the tribe. Act March 3, 1893, c. 209, 27 Stat. 630.

[2] Concluding, as we do, that the assignment to Clarissa Chase passed only the Indian or tribal right of occupancy, the remaining question is not difficult of solution. She took that right as it was held by the tribe, without enlargement or diminution. It was merely individualized. Upon her death, in 1875, it passed to the defendant, he being her sole heir. The act of 1882, consented to by the tribe, put into effect a general plan of allotment which completely displaced the Indian right of occupancy and in that sense terminated all right under the assignment. Under that plan the assigned tract was available for allotments and the defendant was entitled to an allotment. He could select the assigned tract for his allotment—indeed, he had a preferred right to do so. He could exercise that right or waive it and select other lands. But he could not select other lands and also hold the assigned tract. He was entitled to one allotment, not two. If not selected by him, the tract in question would be open to selection by another. He does not assert that he selected it, or that he was denied the right to do so, or that he received less than a full allotment without this tract. But he claims that the assignment passed the title in fee and in consequence was an insurmountable obstacle to the allotment of the tract under the act of 1882. This claim, as has been shown, is untenable. All that passed by the assignment was a possessory right, and this was terminated by the act of 1882.

Some reliance is had upon the provision in section 4 that "any right in severalty acquired by any Indian under existing treaties shall not be affected by this act." But this, as an examination of the act discloses, is merely a saving clause in that part of the act providing for the sale of a distinct portion of the reservation. If the provision be read in connection with what is said in section 5 in dealing with allotments and with assignments under the treaty it becomes manifest that it was not intended to interfere with or qualify the plan of allotment as defined in that section, but only to prevent the sale under the earlier and separable portion of the act, of any tract to which an Indian had a right in severalty under a treaty. The legislative history of the act also sustains this view. See Cong. Rec., 47th Cong., 1st Sess., pp. 3028–3032, 3077–3079.

[3] According to the pleadings, Reuben Setter died at some time after selecting the tract for his allotment and before the issue of the patent in his name, and this is set up as an obstacle to a recovery on behalf of his heir. If there be any merit in this objection, it does not render the patent void but only voidable. A statute in force for many years, and which this court has applied to a patent issued under an Indian treaty for Indian lands, provides that where the person to whom the patent issues is dead at the time the title shall inure to and become vested in his heirs, devisees or assigns, as if the patent

had issued in his lifetime. Rev. Stat. § 2448; Crews v. Burcham, 1 Wall. 352, 357, 17 L. Ed. 91. Thus the fact that Reuben Setter was dead when the patent issued is in itself of no moment. If his selection had not *102 advanced before his death to the *point where the patent properly could be issued thereafter that is a matter of which only the United States and the tribe can complain—and then only in an appropriate proceeding. Apparently both are content to let the patent stand, and certainly it is not open to the defendant to make the objection.

It results that the judgment of the Circuit Court of Appeals must be reversed and that of the District Court affirmed.

It is so ordered.

(245 U. S 122)

SCHARRENBERG v. DOLLAR S. S. CO. et al.

(Argued Oct. 12, 1917. Decided Nov. 5, 1917.)

No. 192.

1. ALIENS ⇐56—IMPORTATION OF "CONTRACT LABORERS"—"LABORERS."

Act. Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898, as amended March 26, 1910, c. 128, § 1, 36 Stat. 263 (Comp. St. 1916, § 4244), defining "contract laborers" as persons induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, to perform labor in this country of any kind, section 4 (Comp. St. 1916, § 4248), making it a misdemeanor for any corporation to assist or encourage the importation or migration of contract laborers, and section 5 (section 4250), imposing penalties for knowingly assisting, encouraging, or soliciting such migration or importation, are not violated by bringing seamen from China to San Francisco under contract to join the crew of a vessel of American registry, as seamen are neither in popular nor in technical legal language classed as "laborers," nor is a ship of American registry engaged in foreign commerce a part of the territory of the United States in such a sense that men employed on it can be said to be laboring in the United States or performing labor in this country, though for purposes of jurisdiction ships are figuratively said to be a part of the territory of the nation whose flag they fly.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Contract Laborer; First and Second Series, Laborer.]

2. ALIENS ⇐56—IMPORTATION OF CONTRACT LABORERS.

That the aliens involved were Chinese subjects was without significance, as the penal provisions of the statute apply to all alien contract laborers without regard to their origin or nationality.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Action for statutory penalties by Paul Scharrenberg against the Dollar Steamship Company and others. A judgment for defendants on demurrer was affirmed by the Circuit Court of Appeals for the Ninth Circuit (229 Fed. 970, 144 C. C. A. 252, Ann. Cas. 1917C, 258), and plaintiff brings certiorari. Affirmed.

Mr. H. W. Hutton, of San Francisco, Cal., for petitioner.

Mr. Nathan H. Frank, of San Francisco, Cal., for respondent.

*123 *Mr. Justice CLARKE delivered the opinion of the court.

This is a suit to recover penalties upon the claim that the defendants "knowingly assisted and encouraged the importation and migration" of certain alien contract laborers into the United States, for the purpose of having them perform labor therein in violation of sections 4 and 5 of the Act of Congress of February 20, 1907 (34 Stat. 898).

The Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, sustaining a general demurrer to the second amended complaint and the case is here for review on certiorari.

[1] The complaint is in nineteen separate counts in identical form and each relating to the employment of a single man. The essential allegations of each count, with a difference only in name of the man employed, are as follows:

That in 1913 the three defendant corporations were *operators of the British steamship *124 Bessie Dollar, and also of the American steamship Mackinaw, and that the defendant Abernethy was the master of the former; that when the Bessie Dollar was in the port of Shanghai, China, the defendants formed the design of procuring a crew of alien laborers to be transferred to the Mackinaw at San Francisco, and to that end, although the Bessie Dollar had a full crew of officers and men, they procured one Dung Pau to sign shipping articles as a "purported seaman" for service on her as follows, viz.:

"On voyages from Shanghai to San Francisco, there to join the S. S. Mackinaw, or other vessel, within the limits of 70 degrees north and 70 degrees south latitude, trading to and from as may be required, and back to Shanghai, to be discharged with consent of local authorities. Term of service not to exceed two years. The master has the option to transfer any or all of the within mentioned persons to any other British or Foreign ship bound to Shanghai in the same capacity and at the same rate of wages."

It is also alleged that Pau "worked as a seaman" on the voyage to San Francisco, and on arrival there was discharged from the Bessie Dollar, and that on the same day, pursuant to the design formed in Shanghai, he signed shipping articles before the United States Shipping Commissioner for the Port of San Francisco for a voyage on the Mackinaw as follows:

"From San Francisco, Cal., to Shanghai, China, and such other Asiatic Ports as the master may direct, via Grays Harbor, Seattle, Wash., and such other ports on the Pacific Coast as the master may direct; final port of discharge shall be Shanghai, China."

And, finally, it is averred that, pursuant to the second contract, Pau worked "as a

seaman" on board the Mackinaw in the Port of San Francisco for some days, and on the *125 voyage from San Francisco to Grays Harbor, Washington, and at Grays Harbor until the time of the commencement of this action.

The employment of the man to serve as a bona fide seaman on the Mackinaw is not questioned, and the allegations of the complaint negative any suspicion that the employment of him in China was a subterfuge adopted for the purpose of unlawfully securing his entry into the United States.

Basing his right upon the allegations of the complaint, which we have thus epitomized, the claim of the petitioner is, that by employing and bringing an alien laborer as a seaman to San Francisco, in the manner described, for the purpose of shipping him, followed by his actually being shipped, as a seaman on board a vessel of American registry, the defendants violated the Act of Congress of February 20, 1907 (34 Stat. at Large, p. 898).

The argument in support of this claim is that the seaman, described in each count of the complaint, was an alien contract laborer; that the steamship Mackinaw was a part of the territory of the United States, and that therefore the contracting to bring such alien to San Francisco and to there employ him upon such a vessel was to knowingly assist and encourage the migration of an alien contract laborer into the United States, for the purpose of having him perform labor therein, in violation of the fourth and fifth sections of the act.

The validity of this claim, and of the argument in support of it, calls for the construction of three short provisions of two statutes.

Section 2 of the act of 1907, as amended in 1910 (36 Stat. at Large, p. 263), furnishes this definition of "contract laborers," which must be read into sections 4 and 5 of the act of 1907:

"Persons * * * who have been induced or *126 solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled."

Section 4 makes it a misdemeanor for any corporation to "in any way assist or encourage the importation or migration of any contract laborer or contract laborers into the United States."

Section 5 imposes severe penalties for every violation of the act "by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States."

Thus a contract laborer is one who under the conditions described in the first of these statutes comes "to perform labor in this country," and the penalties denounced by the sections of the other act are against persons who knowingly assist or induce the importation or migration of such laborer "into the United States."

The purpose of this alien labor legislation was declared by this court almost thirty years ago, in Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, to be, to arrest the bringing of an ignorant, servile class of foreign laborers into the United States, under contract to work at a low rate of wages, and thus reduce other laborers engaged in like occupations to the level of the assisted immigrant.

Having these terms of the statutes and this history in mind, can it with reason be said that the men shipped on the Mackinaw as "seamen" were "laborers," and that when employed upon that vessel in foreign commerce they were performing labor "in this country" within the meaning of the acts?

In familiar speech a "seaman" may be called a "sailor" or a "mariner," but he is never called a "laborer," although he doubtless performs labor when assisting in the care and management of his ship; and a "seaman" is defined, in the United States statutes applicable to "Merchant Seamen," as being any *127 person (masters and apprentices excepted) who shall be employed to serve in any capacity on board a vessel. R. S. § 4612. In the shipping articles, which the United States law requires shall be signed by members of the crews of ships of American registry engaged in foreign commerce, the men are designated as "seamen" or "mariners." Thus, neither in popular nor in technical legal language would the men employed on the Mackinaw be called or classed as, "laborers," and such seamen are not brought "into this country" to enter into competition with the labor of its inhabitants, but they come to our shores only to sail away again in foreign commerce on the ship which brings them or on another, as soon as employment can be obtained.

Equally unallowable is the contention that a ship of American registry engaged in foreign commerce is a part of the territory of the United States in such a sense that men employed on it can be said to be laboring "in the United States" or "performing labor in this country." It is, of course, true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative (International Law Digest, Moore, vol. I, § 174), and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry is quite impossible. Thus the seamen employed on the Mackinaw were not within either the spirit or the letter of the law on which the petitioner bases his action and in any point of view his contention is fanciful and unsound and must be denied.

In the result thus reached we are adopting the construction given to another section of this act of Congress of 1907 in Taylor v. United States, 207 U. S. 120, 28 Sup. Ct. 53, 52 L. Ed. 130, and we are approving the construction placed upon the sections we are here considering of the act, and upon earlier acts

relating to the immigration of alien laborers, in the long-standing decisions of many lower courts and of the Department of Justice, in all of which it is held that seamen employed in foreign commerce cannot be considered alien contract laborers within the terms of the various statutes. United States v. Sandrey (C. C.) 48 Fed. 550; United States v. Burke (C. C.) 99 Fed. 895; Moffitt v. United States, 128 Fed. 375, 63 C. C. A. 117; United States v. Jamieson (C. C.) 185 Fed. 165; Immigration—Deserting Seamen, 23 Opinions of the Attorney General, 521; Chinese Seamen—Transfer of Crew—Alien Laborers, 24 Opinions of the Attorney General, 553. This construction of the act has also long been applied by the Department of Labor in its practical administration of the law. See Immigration Rules 1911, No. 10, subdivision 1, (a), (c), and (d); subdivision 3.

[2] The fact that the aliens in this case were Chinese subjects is without significance. The suit is to enforce the highly penal provisions of acts of Congress which apply to all alien contract laborers without regard to their origin or nationality.

It results that the judgment of the Court of Appeals must be

Affirmed.

(245 U. S. 33)

SMITH v. INTERSTATE COMMERCE COMMISSION.

(Argued Oct. 2 and 3, 1917. Decided Nov. 5, 1917.)

No. 337.

1. COMMERCE ⇐87—INTERSTATE COMMERCE COMMISSION — INVESTIGATIONS — SCOPE AND EXTENT OF POWERS.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 12, 24 Stat. 383, as amended (Comp. St. 1916, § 8576), authorizing the Interstate Commerce Commission to inquire into the management of the business of carriers and keep itself informed as to the manner and method in which such business is conducted and to obtain full and complete information from the carriers, section 13, as amended (section 8581), authorizing it to institute an inquiry on its own motion in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before it, or concerning which any question may arise under any of the provisions of that act or relating to the enforcement of any of its provisions, and section 20, as amended (section 8592), authorizing the Commission to require detailed accounts of all expenditures and revenues and a complete exhibit of the financial obligations of carriers, and to prescribe forms of accounts, records, and memoranda, the Commission is authorized to make an investigation as to whether amounts subscribed or expended by railroad companies in political activities and efforts to suppress competition have been charged to operating or legal expenses, and where this was the purpose of an inquiry, questions as to the amount so subscribed or expended were not objectionable.

2. COMMERCE ⇐87—INTERSTATE COMMERCE COMMISSION—INVESTIGATIONS—SCOPE AND EXTENT OF POWERS.

Interstate Commerce Act 1887, § 13, as amended (Comp. St. 1916, § 8581), does not require that some definite charge of evil or abuse and some definite remedy be put into words by some complainant, or by the Interstate Commerce Commission to authorize it to make an investigation as to whether expenditures by a railroad company in political activities and to suppress competition have been charged to operating or legal expenses.

3. COMMERCE ⇐87—INTERSTATE COMMERCE COMMISSION—INVESTIGATIONS—SCOPE AND EXTENT OF POWERS.

The United States Senate adopted a resolution, directing the Interstate Commerce Commission to investigate certain practices and financial relations of certain railroad companies, and as to the amount, if any, subscribed, expended, or contributed to prevent other railroads from entering their territory, for maintaining political or legislative agents, for contributing to political campaigns, or for creating sentiment in favor of any of their plans. The Commission instituted a proceeding pursuant thereto with which, over two years after the passage of the resolution, it consolidated a complaint by L., the author of such resolution, as to an alleged improper issue of free passes. *Held*, that the contention that the investigation by the Commission was strictly limited to the subject specified in the Senate resolution was without merit, as it ascribed too much dominance to the resolution, put out of view or unduly subordinated the invocation of the powers of the Commission by L. and the interval of two years between it and the resolution, and also the independent and inherent powers of the Commission.

4. COMMERCE ⇐87—INTERSTATE COMMERCE COMMISSION—INVESTIGATIONS—SCOPE AND EXTENT OF POWERS.

Conceding that an interstate carrier may attempt to mold or enlighten public opinion, its conduct and the expenditures of its funds in this connection are open to inquiry by the Interstate Commerce Commission.

Appeal from the Supreme Court of the District of Columbia.

* Petition by the Interstate Commerce Commission for an order requiring M. H. Smith to attend before it and answer certain questions. From an order requiring defendant to answer the questions, he appeals. Affirmed. 234

Petition of the Interstate Commerce Commission to require the attendance before it of appellant, president of the Louisville & Nashville Railroad Company, an interstate carrier, to answer certain questions theretofore asked him in a proceeding then pending before the Commission.

The petition described the Commission as an administrative tribunal and recited the powers conferred upon it by sections 1, 15, 12, 13, 20 and 21 of the Act of Congress to regulate commerce, approved February 4, 1887, as subsequently amended (Comp. St. 1916, §§ 8563, 8576, 8581, 8583, 8592, 8594). That by a resolution of the United States Senate of November 6, 1913, the Commission was directed to investigate, take proof and report to the Senate as soon as practicable upon certain practices and financial relations of the Louisville & Nashville Railroad, the Nashville, Chatanooga & St. Louis Railway and other carriers. The resolution was set out. Its twelfth paragraph is as follows:

"What amount, if any, the Louisville & Nashville Railroad, the Nashville, Chattanooga & St. Louis Railway, the Nashville & Decatur *35 Railroad, and the Lewisburg & Northern Railroad, all or any of them, have subscribed, expended or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads, for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads."

The other paragraphs concern the relation of the railroads to one another, the control, if any, exercised by the Louisville & Nashville over the others, by stock ownership, leases or arrangements, and whether but for these the roads would be competitive and if through such means rates were fixed and maintained. The resolution is set out in full in United States v. Louisville & Nashville Railroad Co., 236 U. S. 318, 324, 35 Sup. Ct. 363, 59 L. Ed. 598.

That thereafter the Commission instituted a proceeding in pursuance of such resolution and it was ordered that the proceeding be set for hearing at such times and places and that such persons be required to appear and testify or to produce books, documents and papers as the Commission might thereafter direct, and that the investigation be carried on in the meantime by such other means and methods as might be deemed appropriate. A copy of the order was served on the Louisville & Nashville and other railroads.

That subsequently, on March 20, 1916, the order of the Commission was amended by adding to the order the provision that after the hearings and investigations authorized the Commission might issue such order or orders in the matter as might be proper and necessary in the premises and that case No. 8488, Luke Lea v. Louisville & Nashville Railroad Co. et al., be consolidated for hearing with the proceeding upon one record at such times and places as the Commission might direct. Copies of the order and original order were served on the railroads.

That pursuant to such orders a meeting *36 was had April 27, 1916, and pursuant to adjournment resumed in the city of Washington May 4, 1916. At such hearings appellant appeared in response to a subpœna and certain questions were addressed to him.

He testified that there was no connection between the reckless dissipation of the funds of a railroad in political campaigns and the adjustment of reasonable rates, even if the contribution was of the sum of $500,000 or $20,000,000, as the adjustment of rates is governed by conditions entirely independent of the revenues of a railroad. In illustration he adduced the adjustment of rates of bankrupt roads operated by receivers of courts which he testified are handled in the same way and arrived at in the same manner as they are by solvent roads.

The following questions were then asked him by counsel for the Commission, omitting those not now relevant. We number them for convenience of reference:

1. "I will ask you, Mr. Smith, if you know of any funds of the Louisville & Nashville Railroad expended in Tennessee for political campaign purposes during the year 1915 and charged upon the books of that carrier to operating expenses."

2. "Can you tell us what funds of the Louisville & Nashville Railroad Company were expended in the state of Alabama during the years 1912 and 1913 for political campaign purposes and charged on the books of that carrier to operating expenses or to construction account?"

3. "Can you tell us of your own knowledge whether these expenditures of the funds of the Louisville & Nashville Railroad Company for political purposes were charged in the operating expense account or construction account of either the Louisville & Nashville Railroad Company or the Nashville, Chattanooga & St. Louis Railway? Can you tell us whether these expenditures were charged on the books of the Louisville & Nashville Railroad to legal expenses?" *37

4. "Among the vouchers in the files of the Louisville & Nashville Railroad, found by the examiners of the Interstate Commerce Commission, there appears one, No. 2282, February, 1910, in favor of the Columbia Trust Company for $20,715.06 for special fees paid under the direction of the president. The examiners were refused all information regarding this voucher. Can you tell us what it was about and what the voucher was for?"

5. "Can you tell us why the entry in reference to this $20,000 voucher was made in such a way as to give no information as to the purpose of this expenditure?"

6. "Among the vouchers found by the accountants for the Commission in the files of the Louisville & Nashville Railroad, appears one numbered 391, dated May 5, 1907, in favor of the National Bank of Commerce, for $15,000 issued for certain expenditures authorized by the president. All further information was refused the accountants. The books give no further information. Can you advise us or enlighten us as to the purposes of this $15,000 voucher?"

7. "Did the Louisville & Nashville Railroad Company, through you or by your direction, expend approximately $34,800 in Alabama through the Johnson-Dallas Agency in a campaign against rate reductions as advocated by former Governor Comer, of that state?"

8. "Have you personal knowledge of any funds of the Louisville & Nashville Railroad Company expended in Alabama through the Johnson-Dallas Agency in a campaign against rate reductions?"

9. "Is it the policy of the Louisville & Nashville Railroad Company to make political campaign contributions, if you know?"

All of the questions the witness declined to answer upon the advice of counsel.

The answer of appellant to the petition challenged in general and in detail the power *38 of the Commission and urged that the Commission is entirely a ministerial tribunal, having only the powers given it by act of Congress, and that those, with few exceptions, are confined to the enforcement of the act, and that the latter as amended "does not attempt to regulate the politics or the political activities of common carriers, nor the subject of their endeavoring to exclude competitors from their territories."

That the object of the questions asked by the Commission "was to delve into questions purely political" and to ascertain whether

the witness or the company believed that a railroad company had a right to engage in political campaigns and to make political contributions and whether it had been the policy of the company to make contributions of funds to such campaigns and whether the company had in the past engaged in such practices. It is asserted that all such matters are outside of the jurisdiction of the Commission.

That the proceeding is a consolidation of two proceedings, Nos. 6319 and 8488, that Luke Lea is the open and sole complainant in the latter and the instigator and real complainant in the other, which was instituted by the Commission without there being a nominal complainant, but pursuant to a resolution of the United States Senate introduced by Lea, then a member of the Senate and the complainant in No. 8488, which is confined to an alleged improper issue of free passes.

Certain activities of Lea are stated and certain resentments and motives of his are urged as having actuated him and a want of power upon the part of the Commission is repeated and the refusal to answer the questions hence asserted to be justified.

The Commission moved to strike out certain portions of the answer, which was denied.

The court required appellant to answer the questions, and from its order this appeal is prosecuted.

Messrs. Helm Bruce and Edward S. Jouett, both of Louisville, Ky., for appellant.

Mr. Joseph W. Folk, of Washington, D. C., for appellee.

*41 * Mr. Justice McKENNA, after stating the case as above, delivered the opinion of the Court.

The fundamental contention of appellant is that the Interstate Commerce Commission has no power to ask the questions in controversy and in emphasis of this he asserts "the inquiry was confined exclusively to supposed political activities and efforts to suppress competition." And these, it is further asserted, "are not matters which the Commission 'is legally entitled to investigate.'" The contention is attempted to be supported by the insistence that the investigation was provoked and prosecuted solely in obedience to the Senate resolution and neither in exercise of the judgment of the Commission nor in pursuance of a complaint *42 made to it. And the twelfth paragraph of *the resolution is dwelt upon as directing and controlling the inquiry as to what amount, if any, the railroads "have subscribed, expended or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads, for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads."

[1] If, however, we advert to the questions we observe that the matters dwelt on by appellant are incidents only, having the purpose, it may be, in one sense to ascertain the "amount, if any," subscribed or expended, but not having the purpose in the sense of the questions, which is: whether the amount subscribed or expended was charged to operating or legal expenses. The latter purpose is more special than the other, and, we may say in passing, does not necessarily involve even a criticism of the other, involves only the display in the accounts of the carriers of the amount expended and its allocation. To this limitation the investigation is reduced, and the question is, being so reduced, Is it within the powers of the Commission?

The Interstate Commerce Act confers upon the Commission powers of investigation in very broad language and this court has refused by construction to limit it so far as the business of the carriers is concerned and their relation to the public.[1] And it would seem to be a necessary deduction from the cases that the investigating and supervising powers of the Commission extend to all of the activities of carriers and to all sums expended by them which could affect in any *43 way their benefit or burden as agents *of* the public. If it be grasped thoroughly and kept in attention that they are public agents, we have at least the principle which should determine judgment in particular instances of regulation or investigation; and it is not far from true—it may be it is entirely true, as said by the Commission—that "there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce."

Turning to the specialties of the Interstate Commerce Act we find there that all charges and treatment of all passengers and property shall be just and reasonable, and there is a specific prohibition of preferences and discriminations in all the ways that they can be executed, with corresponding regulatory power in the Commission. And authority and means are given to enable it to perform its duty. By section 12 it is authorized to inquire into the management of the business of carriers and keep itself informed as to the manner and method in which the same is conducted, and has the right to obtain from the carriers full and complete information. It may (section 13) institute an inquiry of its own motion, and may (section 20) require

[1] Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755; Interstate Commerce Commission v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860; Interstate Commerce Commission v. Goodrich Transportation Co., 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729; United States v. White Star Line, 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729; Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652; Interstate Commerce Commission v. Chicago, R. I. & P. Ry. Co., 218 U. S. 88, 30 Sup. Ct. 651, 54 L. Ed. 946.

detailed accounts of all the expenditures and revenues of carriers and a complete exhibit of their financial operations and prescribe the forms of accounts, records and memoranda to be kept. And it is required to report to Congress all data collected by it.

It would seem to be an idle work to point out the complete comprehensiveness of the language of these sections and we are not disposed to spend any time to argue that it necessarily includes the power to inquire into expenditures and their proper assignment in the accounts, and the questions under review, we have seen, go no further. They are incidental to an investigation as to the "manner and method" (section 12) in which the business of the carriers is conducted; they are in requisition of a detailed account
*44 of their expenditures and revenues and an exhibit of their *financial operations (section 20), and the answers to them may be valuable as information to Congress (section 21).

[2] A limitation, however, is deduced from section 13. It is said to be confined to cases where an inquiry is instituted "as to any matter or thing concerning which a complaint is authorized to be made, or concerning which any question may arise under any provisions" of the act "or relating to the enforcement of any of the provisions" of the act. In other words, that the inquiry is determined by the manner of procedure. The objection overlooks the practical and vigilant function of the Commission. To sustain it appellant seems to urge that there must be put into words by some complainant or by the Commission, if it move of itself, some definite charge of evil or abuse, and put into expression some definite remedy, and that an inquiry must not transcend either charge or remedy. To so transcend, appellant urges, would be an exercise of autocratic power and is condemned in Harriman v. Interstate Commerce Commission, 211 U. S. 407, 29 Sup. Ct. 115, 53 L. Ed. 253.

Appellant presses that case beyond its principle. And we may observe that section 13 has been amended and broadened since the decision of that case.[2] The inquiry in the
*45 present case is more immediate to the function of the Commission than the inquiry in that and comes within Interstate Commerce Commission v. Chicago, R. I. & P. Ry., supra, where it was said, at page 103 of 218 U. S., at page 656 of 30 Sup. Ct. (54 L. Ed. 946):

"The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it therefore are complex and difficult, the means of solving them are as great and adequate as can be provided."

And they must necessarily be expressed in generalities. A precise specification of powers might work a limitation and all not enumerated be asserted to be withheld.

We find it difficult to treat counsel's argument as seriously as they urge it. The expenditures of the carriers essentially concern their business. Section 20 declares it and gives the Commission power to require a detail of them, and necessarily not only of their amount but purpose and how charged. And the Commission must have power to prevent evasion of its orders and detect in any formal compliance or in the assignment of expenses a "possible concealment of forbidden practices."

[3] It may be said that our comments are not applicable to questions numbered 7 and 8, which relate to the expenditure of money in Alabama "in a campaign against rate reduction." That is, those questions are not directed to "political activities" strictly so called, nor to the suppression of competition. They are directed, however, to the use of funds in a campaign against state legislative action. But this, appellant asserts, is at the farthest an attempt to "influence legislation or to mold public opinion" and that there is nothing in the Interstate Commerce Act "which forbids it or gives to the Commission any power to investigate the subject." And it is besides urged, as it is urged against the other questions, that they do not relate to *46
"the subject under *investigation," which is strictly defined by the Senate resolution, to which, it is contended, the order of the Commission was responsive and subservient, and was to be and is confined to the efforts simply "of the railroad companies in political matters and in attempts to suppress competition." Indeed, the servility of the Commission to the Senate's resolution is the basic and insistent contention of appellant and taints, he further contends, all that the Commission did.

The contention ascribes too much dominance to the resolution and puts out of view or unduly subordinates the invocation of the powers of the Commission by the complaint of Lea and the interval of two years between it and the resolution, and puts out of view besides the independent and inherent powers of the Commission to which we have adverted.

[4] Abstractly speaking, we are not disposed to say that a carrier may not attempt to mold or enlighten public opinion, but we are quite clear that its conduct and the expendi-

[2] Prior to the decision section 13 read as follows: "Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or Railroad Commission of any state or territory, at the request of such commissioner or Commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made."

After the decision the section was amended to read as follows: "* * * And the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this act, or concerning which any question may arise under any of the provisions of this act, or relating to the enforcement of any of the provisions of this act." Comp. St. 1916, § 8581.

tures of its funds are open to inquiry. If it may not rest inactive and suffer injustice, it may not on the other hand use its funds and its power in opposition to the policies of government. Beyond this generality it is not necessary to go. The questions in the case are not of broad extent. They are quite special, and we regard them, as the learned judge of the court below regarded them, as but incident to the amount of expenditures and to the manner of their charge upon the books of the companies. This, we repeat, is within the power of the Commission. The purpose of an investigation is the penetration of disguises or to form a definite estimate of any conduct of the carriers that may in any way affect their relation to the public. We cannot assume that an investigation will be instituted or conducted for any other purpose or in mere wanton meddling.

Order affirmed.

(245 U. S. 47)

SMITH v. INTERSTATE COMMERCE COMMISSION.

(Argued Oct. 2 and 3, 1917. Decided Nov. 5, 1917.)

No. 339.

Appeal from the Supreme Court of the District of Columbia.

Proceeding by the Interstate Commerce Commission to compel Addision R. Smith to answer certain questions. From an order requiring the defendant to answer such questions, he appeals. Affirmed.

Messrs. Helm Bruce and Edward S. Jouett, both of Louisville, Ky., for appellant.

Mr. Joseph W. Folk, of Washington, D. C., for appellee.

Mr. Justice McKENNA delivered the opinion of the court.

This case was heard with Smith v. Interstate Commerce Com'n, 245 U. S. 33, 38 Sup. Ct. 30, 62 L. Ed. — (No. 337), just decided. Like the latter case it was based on a proceeding brought by the Interstate Commerce Commission in the Supreme Court of the District of Columbia to enforce answers to certain questions asked of appellant by the Commission and which he refused to answer upon the advice of counsel.

The petition and reply thereto are the same as in No. 337 and present for decision the same propositions.

The court entered an order requiring appellant to answer questions to the following effect:

First, whether he had personal knowledge of
*48 funds of the Louisville & Nashville Railroad used for political *campaign purposes in the state of Tennessee and charged on the books of the carrier to operating expenses or construction account; and, second, whether he had personal knowledge of funds of the Louisville & Nashville Railroad used for campaign purposes in the state of Kentucky and charged on the books of the carrier to construction account or operating expenses.

It will be observed that the questions are limited, as some of the questions in No. 337 were, to the allocation upon the books of the company, of the funds expended, if any. They are within the reasoning of the opinion in No. 337 and on the authority of that case the order is

Affirmed.

(245 U. S. 48)

JONES v. INTERSTATE COMMERCE COMMISSION.

(Argued Oct. 2 and 3, 1917. Decided Nov. 5, 1917.)

No. 340.

Appeal from the Supreme Court of the District of Columbia.

Proceeding by the Interstate Commerce Commission to compel George W. Jones to answer certain questions. From an order requiring him to answer such questions, defendant appeals. Affirmed.

Messrs. Helm Bruce and Edward S. Jouett, both of Louisville, Ky., for appellant.

Mr. Joseph W. Folk, of Washington, D. C., for appellee.

Mr. Justice McKENNA delivered the opinion of the court.

This case was submitted with Smith v. Interstate Commerce Com'n, 245 U. S. 33, 38 Sup. Ct. 30, 62 L. Ed. —, and Id., 245 U. S. 47, 38 Sup. Ct. 34, 62 L. Ed. — (Nos. 337 and 339). Like them it is a proceeding to compel appellant to *answer certain questions asked him* 49
by the Interstate Commerce Commission. It was based on a petition like the petitions in those cases to which there was a like reply.

The court entered an order requiring appellant to answer the following questions asked by counsel for the Commission:

"I will ask you if you distributed in the state of Alabama on behalf of the Louisville & Nashville Railroad, campaign funds favoring the election of a certain candidate?

"I show you Ledger H, folio 454, from the records of the Louisville & Nashville Railroad, showing certain vouchers sent you in Alabama for various amounts, and will ask you how you expended the money represented by these vouchers, taking the first voucher as a beginning.

"I will ask you whether or not you have personal knowledge of funds of the Louisville & Nashville Railroad and of the Nashville, Chattanooga & St. Louis Railway used to the extent of thousands of dollars for political campaign purposes in the state of Alabama.

"I will ask you do you know of any campaign funds being expended by the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway in the state of Alabama through any attorney under a subterfuge of paying the attorney a bill for professional services?

"Do you know of any funds of the Louisville & Nashville Railroad expended in the state of Alabama for political purposes and charged on the books of the carrier to operating expense?

"I will ask you if you know of any funds of the Louisville & Nashville Railroad or the Nashville, Chattanooga & St. Louis Railway expended in the state of Alabama for political purposes and charged on the books of these carriers or on the books of either carrier to construction. *50

* "I will ask you if you have any knowledge of funds of the Louisville & Nashville Railroad or the Nashville, Chattanooga & St. Louis Railway used for political campaign purposes in the state of Tennessee.

"Do you know of any funds of the Louisville & Nashville Railroad expended in the state of Tennessee for political campaign purposes and charged on the books of that carrier to operating expense or construction account?"

The questions are similar to those passed on in the other two cases, and the order is

Affirmed.

(245 U. S. 20)

CONTRIBUTORS TO PENNSYLVANIA HOSPITAL v. CITY OF PHILADELPHIA et al.

(Argued Oct. 16, 1917. Decided Nov. 5, 1917.)

No. 349.

1. CONSTITUTIONAL LAW ⊂⊃118 — EMINENT DOMAIN ⊂⊃3 — IMPAIRING OBLIGATION OF CONTRACTS.

Though the statute (Act Pa. April 17, 1854 [P. L. 385]) forbidding the opening of any street or alley through the grounds of a hospital without the consent of the hospital authorities was conditioned upon the hospital making certain payments and furnishing ground for designated streets, and though these terms were accepted by the hospital and complied with, the acquirement of land for the opening of a street through such grounds was not prohibited by the contract clause of the federal Constitution, since states cannot by virtue of that clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern such authority that to restrain its exercise by contract would be a renunciation of the power to legislate for the preservation of society or to secure the performance of essential governmental duties, and the right to exercise the power of eminent domain upon just compensation for a public purpose is so governmental in character as to come within this doctrine.

2. COURTS ⊂⊃394(9) — FEDERAL SUPREME COURT — REVIEW OF DECISIONS OF STATE COURTS — IMPAIRING OBLIGATIONS OF CONTRACTS.

The contention that the opening of a street through such grounds was in violation of the contract clause of the federal Constitution was so absolutely devoid of merit as to justify the dismissal of a writ of error to a state court for want of jurisdiction.

In Error to the Supreme Court of the State of Pennsylvania.

Suit by the Contributors to the Pennsylvania Hospital against the City of Philadelphia and others. Judgment for defendants was affirmed by the Supreme Court of Pennsylvania (254 Pa. 392, 98 Atl. 1077), and the plaintiff brings certiorari. Affirmed.

Mr. Owen J. Roberts, of Philadelphia, Pa., for plaintiff in error.

Mr. John P. Connelly and Mr. Ernest Lowengrund, both of Philadelphia, Pa., for defendants in error.

*21 *Mr. Chief Justice WHITE delivered the opinion of the Court.

Whether contract obligations were impaired in violation of rights of the plaintiff in error protected by the Constitution of the United States as the result of the decision below, is the sole question we are called upon to decide on this record. It thus arises:

The plaintiff in error, a charitable institution was organized under the laws of Pennsylvania and in 1841 it established on a tract of land in the city of Philadelphia a hospital for the care and cure of the insane. Solicitous lest the opening of streets, lanes and alleys through its grounds might injuriously affect the performance of its work, in 1854 a committee of the managers of the hospital memorialized the Legislature on that subject and this resulted in the passage of a law specially forbidding the opening of any street or alley through the grounds in question without the consent of the hospital authorities. The act was conditioned upon the hospital making certain payments and furnishing ground for a designated public street or streets and these terms were accepted by the hospital and complied with. In 1913 the city, within the authority conferred upon it by the state, took the necessary preliminary steps to acquire by eminent domain land for the opening of a *22 street through the hospital *grounds and to* prevent the accomplishment of this result the present suit was begun by the hospital to protect its right of property and its alleged contract under the act of 1854 (P. L. 385). As the result of proceedings in the state court the purpose of the city was so shaped as to cause it to seek to take under the right of eminent domain, not only the land desired for the street, but the rights under the contract of 1854 and there was a judgment against the hospital and in favor of the city in the trial court which was affirmed by the Supreme Court by the judgment which is under review on this writ of error. 254 Pa. 392, 98 Atl. 1077.

The conclusions of the court were sustained in a per curiam opinion pointing out that there was no question involved of impairing the contract contained in the act of 1854 since the express purpose of the city was to exert the power of eminent domain not only as to the land proposed to be taken, but as to the contract itself. The right to do both was upheld on the ground that the power of eminent domain was so inherently governmental in character and so essential for the public welfare that it was not susceptible of being abridged by agreement and therefore the action of the city in exerting that power was not repugnant either to the state Constitution or to the contract clause of the Constitution of the United States.

[1] It is apparent that the fundamental question, therefore, is, did the Constitution of the United States prevent the exertion of the right of eminent domain to provide for the street in question because of the binding effect of the contract previously made excluding the right to open the street through the land without the consent of the hospital. We say this is the question, since if the possibility were to be conceded that power existed to restrain by contract the further exercise by government of its right to exert eminent domain, it would be unthinkable that the existence of such right of contract could be *rendered unavailing by directing* proceedings in eminent domain against the contract, for this would be a mere evasion of the assumed power. On the other hand, if there can be no right to restrain by contract

the power of eminent domain, it must also of necessity follow that any contract by which it was sought to accomplish that result would be inefficacious for want of power. And these considerations bring us to weigh and decide the real and ultimate question; that is, the right to take the property by eminent domain, which embraces within itself, as the part is contained in the whole, any supposed right of contract limiting or restraining that authority. We are of opinion that the conclusions of the court below in so far as they dealt with the contract clause of the Constitution of the United States were clearly not repugnant to such clause. There can be now, in view of the many decisions of this court on the subject, no room for challenging the general proposition that the states cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties. Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079; Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; Douglas v. Kentucky, 168 U. S. 488, 18 Sup. Ct. 199, 42 L. Ed. 553; Manigault v. Springs, 199 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274; Texas & New Orleans R. R. Co. v. Miller, 221 U. S. 408, 31 Sup. Ct. 534, 55 L. Ed. 789. And it is unnecessary to analyze the decided cases for the purpose of fixing the criteria by which it is to be determined in a given case whether a power exerted is so governmental in character as not to be subject to be restrained by the contract clause, since it is equally true that the previous decisions of this court leave no doubt that the right of government to exercise its power of eminent domain upon just compensation for a public purpose comes within this general doctrine. Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. Ed. 773; West River Bridge Co. v. Dix, 6 How. 507, 12 L. Ed. 535; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165; Offield v. Railroad Company, 203 U. S. 372, 27 Sup. Ct. 72, 51 L. Ed. 231; Cincinnati v. Louisville & Nashville R. R. Co., 223 U. S. 390, 32 Sup. Ct. 267, 56 L. Ed. 481.

*24

[2] The principle then upon which the contention under the Constitution rests having been, at the time the case was decided below, conclusively settled to be absolutely devoid of merit, it follows that a dismissal for want of jurisdiction might be directed. Equitable Life Assurance Society v. Brown, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co., 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; Manhattan Life Insurance Co. v. Cohen, 234 U. S. 123, 137, 34 Sup. Ct. 874, 58 L. Ed. 1245. In view, however, of the course of the proceedings below and the aspect which the case took as resulting from those proceedings, without departing from the rule settled by the cases referred to, we think our decree may well be one, not of dismissal, but of affirmance.

Affirmed.

(245 U. S. 50)

COHEN v. SAMUELS.

(Argued Oct. 17, 1917. Decided Nov. 5, 1917.)

No. 359.

BANKRUPTCY ⟸143(12)—PROPERTY VESTING IN TRUSTEE—INSURANCE POLICIES.

Bankruptcy Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (Comp. St. 1916, § 9654), provides that the trustee is vested by operation of law with title to all property not exempt, all powers which the bankrupt might have exercised for his own benefit, and property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him, provided that, when any bankrupt shall have any insurance policy having a cash surrender value payable to himself, his estate, or his personal representative, he may pay or secure to the trustee the cash surrender value as ascertained and stated, and continue to hold, own, and carry such policy free from the claims of creditors, and that otherwise the policy shall pass to the trustee as assets. *Held*, that insurance policies having cash surrender values pass to the trustee, though naming persons other than the bankrupt as beneficiaries, where the bankrupt was given the absolute right to change the beneficiary without the consent of the beneficiary.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Voluntary bankruptcy proceeding by Elias W. Samuels. An order of the District Court, refusing the petition of Samuel C. Cohen, trustee, that the bankrupt be compelled to pay him the cash values of certain life insurance policies or surrender the policies, was affirmed by the Circuit Court of Appeals for the Second Circuit (237 Fed. 796, 151 C. C. A. 38), and the trustee brings certiorari. Reversed and remanded.

Mr. Lawrence B. Cohen, of New York City, for petitioner.

Mr. Samuel Sturtz, of New York City, for respondent.

*51

*Mr. Justice McKENNA delivered the opinion of the Court.

On May 13, 1915, Elias W. Samuels filed a voluntary petition in bankruptcy and was adjudicated a bankrupt. On the same day Cohen, petitioner herein, was duly elected his trustee. Samuels at the time of the adjudication held five life insurance policies in various life insurance companies.

On September 16, 1915, Cohen made motions before the referee in bankruptcy to require Samuels to deliver to him, Cohen, the policies or pay to him the cash surrender value of them as of the date of the adjudication. The motions were denied.

Subsequently Cohen filed petitions to review the rulings of the referee as to three of the policies, which petitions came on for hearing before the United States District Court for the Southern District of New York February 14, 1916.

The policies were respectively for the sums of $3,000, $3,000, and $1,000, and had respectively a cash surrender value of $193.85, $753, subject to a deduction of a loan of $555 and interest, and $396, The policies were payable to certain relatives of Samuels as beneficiaries and it was provided in each that Samuels reserved the absolute right to change the beneficiary without the latter's consent.

The District Court affirmed the orders of the referee, following what the court conceived to be the ruling in In re Hammel & Co., 221 Fed. 56, 137 C. C. A. 80.

Cohen petitioned the Circuit Court of Appeals to revise the ruling of the District Court as provided in section 24b of the Bankruptcy Act (Comp. St. 1916, § 9608) and for such other and further relief as might be proper.

The Circuit Court of Appeals affirmed the ruling of the District Court, one judge dissenting. 237 Fed. 796, 151 C. C. A. 38.

The facts are not in dispute. The policies
*52 had a cash surrender value at the time Samuels was adjudicated a bankrupt which the companies were willing to pay to him and in all of them he had the absolute right to change the beneficiaries.

The question in the case is the simple one of the construction of section 70a (section 9654). By it the trustee of the bankrupt is vested by operation of law with title to all property of the bankrupt which is not exempt; "(3) all powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; * * * (5) property which prior to the filing of his petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets. * * *"

Regarding the section in its entirety there would seem to be no difficulty in its interpretation, but we are admonished by the decision of the Circuit Court of Appeals and its reasoning and also by the argument of counsel that there are considerations which give particular control to the proviso and distinguish between insurance policies and other property which the bankrupt can transfer or which can be levied upon and sold under judicial process against him (subdivision 5). We have given attention to those considerations and feel their strength, but they are opposed by other considerations. It might indeed be that it would better fulfill the protection of insurance by considering the proviso alone and literally, regarding the policy* 53
at the moment of adjudication, and, if it be not payable then in words to the bankrupt—no matter what rights or powers are reserved by him, no matter what its pecuniary facility and value is to him—to consider that he has no property in it. But we think such construction is untenable. The declaration of subdivision 3 is that "powers which he might have exercised for his own benefit" "shall in turn be vested in the trustee," and there is vested in him as well all property that the bankrupt could transfer or which by judicial process could be subjected to his debts, and especially as to insurance policies which have a cash surrender value payable to himself, his estate or personal representative. It is true the policies in question here are not so payable, but they can be or could have been so payable at his own will and by simple declaration. Under such conditions to hold that there was nothing of property to vest in a trustee would be to make an insurance policy a shelter for valuable assets and, it might be, a refuge for fraud. And our conclusions would be the same if we regarded the proviso alone.

This court has been careful to define the interest of bankrupts in the insurance policies they may possess. In Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, we gave a bankrupt the benefit of the redemption of a policy from the claims of creditors, though a cash surrender value was not provided by it but was recognized by the insurance company. In Burlingham v. Crouse, 228 U. S. 459, 472, 33 Sup. Ct. 564, 568 (57 L. Ed. 920, 46 L. R. A. [N. S.] 148), we said that it "was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset; otherwise to leave to the insured the benefit of his life insurance." See also Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154. Judgment of the Circuit Court of Appeals affirming the order of the District Court is reversed and the case remanded to the District Court for further proceedings in accordance with this opinion.

(245 U. S. 116)

KELLEY v. GILL.

(Submitted Oct. 2, 1917. Decided Nov. 5, 1917.)

No. 411.

1. BANKRUPTCY ⊂=293(1)—ACTIONS BY TRUSTEE — JURISDICTION OF COURT OF BANKRUPTCY.

Bankruptcy Act July 1, 1898, c. 541, § 2, cl. 7, 30 Stat. 545 (Comp. St. 1916, § 9586), gives courts of bankruptcy jurisdiction to cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto, except as therein otherwise provided. Section 23b (Comp. St. 1916, § 9607), with certain exceptions, forbids the trustee from prosecuting a suit without the consent of the proposed defendant in a court other than that in which the bankrupt might have brought it. Section 47a (2), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1916, § 9631), authorizes trustees to reduce the property of the estate to money under the direction of the court and close up the estate as expeditiously as is compatible with the best interests of the parties, and vests trustees as to all property in the custody or coming into the custody of the bankruptcy court with all the rights and remedies of a creditor holding a lien by legal or equitable proceedings, and as to all other property with the rights and remedies of a judgment creditor holding execution duly returned unsatisfied. *Held* that, where the liability of stockholders of a bankrupt corporation on their unpaid stock subscriptions was unconditional, and an order of the bankruptcy court for payment of the subscriptions was not a condition precedent to liability, the trustee could not bring a suit in the bankruptcy court against the stockholders on the theory that the cause of action was not one which the corporation could have brought, but one arising under the amendment of 1910 to section 47, as the elements essential to jurisdiction in equity to avoid multiplicity of actions at law were lacking, and the appropriate remedy was a separate action at law against each stockholder, and moreover, if there had been equity jurisdiction the cause of action would still have been the same cause of action on which the bankrupt could have sued, though he could not have brought the particular suit.

2. BANKRUPTCY ⊂=287(3)—ACTIONS BY TRUSTEE—JURISDICTION OF EQUITY.

Where the liability of stockholders of a bankrupt corporation on their corporate stock subscriptions was unconditional, an order of the bankruptcy court directing the trustee to institute a suit in equity to enforce collection thereof was insufficient to confer equity jurisdiction.

3. BANKRUPTCY ⊂=293(1)—ACTIONS BY TRUSTEE — JURISDICTION OF COURT OF BANKRUPTCY.

Where the liability of stockholders of a bankrupt corporation on their unpaid stock subscriptions was unconditional, and an order of the court of bankruptcy for payment thereof was not a condition precedent to the existence of liability, the jurisdiction of the court of bankruptcy over a suit by the trustee to collect such subscriptions could not be maintained on the ground that it was a suit brought to determine a controversy concerning property in the trustee's possession.

4. BANKRUPTCY ⊂=293(1)—ACTIONS BY TRUSTEE — JURISDICTION OF COURT OF BANKRUPTCY.

That an alleged debtor of a bankrupt corporation is a stockholder or even an officer does not enable the trustee to sue him in the court of bankruptcy.

Appeal from the District Court of the United States for the Southern District of California.

Suit by S. F. Kelley, trustee of the Gibraltar Investment & Home Building Company, bankrupt, against Thomas Gill. From a decree dismissing the bill (Kelley v. Aarons [D. C.] 238 Fed. 996), complainant appeals. Affirmed.

Mr. William B. Ogden, of Los Angeles, Cal., for appellant.

Mr. William Ona Morton, of Los Angeles, Cal., for appellee.

*118 *Mr. Justice BRANDEIS, delivered the opinion of the Court.

The Gibraltar Investment & Home Building Company, a California corporation with a capital stock of $2.000,000 divided into 20,000.000 shares of ten cents each, was adjudicated a bankrupt in the Southern district of that state. Its debts were about $150.000. Its assets consisted of amounts aggregating $480.921.25 unpaid and overdue on subscriptions to its stock. The subscription of each stockholder was contained in a separate contract which provided for payment unconditionally at specified dates. The court of bankruptcy found that a large majority of the subscribers were nonresidents of the district or were insolvent, and that the full amount due from resident solvent stockholders would be required to pay the claims of creditors and cost of administration. It ordered payment of all unpaid subscriptions and directed the trustee in bankruptcy "to institute a suit in equity" to enforce collection thereof. Such a suit was brought in that court against Gill and about 3.000 other residents of the district. A motion to dismiss for want of jurisdiction was sustained; and a decree was entered dismissing the bill. Kelley v. Aarons (D. C.) 238 Fed. 996. The case comes here on appeal under section 238 of the Judicial Code (Comp. St. 1916, § 1215).

The question presented is of importance in the administration of bankrupt corporations. To enable the trustee, by means of a single suit in the court of bankruptcy, to determine and enforce payment of all amounts due from stockholders would obviously promote the effective administration of the bankrupt estate; but the aggregate burden thereby cast upon the individual stockholders might be correspondingly heavy. Whether the right to choose the court and the place in which litigation shall proceed, should be conferred upon the trustee or upon the defendant, is a *119 legislative question with which Congress has dealt in the Bankruptcy Act (1898, c. 541, 30 Stat. 544). Section 2, clause 7, confers upon the court of bankruptcy jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." But section

23b prohibits the trustee (with exceptions not here applicable) from prosecuting, without the consent of the proposed defendant, a suit in a court other than that in which the bankrupt might have brought it, had bankruptcy not intervened.[1] The corporation is a citizen of California. It could not have sued these stockholders except in the state courts. The court of bankruptcy was, therefore, without jurisdiction of this suit unless there is something either in the nature of the cause of action or in the relation of stockholders to a corporation or in the character of the suit which prevents the application of the prohibition contained in section 23b.

The trustee seeks to sustain the jurisdiction on the ground:

First: That the suit—a bill in equity against all resident stockholders—is not one which the corporation could have brought "if proceedings in bankruptcy had not been instituted"; and that a right to bring it arises in the trustee under the amendment of 1910 to section 47, clause a (2).[2]

*120 * Second: That the suit is a proceeding concerning property in the actual or constructive possession of the trustee or the bankrupt.[3]

[1, 2] The cause of action sued on is the failure of the several stockholders to perform their several unconditional promises to pay definite amounts at fixed times which have elapsed. The amount payable by one is in no way dependent upon what is due from another. The corporation had a separate right against each alleged stockholder; and the remedy open to it was a separate action at law against each. The trustee rightly assumes that the corporation could not have brought a single suit in equity against all these stockholders, although a very large number of actions at law would be required to make collection of the balances unpaid on the stock. There was no common issue between these alleged stockholders and the corporation; and the liability of each would have presented a separate controversy unconnected with that of any other. Thus elements essential to jurisdiction in equity to avoid multiplicity of actions at law by the corporations were lacking. St. Louis, Iron Mountain & Southern Railway Co. v. McKnight, 244 U. S. 368, 375, 37 Sup. Ct. 611, 61 L. Ed. 1200.[4] That *lack is not supplied by *121 the assignment to the trustee. No other property has become involved. No new issues have been raised. The order of the court of bankruptcy that subscriptions be paid up was not a condition precedent to the existence of the causes of action against the several stockholders; and it added nothing to the rights which had already passed to the trustee. For him, also, the appropriate remedy was a separate action at law against each stockholder. The amendment of 1910 to section 47 of the Bankruptcy Act did not confer new means of collecting ordinary claims due the bankrupt; and the order directing the trustee "to institute a suit in equity" was impotent to confer equity jurisdiction.

But even if there had been equity jurisdiction, the suit could not have been brought in the federal court. The cause of action sued on would still have been the broken promise of the individual stockholder to pay the balance on his stock. That was a cause of action on which the bankrupt could have sued and sued only in the state court. The cause of action would remain the same, although equity, to avoid multiplicity of actions at law, undertook to deal with three thousand separate claims in a single suit. The mere fact that the bankrupt could not have brought the particular suit would not confer on the court of bankruptcy jurisdiction of the suit of the trustee. Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175.

[3, 4] Nor can the jurisdiction of the court of bankruptcy be maintained on the ground that this is a suit brought to determine a controversy concerning property in the possession of the trustee. He had possession merely of contested claims against alleged stockholders. Many *of the defendants may *122 prove not to be stockholders. And even those confessedly stockholders are, in respect to

[1] The Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) as amended conferred expressly upon the federal courts jurisdiction of actions by the assignees for the collection of debts owing the bankrupt or other assets. Bardes v. Hawarden Bank, 178 U. S. 524, 531, 20 Sup. Ct. 1000, 44 L. Ed. 1175. And independently of any statute, a receiver of an insolvent corporation, appointed by a federal court on a judgment creditor's bill under its general equity jurisdiction, had been held in 1895 entitled to sue a debtor of the corporation in that court on the ground that the proceeding was ancillary. White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. E. 67.

[2] 1910, c. 412, § 8 (36 Stat. 840).

"Section 8. That section forty-seven, clause two, of subdivision a, of said acts as so amended be, and the same hereby is, amended so as to read as follows:

"Collect and reduce to money the property of the estate for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

[3] See Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Whitney v. Wenman, 198 U. S. 539, 552, 25 Sup. Ct. 778, 49 L. Ed. 1157.

[4] In White v Ewing, 159 U. S. 36, 38, 15 Sup. Ct. 1018, 1019 (40 L. Ed. 67), where this court was requested, on certificate from the Circuit Court of Appeals, to answer a question arising in an ancillary suit similar in character, brought by a receiver, the opinion of the court called attention to the fact that "no exception was taken to the form of the bill by demurrer or otherwise, but the defendants answered, denying their liability"; and the fact had been also noted by the Circuit Court of Appeals (66 Fed. 2, 13 C. C. A. 276).

the matters in controversy, as much strangers to the corporation and to the estate as any other person against whom the corporation had a cause of action. The fact that an alleged debtor of a corporation is a stockholder, or even an officer, does not enable the trustee to sue him in the court of bankruptcy. Park v. Cameron, 237 U. S. 616, 35 Sup. Ct. 719, 59 L. Ed. 1147.

We have no occasion to consider whether a different rule applies in those cases where an order of the court of bankruptcy is a condition precedent to the existence of any liability, either because stockholders are liable only after a call, or because the liability of stockholders is pro rata and limited to such sums as may, in the aggregate, be necessary to satisfy the claims of creditors.

Decree affirmed.

(245 U. S. 54)

FIDELITY & COLUMBIA TRUST CO. v. CITY OF LOUISVILLE, KY.

(Argued Oct. 16 and 17, 1917. Decided Nov. 5, 1917.)

No. 424.

1. TAXATION ⟸98 — SITUS OF PROPERTY — BANK DEPOSIT IN ANOTHER STATE.
Deposits in a bank in Missouri, owned by a resident of Kentucky, were taxable at the owner's domicile, even conceding that they were also taxable in Missouri, and whether the tax imposed at the owner's domicile was one on the property, or one on the owner measured by the property.

2. COURTS ⟸394(18) — FEDERAL SUPREME COURT — REVIEW OF DECISIONS OF STATE COURTS.
On writ of error to a state court, the federal Supreme Court has nothing to do with the consistency or inconsistency of the decisions of the state courts respecting the liability to taxation of deposits in a bank in another state.

The Chief Justice dissenting.

In Error to the Court of Appeals of the State of Kentucky.

Suit by the City of Louisville, Ky., against the Fidelity & Columbia Trust Company, as executor and trustee of the estate of L. P. Ewald, deceased. Judgment for plaintiff was affirmed by the Court of Appeals of Kentucky (168 Ky. 71, 181 S. W. 1095; 171 Ky. 509, 188 S. W. 652; 172 Ky. 451, 189 S. W. 438), and defendant brings error. Affirmed.

Mr. William W. Crawford, of Louisville, Ky., for plaintiff in error.

Messrs. Pendleton Beckley, George Cary Tabb, and Stuart Chevalier, all of Louisville, Ky., for defendant in error.

*57 *Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit brought by the City of Louisville, Kentucky, to recover annual taxes for the years 1907 and 1908 in respect of personal property omitted from the original assessments to the owner L. P. Ewald in his lifetime. The facts as simplified for the purposes of argument here are that Ewald was domiciled in Louisville but continued to carry on a business in St. Louis, Missouri, where he formerly had lived. Deposits coming in part if not wholly from this business were made and kept in St. Louis banks subject to Ewald's order alone. They were not used in the business and belonged absolutely to him. The question is whether they could be taken into account in determining the amount of his Louisville tax. It would seem that some deposits were represented by certificates of deposit but it was stated at the argument that no point was made of that. See Wheeler v. Sohmer, 233 U. S. 434, 438, 34 Sup. Ct. 607, 58 L. Ed. 1030. We are to take it that all the sums are to be dealt with as ordinary bank accounts. The decision of the State Court upheld the tax. 168 Ky. 71, 181 S. W. 1095; 171 Ky. 509, 188 S. W. 652; 172 Ky. 451, 189 S. W. 438.

*58 *[1] So far as the present decision is concerned we may concede without going into argument that the Missouri deposits could have been taxed in that State, under the decisions of this Court. Liverpool & London & Globe Ins. Co. v. Orleans Assessors, 221 U. S. 346, 354, 31 Sup. Ct. 550, 55 L. Ed. 762, L. R. A. 1915C, 903. Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395, 27 Sup. Ct. 499, 51 L. Ed. 853. But liability to taxation in one State does not necessarily exclude liability in another. Kidd v. Alabama, 188 U. S. 730, 732, 23 Sup. Ct. 401, 47 L. Ed. 669. Hawley v. Malden, 232 U. S. 1, 13, 34 Sup. Ct. 201, 58 L. Ed. 477, Ann. Cas. 1916C, 842. The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State so chooses, may be measured more or less by reference to the riches of the person taxed. Unless it is declared unlawful by authority we see nothing to hinder the State from taking a man's credits into account. But so far from being declared unlawful, it has been decided by this Court that whether a State shall measure the contribution by the value of such credits and choses in action, not exempted by superior authority, is the State's affair, not to be interfered with by the United States, and therefore that a State may tax a man for a debt due from a resident of another State. Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. Ed. 558. See also Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. Ed. 189.

It is true that the decision in Kirtland v. Hotchkiss, concerned Illinois bonds, and that if they were physically present in the taxing State, Connecticut, a special principle might apply, as explained in Wheeler v. Sohmer, 233 U. S. 434, 438, 34 Sup. Ct. 607, 58 L. Ed. 1030. See Commissioner of Stamps v. Hope, [1891] A. C. 476, 486; Dicey, Confl. of Laws, (2d

Ed.) 312. But the decision was not made to turn upon such considerations; indeed its reasoning hardly is reconcilable with them or with anything short of a general rule for all debts. It is argued that in a later case this Court has held the power of taxation *59 not to extend to chattels*permanently situated outside the jurisdiction although the owner was within it; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493; and that the power ought equally to be denied as to debts depending for their validity and enforcement upon a jurisdiction other than that levying the tax. But this Court has not attempted to press the principle so far and there is opposed to it the long established practise of considering the debts due to a man in determining his wealth at his domicile for the purposes of this sort of tax.

The notion that a man's personal property upon his death may be regarded as a universitas and taxed as such, even if qualified, still is recognized both here and in England. Bullen v. Wisconsin, 240 U. S. 625, 631, 36 Sup. Ct. 473, 60 L. Ed. 830. Eidman v. Martinez, 184 U. S. 578, 586, 22 Sup. Ct. 515, 46 L. Ed. 697. Attorney General v. Napier, 6 Exch. 217. It has been carried over in more or less attenuated form to living persons, and the general principle laid down in Kirtland v. Hotchkiss, supra, has been affirmed or assumed to be law in every subsequent case. Bonaparte v. Appeal Tax Court, 104 U. S. 592, 26 L. Ed. 845. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 29, 31, 11 Sup. Ct. 876, 35 L. Ed. 613. Savings & Loan Society v. Multnomah County, 169 U. S. 421, 431, 18 Sup. Ct. 392, 42 L. Ed. 803. New Orleans v. Stempel, 175 U. S. 309, 321, 20 Sup. Ct. 110, 44 L. Ed. 174. Liverpool & London & Globe Ins. Co. v. Board of Assessors for the Parish of Orleans, 221 U. S. 346, 355, 356, 31 Sup. Ct. 550, 55 L. Ed. 762, L. R. A. 1915C, 903. It was admitted to apply to debts in Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 205, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493. It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. Flint v. Stone-Tracy Co., 220 U. S. 107, 146, 162, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, et seq. Whichever this tax technically may be, the authorities show that it must be sustained.

[2] It is said that the plaintiff in error has been denied the equal protection of the laws because, if the argument is correct, which we have not considered, the decision *60 in this case is inconsistent with earlier decisions of the *Kentucky Court. But with the consistency or inconsistency of the Kentucky cases we have nothing to do. Lombard v. West Chicago Park Commission, 181 U. S. 33, 44, 45, 21 Sup. Ct. 507, 45 L. Ed. 731. We presume that like other appellate courts the Kentucky Court of Appeals is free to depart from precedents if on further reflection it thinks them wrong.

Judgment affirmed.

The CHIEF JUSTICE dissents.

(245 U. S. 128)

BIDDINGER v. COMMISSIONER OF POLICE OF CITY OF NEW YORK.

(Argued Oct. 10 and 11, 1917. Decided Nov. 5, 1917.)

No. 426.

1. EXTRADITION ⟸36 — ARREST AND DELIVERY TO DEMANDING STATE.

Under Rev. St. § 5278 (Comp. St. 1916, § 10126), providing that, when the executive authority of any state demands any person as a fugitive from justice of the executive authority of the state to which such person has fled, and produces a copy of an indictment charging him with treason, felony, or other crime, certified as authentic by the governor or chief magistrate, it shall be the duty of the executive authority of the state to which he has fled to cause him to be arrested and delivered to the agent of the demanding state, where a person admitted he was in Illinois at the time it was charged that he committed crimes for which he was indicted, that the indictments against him were in the form and certified as required by law, and that he was found in the state of New York, this satisfied the requirement of the statute, and it was the duty of the Governor of New York to cause him to be arrested and delivered to the Illinois authorities.

2. HABEAS CORPUS ⟸92(2)—EVIDENCE—EXTRADITION CASES.

Under Cr. Code Ill. § 315 (Hurd's Rev. St. 1915–16, c. 38), requiring indictment for certain felonies to be found within three years, except as otherwise provided, and section 317, providing that no period during which the party charged was not usually and publicly a resident within the state shall be included in the time of limitation, it could not be shown, on habeas corpus by a person arrested for delivery to the Illinois authorities, that he was usually and publicly a resident of Illinois during the three years next after the date at which the crime was alleged to have been committed, contrary to the allegations of the indictment, since, when the papers are in the proper form, the only evidence admissible on such a hearing is evidence tending to prove that accused was not in the demanding state at the time the crime is alleged to have been committed, and defenses, such as the statute of limitations, must be asserted on the trial in the demanding state.

Appeal from the District Court of the United States for the Southern District of New York.

Habeas corpus by Guy B. Biddinger against the Commissioner of Police of the City of New York. From a decision remitting the petitioner to the custody of defendant, the petitioner appeals. Affirmed.

Mr. Walter H. Pollak, of New York City, for appellant.

Messrs. Louis Marshall and Robert S. Johnstone, both of New York City, for appellee.

*Mr. Justice CLARKE delivered the opinion of the Court. *129

In various indictments returned in the *130 state of Illinois on May 5, 1916, against appellant, Guy B. Biddinger, he was charged with having committed crimes in that state at various times between the 15th day of October, 1908, and the 2d day of September, 1910. Each of these indictments contained the allegation required by the Illinois practice that "the said Guy B. Biddinger since the 10th day of May, 1911, and from thence hitherto was not usually and publicly a resident within this state of Illinois."

Transmitting the papers required by the United States statutes, duly certified, the Governor of Illinois demanded of the Governor of New York the extradition of Biddinger as a fugitive from justice. The Governor of New York, after according the accused a full hearing, issued to the commissioner of police of the city of New York an executive warrant for his arrest and delivery to the agent authorized to receive and convey him to Illinois, there to be dealt with according to law. Upon this warrant the appellant was taken into custody.

Thereupon, on the petition of the appellant, a writ of habeas corpus issued from the District Court for the Southern District of New York, and the commissioner of police, making return thereto, gave the executive warrant as his justification for the imprisonment and detention of the accused. An elaborate traverse was filed to this return, but, upon the hearing, the court discharged the writ and remanded Biddinger to the custody of the appellee.

On appeal to this court 25 errors are assigned, but on argument only one is relied upon, viz.: The action of the District Court in excluding evidence offered to prove that the accused had been publicly and usually resident within the state of Illinois continuously for more than three years after the dates on which he was charged with having committed the crimes. This evidence was tendered for the claimed purpose of proving that Biddinger was not a fugitive from justice and therefore was not subject to extradition.

*131 This claim of error requires the consideration of section 2 of article 4, of the Constitution, and of section 5278 of the Revised Statutes of the United States, as well as sections 315 and 317 of the statutes of the state of Illinois (Cr. Code), which read as follows:

Constitution, art. 4, § 2. A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

United States Revised Statutes, § 5278 (Comp. St. 1916, § 10126). "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. * * *"

The statutes of Illinois are:

Section 315. *For Other Felonies.* Section 3. All indictments for other felonies (including the crimes charged) must be found within three years next after the commission of the crime, except as otherwise provided by law.

Section 317. *Time of Absence Not Counted.* Section 5. No period during which the party charged was not usually and publicly resident *132 within this state shall be included in the time of limitation.

Relying upon these constitutional and statutory provisions, the argument is pressed upon our attention with much plausibility that one who continues "usually and publicly" resident within the state of Illinois for a longer period than that within which, under the laws of that state, he may be prosecuted for the crimes charged, cannot, with due regard to the meaning of the language used, be said to "flee," or "to have fled," from justice, or to be "a fugitive from justice," if he afterwards leaves that state and is found in another.

Thus is presented the question whether the order remanding the accused into custody to be conveyed to the state of Illinois for trial is in violation of the rights secured to him by the federal Constitution and laws which we have quoted.

The provision of the federal Constitution quoted, with the change of only two words, first appears in the Articles of Confederation of 1781, where it was used to describe and to continue in effect the practice of the New England colonies with respect to the extradition of criminals. Commonwealth of Kentucky v. Dennison, 24 How. 66, 16 L. Ed. 717. The language was not used to express the law of extradition as usually prevailing among independent nations but to provide a summary executive proceeding by the use of which the closely associated states of the Union could promptly aid one another in bringing to trial persons accused of crime by preventing their finding in one state an asylum against the processes of justice of another. Lascelles v. Georgia, 148 U. S. 537, 13 Sup. Ct. 687, 37 L. Ed. 549. Such a provision was necessary to prevent the very general requirement of the state Constitutions that persons accused of crime shall be tried in the county or district in which the crime shall have been committed from becoming a shield for the guilty rather than the defense for the innocent, which it *133 was intended to be. Its design was and is, in effect, to eliminate, for this purpose, the boundaries of states, so that each may reach

out and bring to speedy trial offenders against its laws from any part of the land.

Such being the origin and purpose of these provisions of the Constitution and statutes, they have not been construed narrowly and technically by the courts as if they were penal laws, but liberally to effect their important purpose, with the result that one who leaves the demanding state before prosecution is anticipated or begun, or without knowledge on his part that he has violated any law, or who, having committed a crime in one state, returns to his home in another, is nevertheless decided to be a fugitive from justice within their meaning. Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544; Appleyard v. Massachusetts, 203 U. S. 222, 27 Sup. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073; Kingsbury's Case, 106 Mass. 223.

Courts have been free to give this meaning to the Constitution and statutes because in delivering up an accused person to the authorities of a sister state they are not sending him for trial to an alien jurisdiction, with laws which our standards might condemn, but are simply returning him to be tried, still under the protection of the federal Constitution but in the manner provided by the state against the laws of which it is charged that he has offended.

The discussion of these provisions of the Constitution and statutes for now much more than a century has resulted in the formulation of this conclusion, more than once announced by this court (Appleyard v. Massachusetts, 203 U. S. 222, 227, 27 Sup. Ct. 122, 123, 51 L. Ed. 161, 7 Ann. Cas. 1073):

"A person charged by indictment or by affidavit before a magistrate with the commission within a state of a crime covered by its laws, and who, after the date of the commission of such crime leaves the state—no matter for what purpose or with what motive, nor under what belief—becomes, from the time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice, and if found in another state must be delivered up by the Governor of such state to the state whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the Governor of the state from which the accused departed. Such is the command of the supreme law of the land, which may not be disregarded by any state."

*134

[1] The appellant admits that he was in the state of Illinois at the time it is charged that he committed the crimes for which he was indicted; that the indictments are in the form, and are certified as, required by law; and that he was found in the state of New York. This satisfies the requirement of the statute and by its terms makes it the duty of the Governor of New York to cause Biddinger to be arrested and given into the custody of the Illinois authorities.

[2] With these facts and this legal history before us, what shall be said of the claim that in a habeas corpus hearing the court erred in not permitting the appellant to introduce evidence tending to prove that the prosecution was barred by showing that he was "usually and publicly" in the demanding state during the three years next after the date at which the crime is alleged to have been committed, and that he therefore could not be a fugitive from justice and subject to extradition.

The scope and limits of the hearing on habeas corpus in such cases has not been, perhaps it should not be, determined with precision. Doubt as to the jurisdiction of the courts to review at all the executive conclusion that the person accused is a fugitive from justice has more than once been stated in the decisions of this court. Ex parte Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250; Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544; Appleyard v. Massachusetts, 203 U. S. 222, 27 Sup. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073, but the question not being necessary for the disposition of the cases in which it is touched upon, as it is not in this, it is left undecided. This much, however, the decisions of this court make clear: That the proceeding is a summary one, to be kept within narrow bounds, not less for the protection of the liberty of the citizen than in the public interest; that when the extradition papers required by the statute are in the proper form the only evidence sanctioned by this court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed; and, frequently and emphatically, that defenses cannot be entertained on such a hearing, but must be referred for investigation to the trial of the case in the courts of the demanding state.

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The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases (United States v. Cooke, 17 Wall. 168, 21 L. Ed. 538), and the form of the statute in Illinois, which the appellant seeks to rely upon, makes it especially necessary that the claimed defense of it should be heard and decided by the courts of that state (Pierce v. Creecy, 210 U. S. 387, 28 Sup. Ct. 714, 52 L. Ed. 1113; Charlton v. Kelly, 229 U. S. 447, 33 Sup. Ct. 945, 57 L. Ed. 1274, 46 L. R. A. (N. S.) 397; Drew v. Thaw, 235 U. S. 432, 35 Sup. Ct. 137, 59 L. Ed. 302; Reed v. United States, 224 Fed. 378, 140 C. C. A. 64; Depoilly v. Palmer, 28 App. D. C. 324).

It results that the decision of the District Court must be

Affirmed.

(245 U. S. 105)

HENDRICKSON, County Judge, v. APPERSON.

(Argued Oct. 11, 1917. Decided Nov. 5, 1917.)

No. 427.

1. COURTS ⟸366(6) — DECISIONS OF STATE COURTS—CONSTRUCTION OF STATE STATUTES.

The holding of the Court of Appeals of Kentucky that Ky. St. 1894, § 4131, as amended in 1906 (Acts 1906, c. 22, art. 8, § 3), authorizes the appointment of special collectors, each charged with the duty of collecting only a designated part of the assessed county taxes, must be accepted by the federal Supreme Court.

2. CONSTITUTIONAL LAW ⟸144 — COUNTIES ⟸194—COLLECTION OF TAXES—IMPAIRING OBLIGATION OF CONTRACTS.

Ky. St. 1894, § 4131, as amended in 1906 (Acts 1906, c. 22, art. 8, § 3), construed as authorizing the county court to appoint special collectors, each charged with the duty of collecting only some designated part of the assessed county taxes, impairs the obligations of contracts of a county which has made repeated successful efforts to avoid payment of its adjudicated indebtedness, indicating a deliberate design on the part of its officials to deprive its creditors of an efficacious remedy provided by law and incorporated into its contracts, contrary to Const. U. S. art. 1, § 10, as a judgment creditor's right to have any tax levied to discharge his judgment collected along with the taxes for general county purposes was a substantial and valuable right.

3. MANDAMUS ⟸3(8)—EXISTENCE OF OTHER REMEDY—LEVY OF TAXES—STATUTORY PROVISIONS.

Kentucky Refunding Act of 1878 (Acts 1877–78, c. 483), so far as it attempts to impose on the circuit court or the judge thereof the duty of levying and collecting taxes where the county court fails in its duty, having been declared unconstitutional and void by the Kentucky courts, its provisions do not afford a remedy which will prevent mandamus to compel levy by the county court.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mandamus proceeding by Lewis Apperson against W. T. Hendrickson, Judge of the County Court of Taylor County, Kentucky. A judgment granting the writ was affirmed by the Circuit Court of Appeals for the Sixth Circuit (238 Fed. 473, 151 C. C. A. 409), and defendant brings certiorari. Affirmed.

Mr. Helm Bruce, of Louisville, Ky., for petitioner.

Mr. L. A. Faurest, of Elizabethtown, Ky., for respondent.

*105 *Mr. Justice McREYNOLDS delivered the opinion of the Court.

Seeking to enforce a long-standing judgment against Taylor county, respondent instituted this proceeding (May, 1916) in the United States District Court at Louisville against County Judge Hendrickson and justices of the peace constituting the fiscal court. The judgment was based on bonds authorized by a special act of the Kentucky Legislature approved in 1878 and entitled, "An act for the benefit of Taylor county, empowering it to compromise its debts, issue bonds, and levy and collect taxes to pay the same" (1 Acts 1877–78, p. 554); they had been used to compromise and take up others issued under an act of 1869, entitled "An act to incorporate the Cumberland & Ohio Railroad Company" (1 Acts 1869, p. 463).

He asked a—

"writ of mandamus, commanding and requiring the defendants to levy a tax upon each one hundred dollars of property assessed for valuation in said county for the year 1916, sufficient to pay plaintiff's aforesaid judgment, interest and costs, and that they be required to include in the order making the levy for ordinary county purposes the aforesaid levy for the purpose of paying the aforesaid judgment, and to further direct the said W. T. Hendrickson, as county judge of Taylor county, that when he next appoints a collector whose duty it shall be to collect any or all items by a levy made by the fiscal court of Taylor county for any purpose, he shall embrace in said order of appointment a direction to the officer appointed to collect both the levy made to pay this judgment and the levy made and to be made for any item which may be levied by said fiscal court, and that said county judge shall continue to so embrace said directions in the same order of appointment until a collector is appointed who shall qualify as such collector, and said*county judge shall exact of him but one and a single bond to cover the collection of the levy made to pay this judgment, as aforesaid, and the item or items of any levy made by the fiscal court of Taylor county for any other purpose."

Answering, defendants set up:

"That under the statutes of Kentucky, as construed by the Court of Appeals of Kentucky, the county court of Taylor county has a discretion as to whether it will appoint one person to collect all moneys due the state and the county, and taxing districts therein, or as to whether it will appoint separate collectors and designate in the order of appointment of each collector what he shall collect, including the right and discretion to appoint one collector to collect taxes levied by the fiscal court of the county for ordinary county purposes, and another collector to collect taxes levied by the fiscal court for other purposes, such as the payment of judgments against the county, and to direct in each order of appointment what taxes the appointee thereunder shall collect, and for the collection of which he should be required to give bond. And they respectfully submit that this honorable court cannot, by its judgment, control the aforesaid discretion of the county court of Taylor county, given it by the statutes of Kentucky as construed by the Court of Appeals of Kentucky."

Having heard the cause on demurrer to the answer, the trial court directed that appropriate levies be made during 1916, 1917, and 1918, to raise funds to satisfy respondent's judgment at the same time and by the same order which should provide for other county taxes; and further:

"That said defendants and their successors in office, as the fiscal court of Taylor county, be, and they are hereby, ordered to place the tax bill for each of the aforesaid levies for collection in the hands of the sheriff of Taylor county, and his successor in office, if any, and*upon default* of said sheriff to execute bond and qualify for said office, then W. T. Hendrickson, county judge, and his successor in office, if any, constituting the county court of said county, is directed when he next appoints a collector whose duty it shall be to collect any or all items of any

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levy made, or which may hereafter be made by the fiscal court of Taylor county for any purpose, to embrace in said order of appointment a direction to such officer appointed to collect both the levy made or which may hereafter be made to pay this judgment and the levy made or which may hereafter be made for any and all items which are levied or which may be levied by said fiscal court; and said county judge, acting as said county court, shall continue to so embrace such directions in the same order of appointment until a collector is appointed who shall qualify as such collector by executing proper bond; and said county judge shall exact of him but one and a single bond to collect the levy made, or which may hereafter be made to pay this judgment as aforesaid, and the item or items for any levy made, or which may hereafter be made by said fiscal court for any other purpose. * * *"

The Circuit Court of Appeals affirmed the action of the District Court, but upon a different view, following Tucker et al. v. Hubbert, 196 Fed. 849, 117 C. C. A. 365, and Graham v. Quinlan, 207 Fed. 268, 124 C. C. A. 654.

Petitioners maintain that section 4131, Kentucky Statutes, as amended in 1906 and construed by the Court of Appeals (Commonwealth, etc., v. Moody, 150 Ky. 571, 150 S. W. 680), empowers the Taylor county court to appoint one collector of all county taxes, or, if so advised, to designate more than one and direct each to collect certain taxes, under a bond covering only those specified, and that such discretion cannot be interfered with by mandamus.

*111 Respondent maintains that, properly construed, section 4131 permits appointment of only one such collector, and that*if the 1906 amendment (Acts 1906, c. 22, art. 8, § 3) means what petitioners assert, it impairs his contract with the county, contrary to the federal Constitution. Article 1, § 10.

It is stated, without contradiction, that prior to 1906 section 4131 embodied the applicable statutory provision concerning a collector in effect when the refunding bonds were issued. See Kentucky General Statutes (1873) c. 92, art. 8, § 2; Kentucky Statutes of 1894, § 4131.

The original section follows:

"Section 4131. On the failure of the sheriff or collector to execute bond and qualify as hereinbefore provided, he shall forfeit his office, and the county court may appoint a sheriff or collector to fill the vacancy until a sheriff or collector is elected, or it may appoint a collector for the county of all moneys due the state, county or taxing district authorized to be collected by the sheriff, or it may appoint a separate collector of all the moneys due the state, county or any taxing district thereof during the vacancy in the office of sheriff; and in the event the county court fails for thirty days to appoint a collector of money due the state, the auditor of public accounts may appoint a collector thereof. Such collectors shall, within ten days after their appointment, execute bond as required of the sheriff, to be approved by the county court, and if the bond be not executed within said time the appointment of another collector may, in like manner, be made and qualified."

The amendment of 1906 added these words:

"But such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the county court appointing him."

[1] In Commonwealth, etc., v. Wade's Adm'r, etc. (Oct. 1907) 126 Ky. 791, 104 S. W. 965, the Court of Appeals held, that, under the original section, where there was no sheriff only one person could be appointed to collect all county taxes.* In Commonwealth, etc., v. Moody (Nov. 1912) 150 Ky. 571, 150 S. W. 680, the same court construed the amendment, and held, we are constrained to conclude, notwithstanding some grave doubts, that it authorized appointment of special collectors, each charged with the duty of collecting only some designated part of assessed county taxes. And, of course, this construction by the state's highest court must be accepted. *112

[2] But, so construed, we are of opinion that the amendment would impair the contract under which the bonds were issued, and upon which respondent has a right to rely. It cannot, therefore, be permitted to defeat the remedy theretofore available to him.

The doctrine of this court here to be applied has long been established.

In Von Hoffman v. City of Quincy, 4 Wall. 535, 550, 552, 553 (18 L. Ed. 403), through Mr. Justice Swayne, we said:

"It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. * * * Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract 'is the law which binds the parties to perform their agreement.' The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. * * * It is competent for the states to change*the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void." *113

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." Louisiana v. New Orleans, 102 U. S. 203, 206 (26 L. Ed. 132). And see Seibert v. Lewis, 122 U. S. 284, 294, 295, 7 Sup. Ct. 1190, 30 L. Ed. 1161.

Considered in the light of Taylor county's notable and repeated successful efforts to avoid payment of adjudicated indebtedness and also in connection with the present controversy, we think it clear that the right to have any tax levied to discharge respondent's claim collected along with taxes for general county purposes was a substantial and valuable one. The circumstances indicate a deliberate design upon the part of county officials to deprive its creditors of an efficacious remedy provided by law and incorporated into its contracts. To give the amendment the effect claimed would render easier of accomplishment well-defined plans obviously designed to defeat proper judicial process and in notorious operation long before its passage. There is here something more than provision for the ordinary and orderly readjustment of administrative matters evidently intended to facilitate public business. *114 Actual conditions cannot be ignored, and certainly we ought not, through assumptions out of harmony with patent facts and overnice refinements, to facilitate the practical destruction of admitted legal obligations.

The declarations of the Court of Appeals of Kentucky in Commonwealth, etc., v. Wade's Adm'r, etc., 126 Ky. 801, 802, 104 S. W. 965, 967, are illuminating. Referring to the appointment of a separate collector charged with the sole duty of collecting a special tax ostensibly levied to satisfy a judgment against Taylor county, it said:

"There can be little doubt that the fiscal court, by what they did in the matter, were undertaking to nullify the judgment of the circuit court. The appointment of the special collector, Trotter, of whom nothing was ever afterward heard, and who in no way attempted to qualify as collector, or discharge the duties of that office, point to the fact that this was an arrangement by which the fiscal court could seemingly comply with the judgment, but without, in fact, accomplishing anything. This unlawful purpose could only be successful by the failure of the regular collector of the revenue to do his duty in the premises, and to collect the taxes provided for by the special levy. Such juggling with the decrees and judgments of the courts cannot be tolerated. Ours, as has often been said, is a government of laws, and, if the judgments of the courts enforcing the law may be thus nullified or disregarded either by overt act or culpable negligence, government is at an end. The county is as amenable to the law as an individual, and it is the high duty of its officials to enforce the law wherever and whenever they are its ministers. * * * It seems to us high time that it should be taught as a practical lesson, as well as a theory, that there are none so high as to be above the restraints of the law, or so low as to be beneath its protection."

*115 [3] The argument for petitioner, that the Refunding Act of 1878 provided an exclusive remedy through application to the circuit court in case the county court should fail in its duty, is not well founded. The decisions of the Court of Appeals in Muhlenburg County v. Morehead, 46 S. W. 484, 20 Ky. Law Rep. 376, and Pennington v. Woolfolk, 79 Ky. 13, make it quite plain that an "attempt to impose on the circuit court or judge thereof the duty of levying and collecting taxes is unconstitutional and void" under the jurisprudence of Kentucky.

The judgment of the court below is Affirmed.

(245 U. S. 115)

HENDRICKSON, County Judge, v. CREAGER.

(Argued Oct. 11, 1917. Decided Nov. 5, 1917.)

Nos. 428–431.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mandamus proceedings by Elizabeth Creager, by Hugh S. Gardner, by Mildred E. Hocker, and by the Sterling Land & Investment Company against W. T. Hendrickson, Judge of the County Court of Taylor County, Kentucky. The judgment in each case granting the writ was affirmed by the Circuit Court of Appeals for the Sixth Circuit (238 Fed. 473, 151 C. C. A. 409), and the defendant brings certiorari in each case. Affirmed.

Mr. Helm Bruce, of Louisville, Ky., for petitioner.

Mr. L. A. Faurest, of Elizabethtown, Ky., for respondents.

*116 PER CURIAM. The essential questions involved in these cases are the same as those considered and decided in Hendrickson v. Apperson, (No. 427) 245 U. S. 105, 38 Sup. Ct. 44, 62 L. Ed. —. The judgment of the Circuit Court of Appeals in each of them is accordingly Affirmed.

(245 U. S. 86)

GAUZON v. COMPANIA GENERAL DE TOBACOS DE FILIPINAS.

(Submitted Oct. 15, 1917. Decided Nov. 5, 1917.)

No. 437.

1. COURTS ⇐387(1) — FEDERAL SUPREME COURT—REVIEW OF DECISIONS OF TERRITORIAL COURTS—APPEAL OR ERROR.

A writ of error and not an appeal was the proper method by which to review a judgment of the Supreme Court of the Philippines in a proceeding to register title to land.

2. COURTS ⇐387(4) — FEDERAL SUPREME COURT—REVIEW OF DECISIONS OF TERRITORIAL COURTS—QUESTIONS OF FACT.

On writ of error to the Supreme Court of the Philippine Islands to review a judgment in a proceeding to register title to lands, the federal Supreme Court will not reconsider the conclusions of the lower court upon issues of fact which find support in the record.

3. APPEAL AND ERROR ⇐3—PROPER MODE OF REVIEW—ABOLITION OF DISTINCTION.

Act Sept. 6, 1916, c. 448, § 4, 39 Stat. 726 (Comp. St. 1916, § 1649a), providing that no court having power to review a judgment or decree shall dismiss a writ of error solely because an appeal should have been taken, or an appeal because a writ of error should have been sued out, but that it shall disregard such mistake or error and take the action which would be appropriate if the proper appellate procedure had been followed, does not abolish the distinction between writs of error or appeals, but only requires that the party seeking review shall have it in the appropriate way, notwithstanding a mistake in choosing the mode of review.

4. Courts ⊂=366(18) — Federal Courts — Following Local Decisions.

The federal Supreme Court is not disposed to disturb a judgment of the Supreme Court of the Philippine Islands construing local laws and announcing a rule applicable in such Islands respecting the right of redemption from a mortgage.

Appeal from and in Error to the Supreme Court of the Philippine Islands.

Proceeding by Compania General De Tobacos de Filipinas against Romana Gauzon to register the title to land. A judgment of the Court of Land Registration was modified by the Supreme Court of the Philippine Islands, and defendant appeals and brings error. Appeal dismissed, and judgment affirmed on the writ of error.

Messrs. F. W. Clements, Alexander Britton, and Evans Browne, all of Washington, D. C., for appellant and plaintiff in error.

Mr. F. C. Fisher, of Manila, P. I., for appellee and defendant in error.

*87 * Memorandum opinion by direction of the court, by Mr. Justice DAY.

In this case, submitted upon motion to dismiss or affirm, the present appellee and defendant in error, herein called the Company, made application in the Philippine Court of Land Registration for registration of certain property under the Torrens System. As described and claimed by the Company the hacienda contained 611 hectares, 33 ares, and 82 centares.

The case was twice in the Supreme Court of the Philippines. After its first judgment that court granted a rehearing, and ordered a new trial, and we are concerned now with the writ of error and appeal to this court from the second judgment of the Supreme Court of the *Philippines. The Supreme Court states that so far as Romana Gauzon was concerned the hacienda was made up of two portions, one consisting of 465 hectares, 33 ares and 82 centares, by royal grant, while the remaining portion was made up of 146 hectares obtained from other sources. Romana Gauzon had mortgaged the hacienda, and the same was bought by the Company at sheriff's sale; some time thereafter it made the application for registration.

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On the retrial, after the first judgment of the Supreme Court, Romana Gauzon claimed to be the owner of the 146 hectares, alleging that they were not included in the mortgage. The Court of Land Registration refused registration of the 146 hectares. That court held that while Romana Ganzon had not shown herself to be the owner of the 146 hectares, the Company had not clearly demonstrated that it was the owner thereof.

The Supreme Court, in the judgment now under review, held that the Company had, as between itself and Romana Gauzon, shown title to the 146 hectares, and modified the judgment of the Court of Land Registration so as to decree the registration of all the land described in the application. This judgment evidently proceeded upon the determination of questions of fact.

[1, 2] The writ of error was the proper method by which to review the judgment of the Supreme Court of the Philippines. Carino v. Insular Government, 212 U. S. 449, 29 Sup. Ct. 334, 53 L. Ed. 594; Tiglao v. Insular Government of Philippine Islands, 215 U. S. 410, 30 Sup. Ct. 129, 54 L. Ed. 257; Jover y Costas v. Insular Government, 221 U. S. 623, 31 Sup. Ct. 664, 55 L. Ed. 884. The case being properly here upon writ of error the appeal must be dismissed. Upon such writ the case having been decided upon issues of fact, this court will not reconsider the conclusions of the lower court, which find support in the record, in reaching its judgment.

[3] Whether section 4 of the act of September 6, 1916, 39 Stat. 726, applies to this action in view of the fact that the appeal and writ of error were taken December 5, 1916,*it is unnecessary to decide, as the section does not change the result. Section 4 provides that the reviewing court shall not dismiss a writ of error because an appeal should have been taken, or dismiss an appeal because a writ of error should have been sued out, but shall disregard such mistakes and take the action appropriate if the proper appellate procedure had been followed. This section does not abolish the distinction between writs of error and appeals, but only requires that the party seeking review shall have it in the appropriate way notwithstanding a mistake in choosing the mode of review.

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[4] Upon petition for rehearing in the Supreme Court the plaintiff in error contended that she should have been allowed the right of redemption. Upon that question the court adhered to its first judgment denying the right, and affirmed the doctrine announced in Benedicto v. Yulo, 26 Phil. 160. We are not disposed to disturb this judgment of the Supreme Court construing local laws and announcing a rule applicable in the Islands.

The judgment of the Supreme Court of the Philippines is

Affirmed.

(245 U. S. 102)

EICHEL et al. v. UNITED STATES FIDELITY & GUARANTY CO.

(Submitted Oct. 8, 1917. Decided Nov. 5, 1917.)

No. 571.

1. Courts ⊂=382(5) — Federal Supreme Court — Review of Decisions of Circuit Court of Appeals.

Where a bill in equity, though showing that the parties were citizens of different states, was framed as a dependent and ancillary bill, and the court was asked to entertain it as such in virtue of the jurisdiction already acquired in

pending actions at law arising under a law of the United States, a decree of the Circuit Court of Appeals in such suit was reviewable by the Supreme Court, under Judicial Code (Act March 3, 1911, c. 231) § 128, 36 Stat. 1133 (Comp. St. 1916, § 1120), providing that, with certain exceptions, judgments and decrees of the Circuit Court of Appeals shall be final, where the jurisdiction is dependent entirely upon diversity of citizenship, and section 241 (Comp. St. 1916, § 1218), providing that, where the judgment or decree of the Circuit Court of Appeals is not made final, there shall be of right an appeal or writ of error to the Supreme Court where the matter in controversy exceeds $1,000.

2. APPEAL AND ERROR ⟸1126—AFFIRMANCE ON MOTION—APPEAL FOR PURPOSE OF DELAY.

Where the decree appealed from was part of a prolonged litigation, in which the courts of two circuits, proceeding independently, had reached identical conclusions on the questions of fact, and the questions of law were few and well settled, and the rulings so clearly right that the appeal seemed to be without reasonable justification, and taken for delay, the decree will be affirmed on motion.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

Suit by the United States Fidelity & Guaranty Company against Laura Eichel and others. A decree for defendants for an insufficient amount was modified and affirmed by the Circuit Court of Appeals for the Third Circuit (241 Fed. 357), and defendants appeal. On motion to dismiss or affirm. Motion to dismiss denied, and motion to affirm sustained.

Mr. B. M. Ambler, of Parkersburg, W. Va., for appellee, in support of motion.

Mr. William M. Hall, of Pittsburg, Pa., for appellants, in opposition to motion.

*103 Memorandum opinion by Mr. Justice VAN DEVANTER, by direction of the Court.

A motion to dismiss or affirm is presented.

In its simplest form the case is this: Laura Eichel as use plaintiff began 18 separate actions at law against the guaranty company in the District Court for the Western District of Pennsylvania, all being cognizable in that court because arising under a law of the United States. The guaranty company, conceiving that it had a partial equitable defense, not admissible at law, which was common to all the cases, and other partial defenses in particular cases, exhibited in that court a bill describing the actions at law, setting forth the defenses, showing that nothing was in controversy beyond the defenses, and praying that the entire matter be examined and adjudicated in a single proceeding in equity and further proceedings at law enjoined. Although showing that the parties were citizens of different states, the bill was framed as a dependent and ancillary bill and the court was asked to entertain it as such in virtue of the jurisdiction already acquired. The court did entertain it and ultimately sustained the equitable defense, partly sustained some of the others, ascertained the *104 amount of the liability of the guaranty company upon the claims set forth in the actions at law, and ordered that this amount, with interest, be paid in satisfaction of those claims. The Circuit Court of Appeals made a small reduction in the amount of the company's liability, made provision for subrogating the company to the rights of Mrs. Eichel against a bankrupt's estate in process of administration, and affirmed the decree as so modified. 241 Fed. 357.

[1] Plainly the bill was dependent and ancillary and the jurisdiction to entertain it was referable to that invoked and existing in the actions at law out of which it arose. Jones v. Andrews, 10 Wall. 327, 333, 19 L. Ed. 935; Dewey v. West Fairmont Gas Coal Co., 123 U. S. 329, 333, 8 Sup. Ct. 148, 31 L. Ed. 179; Minnesota Co. v. St. Paul Co., 2 Wall. 609, 633, 17 L. Ed. 886; Krippendorf v. Hyde, 110 U. S. 276, 281, 4 Sup. Ct. 27, 28 L. Ed. 145; Johnson v. Christian, 125 U. S. 642, 645, 8 Sup. Ct. 989, 1135, 31 L. Ed. 820; Carey v. Houston & Texas Central Ry. Co., 161 U. S. 115, 16 Sup. Ct. 537, 40 L. Ed. 638; Cortes Co. v. Thannhauser (C. C.) 9 Fed. 226; Hill v. Kuhlman, 87 Fed. 498, 31 C. C. A. 87. This being so, the decree of the Circuit Court of Appeals is open to review here. See Jud. Code, §§ 128, 241. The motion to dismiss the appeal is therefore denied.

[2] The decree, as the record shows, turned upon questions of fact and of general law, unaffected by any ruling upon any federal question. The case is part of a prolonged litigation which is now brought to our attention for the fourth time. Bray v. U. S. Fidelity & Guaranty Co., 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055; Id., 239 U. S. 628, 36 Sup. Ct. 164, 60 L. Ed. 475; Eichel v. U. S. Fidelity & Guaranty Co., 239 U. S. 629, 36 Sup. Ct. 165, 60 L. Ed. 475. It has engaged the attention of the courts of two circuits on several occasions, some of the decisions being reported and others not. Bray v. U. S. Fidelity & Guaranty Co., 170 Fed. 689, 96 C. C. A. 9; U. S. Fidelity & Guaranty Co. v. Bray, 218 Fed. 987, 133 C. C. A. 669; U. S. Fidelity & Guaranty Co. v. Eichel, 219 Fed. 803, 135 C. C. A. 473; Id., 233 Fed. 991, 147 C. C. A. 665; Id. (C. C. A.) 241 Fed. 357. Upon the questions of fact the courts in the two circuits, proceeding independently, have reached identical conclusions. The questions of law are few and well settled. After examining the record in the light of the opinions below and the assignments of error here *105 we are convinced that the rulings were right, so clearly so that the appeal seems to be without reasonable justification, and therefore to have been taken for delay. The motion to affirm is accordingly sustained.

Decree affirmed.

(245 U. S. 136)

ST. LOUIS SOUTHWESTERN RY. CO. et al. v. UNITED STATES et al.

(Argued Oct. 12 and 15, 1917. Decided Nov. 12, 1917.)

No. 199.

1. COMMERCE ⇐88 — CONSTITUTIONAL LAW ⇐298(2) — POWERS OF INTERSTATE COMMERCE COMMISSION.

Complainants operated railroads extending from the lumber region west of the Mississippi and south of the Arkansas river, and two of them had through routes to Paducah, Ky., via Cairo, Ill., while the third had a through route via Memphis. The routes via Cairo were materially longer than possible routes via Memphis, and both routes involved the use of the same connecting carrier to Paducah. A rate of 22 cents per 100 pounds was charged from such territory to Paducah, made by adding to the joint rate, or local, of 16 cents to Cairo, the local rate of 6 cents from Cairo to Paducah. On complaint that this rate was unjust, unreasonable, and discriminatory, the Interstate Commerce Commission found that the rate to Cairo was not unduly low, that the rate to Paducah was unreasonable to the extent that it exceeded the rate to Cairo, that the disparity of rates gave Cairo an undue preference and advantage, and that the natural route to Paducah was via Memphis, and entered an order prohibiting the charging of the existing rate and directing complainants to maintain through routes via either Memphis or Cairo and joint rates not in excess of the rates in effect to Cairo. *Held* that, as the order did not require the complainants to substitute the route via Memphis for that via Cairo, nor to establish an additional route, but merely compelled a direct route and a joint rate of 16 cents, it was within the power of the Commission, under Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379, as amended (Comp. St. 1916, § 8563 et seq.), and was not violative of the Fifth Amendment to the federal Constitution, nor in disregard of section 15 of the Interstate Commerce Act 1887, as amended (section 8583, Comp. St. 1916), prohibiting the Commission from embracing in a through route less than the entire length of a railroad, unless to do so would make the route unreasonably long.

2. COMMERCE ⇐61(4), 85 — REGULATIONS — DISCRIMINATION.

It is within the power of Congress and of the Interstate Commerce Commission to prevent interstate carriers from practicing discrimination against a particular locality to which their lines do not reach, where they bill traffic thereto over connecting lines.

3. COMMERCE ⇐88—ORDERS OF INTERSTATE COMMERCE COMMISSION—CONSTRUCTION.

Where the Interstate Commerce Commission found that a rate on lumber to Cairo, Ill., was not unduly low, that a rate to Paducah, Ky., was unreasonable to the extent that it exceeded the existing rate to Cairo, that the existing disparity of rates gave Cairo an undue preference and advantage, that the natural route to Paducah was via Memphis, rather than via Cairo, and ordered the establishment of through routes to Paducah, via either Memphis or Cairo, and joint rates not in excess of the rates in effect to Cairo, the order was not one to prevent discrimination, under Interstate Commerce Act 1887, § 3 (Comp. St. 1916, § 8565), but an order, under section 15, as amended (section 8583), to reduce existing through rates by establishing joint rates, or in the alternative to establish new through routes with joint rates.

Appeal from the District Court of the United States for the Western District of Kentucky.

Suit by the St. Louis Southwestern Railway Company and others against the United States and the Interstate Commerce Commission. From a decree (234 Fed. 668) dismissing the bill, complainants appeal. Affirmed.

Mr. Henry G. Herbel, of St. Louis, Mo., for appellants.

Mr. Assistant Attorney General Frierson, for the United States.

Mr. C. W. Needham, of Washington, D. C., for Interstate Commerce Commission.

*137 *Mr. Justice BRANDEIS, delivered the opinion of the Court.

This suit was brought in the District Court of the United States for the Western District of Kentucky by three railroad companies[1] against the United States and the Interstate Commerce Commission. Plaintiffs seek to enjoin the enforcement of and to set aside an order entered by the Commission on January 21, 1916, directing these and other carriers to establish certain through routes and joint rates on logs and lumber to *138 *Paducah, Ky., and reducing existing rates. An application was made for a temporary injunction. Both defendants moved to dismiss the bill. The Commission also answered. The case was fully heard upon the evidence before three judges "as upon final submission upon the merits"; a decree was entered dismissing the bill without costs ([D. C.] 234 Fed. 668); and the case comes to this court by direct appeal.

Paducah is situated on the south bank of the Ohio river, 42 miles above Cairo, Ill., which lies on the north bank of the Ohio near its confluence with the Mississippi. An important business in each city is manufacturing and jobbing lumber. They compete in both the buying and the selling markets. Each draws its supplies of logs and lumber, in part, from the extensive region lying west of the Mississippi and south of the Arkansas river, known in the trade as the "blanket territory."[2] The distances from this region to Paducah are not greater than to Cairo; but, prior to the order of the Interstate Commerce Commission herein complained of, the through freight rate on logs and lumber was 22 cents per hundred pounds

[1] A fourth carrier, the Louisiana & Arkansas Railway Company, was permitted to intervene as party plaintiff and joined in the appeal; but the special facts concerning it are not of importance.

[2] This region is called "blanket territory," because a "blanket" rate on logs and lumber is made from all shipping points within the territory to points beyond. That is, the rate is the same regardless of the distance hauled within the territory, which extends about 400 miles from north to south and 300 from east to west.

to Paducah while it was only 16 cents to Cairo.

The principal railroads serving the "blanket territory" are the St. Louis Southwestern, the St. Louis, Iron Mountain & Southern, and the Chicago, Rock Island & Pacific. The first two have their own lines from the "blanket territory" to Cairo, but can reach Paducah only over a connecting line. The Rock Island reaches both Cairo and Paducah only over a connecting line. The most direct route to Paducah from the lines of each of the three complainants is via Memphis, Tenn.; but prior to the order of the Interstate Commerce Commission herein complained of only the Rock Island had established its through route via Memphis. The other two companies had through routes to Paducah via Cairo. These, which had been in operation for many years, are materially longer than possible routes via Memphis; and also necessitate crossing the Ohio as well as the Mississippi. Both the Cairo and the Memphis routes to Paducah involve using as connecting carrier the Illinois Central, which has a line extending from Memphis through Paducah to Cairo.[3] The 22-cent rate from the "blanket territory" to Paducah via Cairo is made by adding to the "joint rate" or "local" of 16 cents to Cairo, the local rate of 6 cents from Cairo to Paducah; Cairo being a "rate-breaking" point.[4] The connection of the Rock Island with the Illinois Central at Memphis is made under similar conditions.

On February 8, 1915, the Paducah Board of Trade filed with the Interstate Commerce Commission a complaint charging (1) that the 22-cent rate to Paducah was unjust and unreasonable; (2) that it was discriminatory and gave an undue preference and advantage to Cairo; and (3) that the route from the "blanket territory" via Cairo was unduly long as compared with the route via Memphis. The complainant asked that through routes be established via Memphis "with joint rates * * * which shall not exceed the rates contemporaneously charged for the transportation of logs and lumber from the same points to Cairo."

Fifty-three railroads, which participate in this traffic, including those named above, were joined as respondents. Hearings were duly had; much evidence was introduced; and on January 21, 1916, the Commission filed a report in which it found:

(a) That the 16-cent rate to Cairo was not unduly low;

(b) That the 22-cent rate to Paducah was unreasonable to the extent that it exceeded the existing rate to Cairo;

(c) That the existing disparity of rates gave to Cairo an undue preference and advantage over Paducah;

(d) That the distances to Paducah via Cairo were so much greater than the distances via Memphis "that the natural route is via Memphis rather than via Cairo";

(e) That through routes and joint rates not higher than the Cairo rate should be established from the "blanket territory" to Paducah via either Memphis or Cairo.

An appropriate order was entered prohibiting the carriers from continuing to charge the existing rate to Paducah and directing them to establish and thereafter maintain through routes to Paducah via either Memphis or Cairo, and joint rates "not in excess of the rates at present in effect * * * to Cairo." Paducah Board of Trade v. Illinois

[3] The distance on the Illinois Central from Memphis to Paducah is about 169 miles. The Nashville, Chattanooga & St. Louis Railroad also has a line from Memphis to Paducah, but it is much longer.

[4] A "through route" is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier—to destination on the line of another. Through carriage implies a "through rate." This "through rate" is not necessarily a "joint rate." It may be merely an aggregation of separate rates fixed independently by the several carriers forming the "through route"; as where the "through rate" is "the sum of the locals" on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. Through Rates and Through Routes, 12 Interst. Com. Com'n R. 164, 166. Ordinarily "through rates" lower than "the sum of the locals" are "joint rates." Prior to the amendment of the Act to Regulate Commerce (1906, c. 3591, § 4, 34 Stat. 584, 590 [Comp. St. 1916, § 8583]) authorizing the Commission to establish through routes and joint rates, all "joint rates" were (as most still are) the result of agreements between carriers, which fix also the "divisions"; that is, the share of the "joint rate" to be received by each. New York, New Haven & Hartford R. R. v. Platt, 7 Interst. Com. Com'n R. 323, 329. The bases of such divisions differ greatly in practice. Sometimes all the carriers participate in the joint rate in the proportions which their local rates bear to the sum of the locals; in other words, the percentage of reduction from the local rate is the same for each. Sometimes one carrier is allowed the full local, while the rate of another is seriously reduced. The share of each being a matter of bargain, it may be fixed at an arbitrary amount. Chamber of Commerce of Milwaukee v. Flint & Pere Marquette R. R., 2 Interst. Com. Com'n R. 553, 567, 568. In constructing the joint rates the charge per mile ordinarily decreases with the increase of the length of haul. But even where the through route and through rates are matters of express agreement between the carriers, a continuous "joint rate" does not always extend from the point of origin to point of destination. There may be, on the "through route" an intermediate point at which, in common railroad practice, the rate "breaks." That is, the "joint rate" from the point of origin ends at this "rate-breaking point" and there is charged for the distance beyond, the same local rate or joint rate that would have been charged, had the business originated at this intermediate point. That is, instead of a "joint through rate," there is a "combination." The so-called "Ohio river crossings" or "gateways" are among the "rate-breaking" points. See Rates on Lumber from Southern Points, 34 Interst. Com. Com'n R. 652, 654; Lehigh Portland Cement Co. v. B. & O. S. W. R. R., 35 Interst. Com. Com'n R. 14, 17; Interstate Commerce Commission v. Chicago, Rock Island & Pacific Railway, 218 U. S. 88, 90, 30 Sup. Ct. 651, 54 L. Ed. 946.

Central Railroad Co., 37 Interst. Com. Com'n R. 719.[5]

Before the effective date of the order, this bill was filed. It sets forth sixteen reasons for holding the order void; and most of them are repeated in the assignment of errors in this court. One is a charge, left wholly unsupported by evidence, that a 16-cent rate to Paducah is confiscatory. Eight deal with the sufficiency or weight of the evidence before the Commission, of which there was ample to sustain its findings. Some relate to the form of the order, which was clearly appropriate. Few, only, of the errors assigned require discussion here.

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[1] First: The carriers deny that the Commission has the power to compel them to establish through routes and joint rates. It is admitted that all the complaining carriers were interstate railroads and were engaged otherwise in interstate commerce. It is undisputed that for many years there has been over the lines of two of these carriers a through route to Paducah via Cairo, and over the other a through route via Memphis; and that on all the lines there were through rates. But it is contended that if a carrier establishes a through route and joint rate with its connections, it creates in effect a relation of partnership; that this relation must be entered into, if at all, voluntarily; and that to "compel a carrier chartered by a state" to enter into such a relation with a carrier chartered in another state violates the Fifth Amendment of the federal Constitution.

The complaining carriers having engaged in this particular commerce, it is clear that Congress has power to regulate it. Atlantic Coast Line Case, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7. No reason appears why the regulation might not take the form of compelling the substitution of a joint rate for a through rate made by a combination of local rates or by a combination of a local rate with a joint rate to an intermediate point. Cincinnati, New Orleans & Texas Railway v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935. So far as the order relates to the existing routes via Cairo and Memphis respectively it did no more than this: It substituted for the through rate of 22 cents (made up on two of the lines of a combination of a joint rate or local rate of 16 cents to Cairo with a local rate on the Illinois Central of 6 cents from Cairo to Paducah), a joint rate of 16 cents from the "blanket territory" to Paducah; thus reducing the existing through rate. The carrier connecting at Cairo (the Illinois Central) and all but one of the carriers connecting with these complainants in the "blanket territory," acquiesced in the order establishing this joint rate. The Illinois Central's share of the 22-cent rate was its local rate of 6 cents. If these complaining carriers cannot reach satisfactory agreements with the Illinois Central as to what its share of the 16-cent rate should be, they may, under section 15 of the Act to Regulate Commerce (Comp. St. 1916, § 8583), apply to the Commission for an appropriate order. In respect to the Rock Island the situation is similar.

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The order entered does not require any complaining carriers to substitute the route via Memphis for that via Cairo; nor does it require any to establish an additional route via Memphis. Carriers are left free to furnish the through transportation either via Cairo or via Memphis. The order merely compels a through route and a joint rate of 16 cents to Paducah. If they elect to continue existing through route via Cairo, the order operates merely to introduce reduced joint rates. If they elect to discontinue the through routes via Cairo, the order operates to establish through routes and joint rates via Memphis, which the findings of the Commission fully justify.

That Congress has power to authorize the Commission to enter an order for through routes and joint rates, like that here complained of, has been heretofore assumed.[6] No reason is shown for questioning its existence now. The provisions of the Act to Regulate Commerce as amended (1887, c. 104, §§ 1, 12, 15, 24 Stat. 379; 1906, c. 3591, § 4, 34 Stat. 584; 1910, c. 309, § 12, 36 Stat. 539, 552 [Comp. St. 1916, §§ 8563, 8576, 8583]) are also appropriate to confer this authority upon the Commission. And there is no foundation in fact or law for the contention of complainants that the Commission disregarded the provision of section 15, by which it is prohibited from embracing in a through route "less than the entire length of a" railroad "unless to do so would make the route unreasonably long." Whether a carrier engaged solely in intrastate commerce could be compelled by Congress to enter interstate commerce, or even whether a carrier, having entered into some interstate commerce, may be compelled to enter into all, we have no occasion to consider;[7] for the complaining car-

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[5] The log and lumber rates from blanket territory to Cairo and Paducah or competitive points had been investigated by the Commission also in earlier proceedings. Rates on Lumber from Southern Points, 34 Interst. Com. Com'n R. 652; Wisconsin & Arkansas Lumber Co. v. St. Louis, Iron Mountain & Southern Railway, 33 Interst. Com. Com'n R. 33; Paducah Board of Trade v. Illinois Central Railroad, 29 Interst. Com. Com'n R. 583; Lumberman's Exchange of St. Louis v. Anderson & Saline River Railroad, 24 Interst. Com. Com'n R. 220; Chicago Lumber & Coal Co. v. Tioga Southeastern Railway Co., 16 Interst. Com. Com'n R. 323; Central Yellow Pine Association v. Illinois Central Railroad, 10 Interst. Com. Com'n R. 505. See, also, St. Louis, Iron Mountain & Southern Railway v. United States (D. C.) 217 Fed. 80.

[6] O'Keefe v. United States, 240 U. S. 294, 33 Sup. Ct. 313, 60 L. Ed. 651; Interstate Commerce Commission v. Northern Pacific Railway, 216 U. S. 538, 30 Sup. Ct. 417, 54 L. Ed. 608.

[7] But see Michigan Central Railroad v. Michigan Railroad Commission, 236 U. S. 615, 631, 35 Sup. Ct. 422, 59 L. Ed. 750; Minneapolis & St. Louis Railroad v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46

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riers had voluntarily entered into the particular class of interstate commerce with Paducah to which alone the order related.

[2] Second: Carriers insist also that the order is void on the ground, that since their "rails do not reach Paducah, they cannot be guilty of discrimination against that city." They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose "rails" reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality, is not confined to those whose rails enter it. Cincinnati, New Orleans & Texas Pacific Railway v. Interstate Commerce Commission, supra.

*145 [3] Furthermore, the order in the case at bar is not merely *one to prevent discrimination. Orders to remove discrimination, as commonly framed, do not fix rates. They merely determine the relation of rates, by prohibiting the carrier from charging more for carriage to one locality than under similar conditions to another; and they usually leave the carriers free to remove the discrimination either by raising the lower rate or by lowering the higher rate or by doing both. American Express Co. v. Caldwell, 244 U. S. 617, 624, 37 Sup. Ct. 656, 61 L. Ed. 1352. The order here complained of gives the carriers no such option. It directs that the rates to Paducah shall be "not in excess of the rates at present in effect from the same points or groups to Cairo, Ill." In other words, the Commission having found the 22-cent rate unduly high, reduces it to 16 cents by establishing joint through rates. The injury resulting from discrimination was doubtless the reason which induced the Paducah Board of Trade to institute the proceedings; and the Commission may have considered the existence of the lower rate to Cairo persuasive evidence that the 22-cent rate to Paducah was unreasonably high and the resulting discrimination strong reason for establishing the 16-cent joint rate. But the order is strictly one under section 15 of the Act to Regulate Commerce to reduce existing through rates by establishing joint rates or, in the alternative, to establish new through routes with joint rates. It is not primarily an order to remove discrimination in violation of section 3.

Decree affirmed.

L. Ed. 1151; Wisconsin, Minnesota & Pacific Railroad v. Jacobson, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194. Compare Norfolk & Western Railway v. Dixie Tobacco Co., 228 U. S. 593, 595, 33 Sup. Ct. 609, 57 L. Ed. 980; Galveston, Harrisburg & San Antonio Railway v. Wallace, 223 U. S. 481, 491, 32 Sup. Ct. 205, 56 L. Ed. 516.

(245 U. S. 151)

GOULD v. GOULD.

(Submitted Nov. 8, 1917. Decided Nov. 19, 1917.)

No. 41.

1. STATUTES ⟸245 — CONSTRUCTION OF TAXING STATUTES.

In construing statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or enlarge their operations to embrace matters not specifically pointed out, and in case of doubt they are construed most strongly against the government and in favor of the citizen.

2. INTERNAL REVENUE ⟸7—INCOME TAX—WHAT CONSTITUTES "INCOME."

Under Act Oct. 3, 1913, c. 16, § 2a, subd. 1, 38 Stat. 166, levying a tax on the entire net income accruing to every citizen, and section 2b, defining "income," alimony paid to a divorced wife under a decree of court does not constitute income.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

3. INTERNAL REVENUE ⟸7—INCOME TAX—DEDUCTIONS.

The net income of a divorced husband, subject to taxation under Act Oct. 3, 1913, is not decreased by the payment of alimony under the order of the court.

In Error to the Supreme Court of the State of New York.

Action by Katherine C. Gould against Howard Gould. To review an adverse judgment (168 App. Div. 900, 152 N. Y. Supp. 1114), affirming an order of the trial court, defendant brings error. Affirmed.

Mr. Martin W. Littleton, of New York City, for plaintiff in error.

Mr. John L. McNab, of San Francisco, Cal., for defendant in error.

*152 *Mr. Justice McREYNOLDS delivered the opinion of the Court.

A decree of the Supreme Court for New York county entered in 1909 forever separated the parties to this proceeding, then and now citizens of the United States, from bed and board; and further ordered that plaintiff in error pay to Katherine C. Gould during her life the sum of $3,000 every month for her support and maintenance. The question presented is whether such monthly payments during the years 1913 and 1914 constituted parts of Mrs. Gould's income within the intendment of the act of Congress approved October 3, 1913 (38 Stat. 114, 166, c. 16), and were subject as such to the tax prescribed therein. The court below answered in the negative; and we think it reached the proper conclusion.

Pertinent portions of the act follow:

"Section II, A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided. * * *

"B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, business, trade, commerce,*153 or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent. * * *"

[1] In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen. United States v. Wigglesworth, 2 Story, 369, Fed. Cas. No. 16,690; American Net & Twine Co. v. Worthington, 141 U. S. 468, 474, 12 Sup. Ct. 55, 35 L. Ed. 821; Benziger v. United States, 192 U. S. 38, 55, 24 Sup. Ct. 189, 48 L. Ed. 331.

[2] As appears from the above quotations, the net income upon which subdivision 1 directs that an annual tax shall be assessed, levied, collected and paid is defined in division B. The use of the word itself in the definition of "income" causes some obscurity, but we are unable to assert that alimony paid to a divorced wife under a decree of court falls fairly within any of the terms employed.

In Audubon v. Shufeldt, 181 U. S. 575, 577, 578, 21 Sup. Ct. 735, 736 (45 L. Ed. 1009), we said:

"Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on a contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. * * * Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings. * * *"*154

*[3] The net income of the divorced husband subject to taxation was not decreased by payment of alimony under the court's order; and, on the other hand, the sum received by the wife on account thereof cannot be regarded as income arising or accruing to her within the enactment.

The judgment of the court below is affirmed.

(245 U. S. 146)

HARTFORD LIFE INS. CO. v. BARBER

(two cases).

(Argued Nov. 5 and 6, 1917. Decided Nov. 19, 1917.)

Nos. 252, 253.

1. INSURANCE ⊂⊃665(1)—WEIGHT AND SUFFICIENCY OF EVIDENCE — LEVY OF ASSESSMENT.

Where a quarterly assessment, levied by an insurance company, whose charter required all of its affairs to be managed and controlled by a board of not less than seven directors, was levied in the usual way adopted by the company, and tacitly sanctioned by the judgment in a suit by a certificate holder in behalf of all other certificate holders, and in the way in which quarterly mortality calls were regularly made for appointed dates, the jury would have been justified in finding that the call was made by the directors, though it did not appear that they went over the figures of the officers, who made it up and voted specifically; it being under their management and control.

2. COURTS ⊂⊃394(14)—REVIEW OF DECISIONS OF STATE COURTS — BASIS OF DECISION — MAKEWEIGHTS.

Where, on a writ of error to a state court, it was claimed that due faith and credit was denied a judgment rendered in another state by permitting a recovery, notwithstanding the certificate holder's failure to pay an assessment, if the assessment was for a larger amount than was necessary to pay death losses up to that time, the state court's reference to the fact that the directors did not levy the assessment, as a mere makeweight, added nothing to the substantial basis for the decision below; it appearing that the verdict could hardly have been rendered, except on the ground that the assessment was excessive.

3. COURTS ⊂⊃8 — ACTION ON FOREIGN STATUTES—FULL FAITH AND CREDIT.

The powers given a Connecticut insurance company, by its charter, were entitled to the same credit elsewhere as a judgment of a Connecticut court determining its powers.

4. JUDGMENT ⊂⊃822(3)—FOREIGN JUDGMENTS —FULL FAITH AND CREDIT.

Full faith and credit was denied a judgment of a Connecticut court, adjudging that a Connecticut insurance company was entitled to hold a mortuary fund collected in advance, in order to enable it to pay losses promptly, but that any excess in such fund above the average of the four preceding quarterly assessments should be distributed to certificate holders in diminution of assessments by crediting the excess on account of the next succeeding assessment, by excluding such judgment, and authorizing a recovery, if an assessment not paid by the certificate holder was excessive, though it appeared that, at the end of the quarter for which the assessment was levied, there was still left of such fund over $50,000, which the assessment would increase to over $375,000 or $75,000 in excess of the amount allowed by the judgment, as the judgment contemplated a possible excess and did not limit the assessment to a sum equal to the difference between $300,000, and the fund on hand after deducting deaths that had occurred when the assessment was levied, since deaths were occurring between the time of the levy, and the time when the assessment would be paid in.

In error to the Supreme Court of the State of Missouri.

Two actions by Rosa Barber against the Hartford Life Insurance Company. Judgments for plaintiff were affirmed by the Supreme Court of Missouri (269 Mo. 21, 187 S. W. 867; 187 S. W. 874), and defendant brings error. Reversed.

Mr. James C. Jones, of St. Louis, Mo., for plaintiff in error.

Mr. Charles E. Morrow, of St. Louis, Mo., for defendant in error.

Mr. Justice HOLMES delivered the opinion 147
of the Court.

These are suits upon two certificates of qualified life insurance issued to Frank Barber and payable at his death to his wife, the plaintiff—defendant in error here. The defense in both suits was the same; that Barber failed to pay a mortuary assessment levied on January 29, 1910, known as quarterly call No. 126, and that the failure avoided the policies by their terms. It set up further that, in a suit brought by one Dresser on behalf of himself and all certificate holders, including the plaintiff, in the Connecticut Court having jurisdiction over the defendant and the mortuary fund from which alone, by the contract, death losses were payable, it was adjudicated on March 23, 1910, that if a certificate holder failed to pay a mortuary assessment the company could not pay the insurance in case of his death.

At the trial the Connecticut judgment was offered and excluded and the jury were instructed that the defendant must prove that an assessment was made by the directors of the company and that it was not for a larger amount than was necessary to pay death losses up to that time after giving Barber credit for his pro rata share in the mortuary fund; that if there was money on hand in that fund, and unless the defendant had "so proved," it could not declare the insurance forfeited on that account. This instruction *148
was in the teeth of the Connecticut adjudication which held that it was proper and reasonable for the company to hold a fund collected in advance in order to enable it to pay losses promptly. The plaintiff recovered judgments and these were sustained by the Supreme Court of Missouri. 269 Mo. 21, 187 S. W. 867. The defendant says that it was denied its constitutional rights by a failure to give due faith and credit to the judgment of the Connecticut Court.

The transactions were of the class before this Court in Hartford Life Ins. Co. v. Ibs, 237 U. S. 662, 35 Sup. Ct. 692, 59 L. Ed. 1165, L. R. A. 1916A, 765, which arose on a similar contract and a failure to pay the call next after the one in question here. In that case the character of the business arrangements was explained and it was decided that the Dresser judgment binds all certificate holders of the class to which Barber belonged. The Missouri Court, indicating some dissatisfaction with the company and the judgments in Connecticut and here, sought to justify a different result by distinctions that seem to

us unreal. The first is that at the end of the quarter for which the assessment was levied, that is on December 31, 1909, after deducting all losses in respect of which the assessment was laid, there was still left, of the fund out of which the losses were paid, over $50,000, which the assessment would increase to over $375,000; that $300,000 was all that was allowed by the contract "as modified by the [Connecticut] judgment"; and that the assessment therefore was excessive and void. The other distinction attempted is that the charter requires all of the affairs of the company to be managed and controlled by a board of not less than seven directors, and that the assessment was not levied by the board.

[1-3] It is obvious on the evidence that this assessment was levied in the usual way adopted by the company and tacitly sanctioned by the Connecticut judgment. Quarterly mortality calls were provided for and were regularly made in this way for the appointed dates. A jury would have been justified, at least, in finding that the call was made by the directors within the meaning of the instructions although it did not appear that the directors went over the figures of the officers who made it up, and voted it specifically. It clearly was made under the directors' management and control. The verdicts for the plaintiff hardly could have been rendered except upon the other ground opened by the instructions, that the assessment was for a larger amount than was necessary to pay death losses up to that time. Upon that ground the verdicts were a matter of course, and we regard the reference to the directors' part in the assessment as a makeweight which adds nothing to the substantial basis for the decision below. See Terre Haute & Indianapolis R. R. Co. v. Indiana, 194 U. S. 579, 589, 24 Sup. Ct. 767, 48 L. Ed. 1124. The powers given by the Connecticut charter are entitled to the same credit elsewhere as the judgment of the Connecticut Court. Supreme Council of the Royal Arcanum v. Green, 237 U. S. 531, 542, 35 Sup. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771.

[4] As we have said the instruction was in the teeth of the Connecticut judgment by which under the Ibs Case the plaintiff was bound. The verdicts were based upon fundamental error, and the only real question in the case is whether it appears as matter of law that under correct instructions the same result must have been reached. The Connecticut judgment was that any excess in the mortuary fund above the average of the four preceding quarterly assessments in the Men's Division of the Safety Fund Department (taken for the purposes of these cases to be $300,000), shall be distributed to certificate holders in diminution of assessments by crediting the excess on account of the next succeeding assessment. This contemplates a possible excess and does not limit the assessment to a sum equal to the difference between $300,000 and the fund on hand after deducting the deaths that had occurred at the time when the assessment was levied, as was assumed by the Missouri Court. Deaths were occurring between the time of the levy and the time when so much of it as might be paid would be paid in. The assessment was for the purpose of keeping up a fund of $300,000 to meet deaths promptly, as they occurred. Without giving the figures in detail it is enough to say that it clearly appears that the amount of the assessment, $322,378.48 was not in excess of what the subsequently rendered Connecticut judgment allowed. It necessarily was levied as an estimate. There was no probability that it would lead to even a temporary excess over $300,000, to be applied to the next assessment laid. We are of opinion that full faith and credit was not given to the Connecticut record and that for that reason the present judgments must be reversed.

Judgments reversed.

(245 U. S. 154)

WEAR et al. v. STATE OF KANSAS ex rel. BREWSTER, Atty. Gen.

(Argued Nov. 12, 1917. Decided Nov. 26, 1917.)

No. 30.

1. NAVIGABLE WATERS ⟸37(7)—LANDS UNDER WATER—GRANT OF RIPARIAN LAND.

A territorial statute enacted in 1859 (Laws 1859, c. 121), adopting the common law of England, did not give a subsequent patent from the United States covering riparian lands the effect of a grant to the thread of the stream, and created no constitutional obstacle to a subsequent decision of the state court that the fact of navigability, rather than the ebb and flow of the tide, excluded riparian ownership of river beds.

2. COURTS ⟸394(25) — FEDERAL SUPREME COURT — REVIEW OF DECISIONS OF STATE COURTS.

Whether a state Supreme Court in a mandamus proceeding should take judicial notice that the principal river of the state is navigable at the capital of the state is a question of state law, and the federal Supreme Court cannot pronounce its action in taking judicial notice thereof erroneous; there being no constitutional right to a trial by jury.

3. NAVIGABLE WATERS ⟸36(1)—LANDS UNDER WATER—OWNERSHIP OF SOIL.

That sand in the bed of a navigable stream is migratory, or liable to be shifted, does not change its character while at rest upon the river bed, as respects the right of the state to require payment from persons taking sand from the bed of the stream.

4. NAVIGABLE WATERS ⟸36(4) — LANDS UNDER WATER—REGULATION OF USE.

That there is a public right to take sand from a navigable stream does not hinder the state from collecting for the good of the whole public a charge from those individuals taking sand and thereby withdrawing it from public access.

In Error to the Supreme Court of the State of Kansas.

Mandamus by the State of Kansas, on relation of S. M. Brewster, Attorney General,

against the State Treasurer, in which Norman S. Wear, impleaded as the Wear Sand Company, and F. D. Fowler were made parties. The Supreme Court of Kansas (State ex rel. Dawson v. Akers, 92 Kan. 169, 140 Pac. 637, Ann. Cas. 1916B, 543) granted the writ, and Wear and Fowler bring error. Affirmed.

Mr. Francis C. Downey, of Kansas City, Mo., for plaintiffs in error.

Mr. J. L. Hunt, of Topeka, Kan., for defendant in error.

*155 *Mr. Justice HOLMES delivered the opinion of the Court.

This is a petition for mandamus to require the Treasurer of the State to transfer certain funds from a special account to the general revenue funds of the State, so that they can be used for paying the expenses of government. The money in question was collected under the State laws of 1913, c. 259, requiring payment of ten per cent. of the market value on the river bank of sand taken by private persons or corporations from the bed of streams subject to the control of the State. It was paid by the plaintiffs in error for sand taken from the Kansas River at Topeka, and it was kept as a separate fund because the plaintiffs in error paid it under duress and protest and claimed the right to recover it before it should lose its identity by the transfer demanded. Under the State procedure the plaintiffs in error were made parties and came in and set up *156 title to the fund. The Supreme Court of the State *overruled the claim and directed the issue of the peremptory writ.

This case was decided on a motion to quash the answers; the allegations of which, so far as now material, may be summed up as follows. In 1859 the Territorial Legislature of Kansas enacted that the Territory should be governed by the common law of England, which still remains the law of the State. On October 1, 1860, the United States conveyed land adjoining the Kansas River to the predecessor in title of the plaintiffs in error, and as the tides do not ebb and flow in the river, they allege that the conveyance carried title to the middle of the stream; that they were the owners of the sand dredged from the same; that to enforce the provisions of the Act of 1913 against them would infringe the Fourteenth Amendment, and that they paid the sums exacted under protest and duress, the circumstances of which are detailed. The river was meandered on both sides by the surveys of the United States up to above this land, and with the Missouri and Mississippi constitutes an open and unobstructed water way from the up stream end of the meander lines to the Gulf of Mexico and the high seas. But the plaintiff in error Fowler, while adopting this allegation, alleges that it is not and never has been a navigable stream, and in 1864 the Kansas Legislature made a declaration to that effect. There follow allegations that the sand is migratory, and, in short, of the nature of animals feræ naturæ, and that ever since the admission of the State the persons within it have taken the sand as of common right. The presence of the sand is alleged to interfere with the use of the stream for its proper purpose of navigation as a valuable commercial highway, the river being alleged to be a public highway the use of which, including the right to take sand, belongs to the people in the State. It also is suggested that if the Court should entertain jurisdiction and determine the questions of fact arising in the proceeding the *plaintiffs in error would be deprived of the equal protection of the laws contrary to the Constitution of the United States.

[1] The argument of the plaintiffs in error does not need a lengthy response or a statement of all the answers that might be made to it. It was said that the territorial statute gave to the patent of the United States the effect of a grant ad filum aquæ. But this attributes too detailed and precise an effect to a general provision of law. We should be slow to believe that a State beginning its organized life with an express adoption of the common law of England, stood any differently from one where the common law was assumed to prevail because the citizens were of English descent. Therefore when the Supreme Court of Kansas regards the principle of the common law to be that the fact of navigability, not the specific test of navigability convenient for England, is what excludes riparian ownership of river beds, it is impossible for us to say that the territorial statute even purports to give greater rights. The Genessee Chief, 12 How. 443, 13 L. Ed. 1058, had been decided before the Territorial Act of 1859 (Laws 1859, c. 121) was passed, and as was observed by Mr. Justice Bradley in Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224, after that decision there seemed to be no sound reason for adhering to the old rule as the proprietorship of the beds and shores of waters held navigable by that case. See further Shively v. Bowlby, 152 U. S. 1, 58, 14 Sup. Ct. 548, 38 L. Ed. 331; Kansas v. Colorado, 206 U. S. 46, 93, 94, 27 Sup. Ct. 655, 51 L. Ed. 956; Donnelly v. United States, 228 U. S. 243, 261, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710. We think it too plain for extended argument that the Territorial Act created no constitutional obstacle to the present decision of the Kansas Court.

[2] Then it was said, if navigability in fact is the test, the plaintiffs in error were entitled to go to a jury on that fact, as it was in 1860, the date of the original grant, and the Supreme Court of the State was not entitled to take judicial notice that the river *158 was navigable at Topeka. *But there is no constitutional right to trial by jury in such a case, and if a State Court takes upon itself to know without evidence whether the principal river of the State is navigable at

the capital of the State we certainly cannot pronounce it error. In this aspect it is a question of State law. Donnelly v. United States, 228 U. S. 243, 262, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710. See Archer v. Greenville Sand and Gravel Co., 233 U. S. 60, 68, 69, 34 Sup. Ct. 567, 58 L. Ed. 850. The fact is of a kind that should be established once for all, not perpetually retried. The Court had too, in favor of its decision, the circumstance that the stream was meandered in the original surveys; the decisions of its predecessors; Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330; Topeka Water Supply Co. v. Potwin, 43 Kan. 404, 413, 23 Pac. 578; Johnston v. Bowersock, 62 Kan. 148, 61 Pac. 740; Kaw Valley Drainage District v. Missouri Pacific Railway Co., 99 Kan. 188, 202, 161 Pac. 937; Kaw Valley Drainage District v. Kansas City Southern Ry. Co., 87 Kan. 272, 275, 123 Pac. 991; Id., 233 U. S. 75, 34 Sup. Ct. 564, 58 L. Ed. 857; legislation of the State; Private Laws of 1858, c. 30, § 4, c. 31, § 4, c. 34; 1860, c. 20, § 3, etc.; and of the United States; Act of May 17, 1886, c. 348, 24 St. 57; Act of January 22, 1894, c. 15, 28 St. 27; Act of July 1, 1898, c. 546, 30 Stat. 597, 633, etc.; and the assent, so far as it goes, of this Court; Kansas City Southern Ry. Co. v. Kaw Valley Drainage District, 233 U. S. 75, 77, 34 Sup. Ct. 564, 58 L. Ed. 857, not to speak of the allegations in the answers of the Wear Sand Company, adopted, notwithstanding his denial of navigability, by Fowler, the other plaintiff in error before this Court.

[3, 4] The allegation that the sand is migratory and belongs to whoever may reduce it to possession, and the allegation of the public right, are inconsistent, of course, with the claim of title and hardly consistent with the allegation that it is got by dredging. But the fact that it is liable to be shifted does not change its character while at rest upon the river bed, and if there were the public right alleged, it would not hinder the State from collecting, for the good of the whole public, a charge from those individuals who withdraw it *from public access. We see nothing in the case of the plaintiffs in error that requires further answers that might be made, or discussion at greater length.

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Judgment affirmed.

(245 U. S. 153)

DAY et al. v. UNITED STATES.

(Argued Nov. 13, 1917. Decided Nov. 26, 1917.)

No. 43.

1. UNITED STATES ⟸70(2)—CONTRACTS—EXTRA COMPENSATION.

A contract with the government for a river improvement required the contractor to base his proposal upon his personal investigation and made him responsible for the preservation and good condition of the work until the termination of the contract, or until the work was turned over to the government in a completed condition. The government had built a bulkhead to protect the work, but there was no guaranty that it was sufficient, and while the contract provided for an extension of time in case the contractor was prevented by freshets or other forces, or violence of the elements, from commencing or completing the work, it provided no other relief in such case. *Held* that, where an unusually high flood made it necessary to raise the height of the protecting dam, the contractor was not entitled to extra compensation for this work, as it was for his own interest to protect the work.

2. CONTRACTS ⟸309(1)—OBLIGATION TO PERFORM—ABILITY TO PERFORM.

One contracting to do work takes the risk, within the limits of his undertaking, of being able to perform, though the old rule has been abated somewhat in determining the scope of the undertaking by the literal meaning of the words alone.

Appeal from the Court of Claims.

Suit by John George Day and another, partners under the firm name of J. G. & I. N. Day, against the United States. From a judgment for the United States, the claimants appeal. Affirmed.

Mr. Benjamin Carter, of Washington, D. C., for appellants.

Mr. Assistant Attorney General Thompson, for appellee.

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*Mr. Justice HOLMES delivered the opinion of the Court.

[1] This is a suit by a contractor to recover for work and material furnished to build a bulkhead and temporary dams in order to protect a canal and locks at the cascades of the Columbia River against an extraordinary flood. The facts of the case are simple. An Act of Congress of July 13, 1892, c. 158, 27 Stat. 109, appropriated $326,250 for continuing an improvement at the cascades that had been under way for a number of years, and authorized a contract for completing it, to be paid for as subsequent further appropriations, not exceeding $1,410,250, should be made. On December 27, 1892, the claimants made a contract to "furnish such labor and material in place," etc., "as may be necessary to complete" the canal and locks, at certain rates, the total of all payments not to exceed $1,745,500, the amount of the two just-mentioned sums. The contractor was required in the usual way to base his proposal upon his personal investigation and the specifications provided in reiterated words that the contractor would "be held responsible, without expense to the Government, for the preservation and good condition of all the work now in place, and such as he may from time to time under this contract put in place, until the termination of the contract, or until the whole work is turned over to the Government in a completed condition, as required."

The Government had built a bulkhead

*161 to protect the *work, 142 feet high, which was the height of the projected work and was supposed to be high enough for floods, but in May and June, 1894, the flood in question rose three feet above it, necessitating the extra work now sued for, and leading to a change in the project so as to add six feet to the height of the protecting dam. The Government, however, had not guaranteed that the bulkhead should be sufficient or that it would protect the work while going on. On the contrary the contract contemplated, in terms, that the contractor might be prevented from commencing or completing the work by freshets or other forces or violence of the elements and provided in that event that the representative of the United States might allow such additional time as in his judgment should be just and reasonable, but gave no other relief.

[2] One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking. The modern cases may have abated somewhat the absoluteness of the older ones in determining the scope of the undertaking by the literal meaning of the words alone. The Kronprinzessin Cecilie, 244 U. S. 12, 22, 37 Sup. Ct. 490, 61 L. Ed. 960. But when the scope of the undertaking is fixed, that is merely another way of saying that the contractor takes the risk of the obstacles to that extent. Carnegie Steel Co. v. United States, 240 U. S. 156, 164, 36 Sup. Ct. 342, 60 L. Ed. 576; Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 543, 544, 23 Sup. Ct. 754, 47 L. Ed. 1171. There can be no doubt of the scope of the undertaking in this case. If the unqualified agreement to complete the work were not enough by itself, Chicago, Milwaukee & St. Paul Ry. Co. v. Hoyt, 149 U. S. 1, 14, 15, 30 Sup. Ct. 779, 37 L. Ed. 625, the provisions to which we have referred would make it plain. Freshets were contemplated as possible but were not allowed to qualify the absoluteness of the contractor's promise, beyond the possibility that they might be considered in the discretion of the other party on the question of time. It is impossible for us to say that if the flood had destroyed the work that the claimants had added and for which they had received nearly $300,000, they would have been excused under the contract from replacing what they had done.

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It follows, without the need of referring to clauses in the contract excluding claims for extra work, that if the claimants put up temporary defences against the water, even though not bound to do so by the contract, they were doing what it was for their own interest and safety to do, and that in the absence of an actual contract to pay for it by the other party there is no ground for shifting the cost on to the United States. The arguments that are based by the claimants upon public documents outside of the record do not seem to us to raise a doubt that the construction adopted and conclusion reached by the Court of Claims were correct.

Judgment affirmed.

(245 U. S. 162)

PHILADELPHIA & READING COAL & IRON CO. v. GILBERT.

(Argued and Submitted Nov. 6, 1917. Decided Nov. 26, 1917.)

No. 454.

1. APPEAL AND ERROR ⟸1—CERTIORARI ⟸9—REVIEW OF DECISIONS OF STATE COURTS—RIGHT OF REVIEW.

A writ of error to review a decision of a state court in the cases specified in the statute is granted as of right, while a writ of certiorari is granted or refused in the exercise of a sound discretion.

2. APPEAL AND ERROR ⟸10 — PROPER MODE OF REVIEW—WRIT OF ERROR OR CERTIORARI.

Under Judicial Code (Act March 3, 1911, c. 231) § 237, 36 Stat. 1156 (Comp. St. 1916, § 1214) as amended by Act Sept. 6, 1916, c. 448, 39 Stat. 726, authorizing a review on writ of error of any final judgment or decree of any state court of last resort in a suit where the validity of a treaty or statute of, or an authority exercised under, the United States, is drawn in question, and the decision is against their validity, or where the validity of a state statute or authority is drawn in question as repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, and also authorizing a review on certiorari in certain cases, including cases where any title, right, privilege, or immunity is claimed under the Constitution of the United States, and the decision is in favor of or against such title, right, privilege, or immunity, where a foreign corporation moved to set aside the service of the summons on the ground that service within the state on a cause of action arising outside the state was an invasion of its rights under Const. U. S. Amend. 14, § 1, a writ of error would not lie, and the proper mode of review was by certiorari, under the provision relating to cases in which any title, right, privilege, or immunity is claimed under the federal Constitution.

In Error to the Supreme Court of the State of New York.

Action by John Gilbert against the Philadelphia & Reading Coal & Iron Company. A judgment for plaintiff was affirmed by the Appellate Division of the Supreme Court of New York (176 App. Div. 889, 162 N. Y. Supp. 1121), and defendant brings error. Writ of error dismissed.

Mr. Pierre M. Brown, of New York City, for plaintiff in error.

Mr. Samuel Seabury and Mr. William M. Seabury, both of New York City, for defendant in error.

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*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

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This was an action in a state court in New York by a resident of that state against a Pennsylvania corporation to recover for a

personal injury sustained by the former while employed in the latter's coal mine in Pennsylvania. In addition to mining coal in Pennsylvania, the defendant was doing business in New York and, conformably to the laws of the latter state, had designated an agent therein upon whom process against it might be served. The summons was served upon this agent. After an unsuccessful effort to have the service set aside as invalid, the defendant answered and the further proceedings resulted in a judgment for the plaintiff, which was affirmed, without opinion, by the Appellate Division of the Supreme Court. An appeal to the Court of Appeals was denied, and the defendant sued out this writ of error. A motion to dismiss the writ is made upon the ground that the judgment, if open to review here, cannot be reviewed upon a writ of error, but only upon a writ of certiorari.

[1] Under section 237 of the Judicial Code, as amended September 6, 1916 (39 Stat. 726, c. 448), a final judgment or decree of a state court of last resort in a suit "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity," may be reviewed in this court upon writ of error; but, if the suit be one "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity, or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity, or where any title, right, privilege, or immunity is
165 claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority," the judgment or decree can be reviewed in this court only upon a writ of certiorari. The difference between the two modes of securing a review, as contemplated by the statute, lies in the fact that a writ of error is granted as of right, while a writ of certiorari is granted or refused in the exercise of a sound discretion.

[2] By a timely motion the defendant sought to have the service of the summons set aside upon the ground—

"that said service is void, in that the defendant's consent to be sued in the state of New York by service upon its aforesaid designated agent, can only be implied with respect to causes of action arising in connection with business the defendant transacts in the state of New York; the plaintiff's cause of action herein did not arise in connection with the business defendant transacts in the state of New York, but is brought to recover damages for personal injuries alleged to have been sustained in the state of Pennsylvania. An attempt to compel the defendant to respond to this suit in the Supreme Court of the state of New York, sitting in Westchester county, is an invasion of the defendant's rights under the Constitution of the United States, particularly section 1 of the Fourteenth Amendment of the said Constitution."

The motion was overruled and the defendant, having first excepted to the ruling, answered to the merits.

All that was drawn in question by the motion was the validity of the service and the power of the court, consistently with the first section of the Fourteenth Amendment—probably meaning the due process of law clause, to proceed upon that service to a hearing and determination of the case. It did not question the validity of *any treaty or *166
statute of, or authority exercised under, the United States. Neither did it challenge the validity of a statute of, or an authority exercised under, any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. Challenging the power of the court to proceed to a decision of the merits did not draw in question an authority exercised under the state, for, as this court has said, the power to hear and determine cases is not the kind of authority to which the statute refers. Bethell v. Demaret, 10 Wall. 537, 540, 19 L. Ed. 1007; French v. Taylor, 199 U. S. 274, 277, 26 Sup. Ct. 76, 50 L. Ed. 189.

It follows that the judgment cannot be reviewed upon writ of error. If a review was desired it should have been sought under that clause of the certiorari provision which reads, "or where any title, right, privilege, or immunity is claimed under the Constitution," etc.

Writ of error dismissed.

MEMORANDUM DECISIONS

Disposed of at October Term, 1917

No. 28. The CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, plaintiff in error, v. The STATE OF KANSAS ex rel. S. M. BREWSTER, Attorney General, etc., et al. Nov. 5, 1917. In error to the Supreme Court of the State of Kansas. For opinion below, see State v. Sessions, 95 Kan. 272, 147 Pac. 789. Mr. Paul E. Walker, of Topeka, Kan., for plaintiff in error. Mr. S. M. Brewster, Atty. Gen., and Messrs. James P. Coleman and F. P. Lindsay, both of Topeka, Kan., for defendants in error.

PER CURIAM. Judgment affirmed with costs upon the authority of St. Louis Southwestern Railway Company v. Arkansas, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed. 265.

No. 55. Jose SANCHEZ y Armijo, plaintiff in error, v. The STATE OF NEW MEXICO. Nov. 5, 1917. In error to the Supreme Court of the State of New Mexico. Mr. T. B. Catron, of Santa Fé, N. M., for plaintiff in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

No. 280. R. V. MOORE, plaintiff in error, v. Walter C. TAYLOR, Commissioner of Insurance of the State of North Dakota, et al. Nov. 5, 1917. In error to the Supreme Court of the State of North Dakota. Mr. Aubrey Lawrence, of Fargo, N. D. (Messrs. Lawrence & Murphy, of Fargo, N. D., of counsel), for plaintiff in error. Mr. Wm. Langer, Atty. Gen., and Mr. Harrison A. Bronson, Asst. Atty. Gen., for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Equitable Life Assurance Society v. Brown, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190, Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co., 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982, and Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123, 137, 34 Sup. Ct. 874, 58 L. Ed. 1245; (2) Butler v. Pennsylvania, 10 How. 402, 415, 416, 13 L. Ed. 472, Newton v. Commissioners, 100 U. S. 548, 559, 25 L. Ed. 710, Taylor v. Beckham, 178 U. S. 548, 20 Sup. Ct. 1009, 44 L. Ed. 1187, and Wilson v. North Carolina, 169 U. S. 586, 18 Sup. Ct. 435, 42 L. Ed. 865; (3) Railroad Co. v. County of Otoe, 16 Wall. 667, 676, 21 L. Ed. 375, Kies v. Lowrey, 199 U. S. 233, 26 Sup. Ct. 27, 50 L. Ed. 167, Stewart v. Kansas City, 239 U. S. 14, 36 Sup. Ct. 15, 60 L. Ed. 120, and Heim v. McCall, 239 U. S. 175, 36 Sup. Ct. 78, 60 L. Ed. 206, Ann. Cas. 1917B, 287.

No. 357. WELLS FARGO & COMPANY et al., appellants, v. Clarence C. CALDWELL, Attorney General, etc., et al. Nov. 5, 1917. Appeal from the District Court of the United States for the District of South Dakota. Messrs. C. O. Bailey, of Sioux Falls, S. D., and Branch P. Kerfoot, of New York City, for appellants. Mr. Clarence C. Caldwell, Atty. Gen., and Mr. P. W. Dougherty, of Pierre, S. D., for appellees. Dismissed, per stipulation, and mandate granted.

No. 445. Bob TERRELL, petitioner, v. The UNITED STATES. Nov. 5, 1917. Mr. Guy H. Sigler, of Ardmore, Okl., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 516. CORRUGATED BAR COMPANY, petitioner, v. TRUSSED CONCRETE STEEL COMPANY. Nov. 5, 1917. For opinion below, see 242 Fed. 933. Messrs. James A. Carr, and T. Percy Carr, both of St. Louis, Mo., for petitioner. Messrs. Fred L. Chappell and Otis A. Earl, both of Kalamazoo, Mich., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 560. Edward W. BLUM, petitioner, v. The BUMILLER-REMELIN COMPANY. Nov. 5, 1917. For opinion below, see 241 Fed. 954. Mr. George B. Parkinson, of South Lincoln, Mass., for petitioner. Messrs. Sturtevant & Mason and Mr. Charles L. Sturtevant, all of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 617. LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY (Ltd.), appellant, v. James J. BAILEY, Secretary of State of the State of Louisiana. Nov. 5, 1917. Appeal from the District Court of the United States for the Eastern District of Louisiana. Mr. J. Zach. Spearing, of New Orleans, La., for appellant. Dismissed with costs, on motion of counsel for the appellant.

No. 655. F. F. DOANE, petitioner, v. CALIFORNIA LAND COMPANY. Nov. 5, 1917. For opinion below, see 243 Fed. 67. Mr. G. R. Freeman, of Corona, Cal., for petitioner. Mr. Alfred A. Fraser, of Boise, Idaho, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 686. The CITY OF CHICAGO, petitioner, v. WHITE TRANSPORTATION COMPANY. Nov. 5, 1917. For opinion below, see 243 Fed. 358. Mr. Samuel A. Ettelson, Corp. Counsel, and Mr. Chester E. Cleveland, Asst. Corp. Counsel, both of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 688. WOO VEY, petitioner, v. The UNITED STATES. Nov. 5, 1917. For opinion below, see 242 Fed. 838. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 689. S. D. BARRETT, petitioner, v. The VIRGINIAN RAILWAY COMPANY. Nov. 5, 1917. For opinion below, see 244 Fed. 397. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted.

No. 695. Theodore DENDINGER, petitioner, v. Arthur L. BEAR, tutor, etc. Nov. 5, 1917. For opinion below, see Bear v. Dendinger, 141 La. 927, 75 South. 845. Messrs. J. D. Dresner and Henry Mooney, both of New Orleans, La., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied.

No. 699. Harry MILLER et al., petitioners, v. The UNITED STATES. Nov. 5, 1917. For opinion below, see 242 Fed. 907. Mr. George F. Deiser, of Philadelphia, Pa., for petitioners. Mr. John W. Davis, Sol. Gen., of Washington, D. C., and Mr. Charels Warren, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

No. 706. The PORT OF PORTLAND, petitioner, v. Wilhelm WILHELMSEN. Nov. 5, 1917. Messrs. Joseph N. Teal, Wirt Minor, A. B. Winfree and William A. Johnson, all of Portland, Or., William C. McCullough, of Cleveland, Ohio, and Rogers MacVeagh, of Portland, Or., for petitioner. Mr. William C. Bristol, of Portland, Or., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 708. James Howard SANNER, petitioner, v. The WESTERN MARYLAND RAILWAY COMPANY. Nov. 5, 1917. For opinion below, see Western Maryland Ry. Co. v. Sanner, 130 Md. 581, 101 Atl. 587. Mr. William C. Sullivan, of Washington, D. C. (Messrs. William Milnes Maloy and George Moore Brady, both of Baltimore, Md., of counsel), for petitioner. Messrs. George R. Gaither and George P. Bagby, both of Baltimore, Md., for respondent. Petition for a writ of certiorari to the Court of Appeals of the State of Maryland denied.

No. 710. SUNDH ELECTRIC COMPANY, petitioner, v. CUTLER-HAMMER MANUFACTURING COMPANY. Nov. 5, 1917. For opinion below, see 244 Fed. 163. Mr. W. Clyde Jones, of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 711. SUNDH ELECTRIC COMPANY, petitioner, v. GENERAL ELECTRIC COMPANY. Nov. 5, 1917. For opinion below, see 244 Fed. 163. Messrs. Frederick P. Fish and Charles Neave, both of Boston, Mass., and Albert G. Davis, of Schenectady, N. Y., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 716. George ORLOV et al., petitioners, v. Abraham ARONSON et al., etc. Nov. 5, 1917. For opinion below, see Aronson v. Orlov, 116 N. E. 951. Messrs. George R. Nutter, Edward F. McClennen, and Jacob J. Kaplan, all of Boston, Mass., for petitioners. Mr. Samuel Sigilman, of Boston, Mass., for respondents. Petition for a writ of certiorari to the Superior Court of the State of Massachusetts denied.

No. 719. The PLANTERS' STEAMSHIP COMPANY, petitioner, v. ROLF SEEBERG SHIP CHANDLERY COMPANY et al. Nov. 5, 1917. Mr. John D. Grace, of New Orleans, La., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 720. The LIBERAL ELEVATOR COMPANY, petitioner, v. The WICHITA MILL & ELEVATOR COMPANY. Nov. 5, 1917. For opinion below, see Wichita Mill & Elevator Co. v. Liberal Elevator Co., 243 Fed. 99. Messrs. E. F. Colladay, of Washington, D. C., and C. M. Williams, of Hutchinson, Kan., for petitioner. Messrs. Chester I. Long and Austin M. Cowan, both of Wichita, Kan., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 730. UNITED METALS SELLING COMPANY, petitioner, v. Edward B. PRYOR et al. Nov. 5, 1917. For opinion below, see 243 Fed. 91. Mr. John A. Garver, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 731. N. B. K. PETTINGILL, petitioner, v. Walter McK. JONES. Nov. 5, 1917. For opinion below, see Jones v. Pettingill, 245 Fed. 269. Mr. N. B. K. Pettingill, of Tampa, Fla., in pro. per. Messrs. Rounds, Hatch, Dillingham & Debevoise, of New York City (Messrs. Francis E. Neagle, of New York City, and Woodward Emery, of Boston, Mass., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

No. 732. Ella GETKIN, petitioner, v. The PENNSYLVANIA RAILROAD COMPANY. Nov. 5, 1917. Messrs. William M. Hargest and William M. Hain, both of Harrisburg, Pa., for petitioner. Petition for a writ of certiorari to the Court of Common Pleas of Dauphin County, State of Pennsylvania, denied.

No. 736. GLOBE STEAMSHIP COMPANY, claimant, etc., petitioner, v. Henry MOSS. Nov. 5, 1917. For opinion below, see 245 Fed. 54. Messrs. Harvey D. Goulder and Thomas H. Garry, both of Cleveland, Ohio, and Wm. B. Cady, of Detroit, Mich., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 737. William BAULCH, petitioner, v. The STRATHLEVEN STEAMSHIP COMPANY (Ltd.). Nov. 5, 1917. For opinion below, see Strathleven Steamship Co. v. Baulch, 244 Fed. 412. Mr. Robert H. Talley, of Richmond, Va., for petitioner. Mr. Floyd Hughes, of Norfolk, Va., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

No. 45. SOUTHERN RAILWAY COMPANY, plaintiff in error, v. C. S. COOK, administrator of W. M. Poteat, deceased. Nov. 9, 1917. In error to the United States Circuit Court of Appeals for the Fourth Circuit. For opinion below, see 226 Fed. 1, 141 C. C. A. 115. Mr. Robert B. Tunstall, of Norfolk, Va., for plaintiff in error. Mr. Harry Wooding, Jr., of Danville, Va., for defendant in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

No. 34. The UNITED STATES of America for the Use of T. H. KESSLER & COMPANY, plaintiff in error, v. TITLE GUARANTY & SURETY COMPANY. Nov. 12, 1917. In error to the United States Circuit Court of Appeals for the Fifth Circuit. For opinion below, see 218 Fed. 67, 134 C. C. A. 19. Mr. James A. Baker, of Houston, Tex., for plaintiff in error. Mr. Lewis R. Bryan, of Houston, Tex., for defendant in error.

PER CURIAM. Judgment affirmed with costs upon the authority of Illinois Surety Company v. Peeler, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609, and cause remanded to the District Court of the United States for the Southern District of Texas.

No. 35. E. O. ELLISON, plaintiff in error, v. CITY OF LA MOURE et al.; and

No. 36. David LLOYD, plaintiff in error, v. CITY OF LA MOURE et al. Nov. 12, 1917. In error to the Supreme Court of the State of North Dakota. For opinions below, see 30 N. D. 43, 151 N. W. 988; 30 N. D. 52, 151 N. W. 991. Mr. S. E. Ellsworth, of Jamestown, N. D., for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Kansas City Star Co. v. Julian, 215 U. S. 589, 30 Sup. Ct. 406, 54 L. Ed. 340; McCorquodale v. Texas, 211 U. S. 432, 437, 29 Sup. Ct. 146, 53 L. Ed. 269; St. Louis & San Francisco Ry. Co. v. Shepherd, 240 U. S. 240, 241, 36 Sup. Ct. 274, 60 L. Ed. 622.

No. 150. Eugene W. MORAN, plaintiff in error, v. CENTRAL RAILROAD COMPANY OF NEW JERSEY. Nov. 12, 1917. In error to the Court of Errors and Appeals of the State of New Jersey. For opinion below, see 88 N. J. Law, 730, 96 Atl. 1023. Messrs. Frank M. Hardenbrook and Charles M. Egan, both of Jersey City, N. J., for plaintiff in error. Messrs. George Holmes, of New York City, and Edwards & Smith, of Jersey City, N. J. (Mr. Charles E. Miller, of Jersey City, N. J., of counsel), for defendant in error.

PER CURIAM. Judgment affirmed with costs upon the authority of Chicago, Burlington & Quincy R. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941; Lehigh Valley R. R. Co. v. Barlow, 244 U. S. 183, 37 Sup. Ct. 515, 61 L. Ed. 1070.

No. 350. Helen BELL, as administratrix of George Bell, deceased, plaintiff in error, v. The CHESAPEAKE & OHIO RAILWAY COMPANY. Nov. 12, 1917. In error to the Court of Appeals of the State of Kentucky. For opinion below, see 161 Ky. 466, 170 S. W. 1180. Mr. Allan D. Cole, of Maysville, Ky. (Messrs. W. T. Cole, of Greenup, Ky., and H. W. Cole, of Maysville, Ky., of counsel), for plaintiff in error. Messrs. E. L. Worthington, W. D. Cochran, and Lewright Browning, all of Maysville, Ky., for defendant in error.

PER CURIAM. Judgment affirmed with costs upon the authority of Chicago Junction Railway Co. v. King, 222 U. S. 222, 32 Sup. Ct. 79, 56 L. Ed. 173; Seaboard Air Line Railway v. Padgett, 236 U. S. 668, 35 Sup. Ct. 481, 59 L. Ed. 777; Baltimore & Ohio Railroad Co. v. Whitacre, 242 U. S. 169, 37 Sup. Ct. 33, 61 L. Ed. 228.

No. 366. William A. TROGLER et al., appellants, v. The UNITED STATES et al. Nov. 12, 1917. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see United States v. Trogler, 237 Fed. 181, 150 C. C. A. 327. Mr. Edwin H. Park, of Denver Colo., for appellants. Mr. Archibald A. Lee, of Denver, Colo., for appellees E. M. Dorsey and H. S. Dorsey.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of: 1. Whitney v. Dick, 202 U. S. 132, 135, 26 Sup. Ct. 584, 50 L. Ed. 963; McClellan v. Carland, 217 U. S. 268, 278, 30 Sup. Ct. 501, 54 L. E. 762. 2. Smith v. Indiana, 191 U. S. 138, 148–150, 24 Sup. Ct. 51, 48 L. Ed. 125; McCandless v. Pratt, 211 U. S. 437, 440, 29 Sup. Ct. 144, 53 L. Ed. 271.

No. 542. Alberto SANDOVAL et al., petitioners, v. Ida C. PFEUFFER et al. Nov. 12, 1917. For opinion below, see 237 Fed. 1020, 150 C. C. A. 669. Mr. Don A. Bliss, of San Antonio, Tex., for petitioners. Messrs. S. J. Brooks, Wm. Aubrey, Guinn & McNeill, and Marcus W. Davis, all of San Antonio, Tex., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 612. Charles M. SIMPSON, petitioner, v. The UNITED STATES. Nov. 12, 1917. For opinion below, see 241 Fed. 841. Mr. George H. Eichelberger, of Cleveland, Ohio (Messrs. Mathews, Orgill & Maschke, of Cleveland, Ohio, of counsel), for petitioner. Mr. John W. Davis, Sol. Gen., of Washington, D. C., and Mr. Edwin S. Wertz, of Cleveland, Ohio, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 721. GREAT NORTHERN RAILWAY COMPANY, petitioner, v. The UNITED STATES of America. Nov. 12, 1917. For opinion below, see 244 Fed. 406. Messrs. E. C. Lindley, of St. Paul, Minn., F. V. Brown, of Seattle, Wash., and Charles S. Albert, of Spokane, Wash., for petitioner. Mr. John W. Davis, Sol. Gen., of Washington, D. C., and Mr. William L. Frierson, Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 725. J. E. BALDWIN, petitioner, v. The UNITED STATES of America. Nov. 12, 1917. For opinion below, see 238 Fed. 793, 151 C. C. A. 643. Mr. A. S. Baskett, of Dallas, Tex., for petitioner. Mr. John W. Davis, Sol. Gen., of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 726. The PEOPLE OF PORTO RICO, petitioner, v. Eduardo WYS. Nov. 12, 1917. Mr. Howard L. Kern, Atty. Gen., and Messrs. Samuel T. Ansell and Edward S. Bailey, both of Washington, D. C., for the People of Porto Rico. Mr. Rafael R. Rivera Zayas, of San Juan,

Porto Rico, for respondent. Petition for a writ of certiorari to the Supreme Court of Porto Rico denied.

No. 727. The PEOPLE OF PORTO RICO, petitioner, v. Aniceto BERRIOS. Nov. 12, 1917. Messrs. Howard L. Kern, Samuel T. Ansell, and Edward S. Bailey, all of Washington, D. C., for the People of Porto Rico. Messrs. R. Martinez Nadal, Manuel F. Rossy, and Juan B. Soto, all of San Juan, Porto Rico, for respondent. Petition for a writ of certiorari to the Supreme Court of Porto Rico denied.

No. 729. Clemente RAMIREZ, petitioner, v. The PEOPLE OF PORTO RICO. Nov. 12, 1917. Mr. Carroll G. Walter, of New York City, for petitioner. Messrs. Samuel T. Ansell and Edward S. Bailey, both of Washington, D. C., for the People of Porto Rico. Petition for a writ of certiorari to the Supreme Court of Porto Rico denied.

No. 741. H. Bradley DAVIDSON et al., petitioners, v. The E. F. BROOKS COMPANY. Nov. 12, 1917. Mr. John C. Gittings, of Washington, D. C., for petitioners. Messrs. Henry F. Woodward and Daniel Thew Wright, both of Washington, D. C., for respondent. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

No. 742. HARTFORD LIFE INSURANCE COMPANY, petitioner, v. Nannie M. JOHNSON. Nov. 12, 1917. For opinion below, see Johnson v. Hartford Life Ins. Co., 197 S. W. 132. Petition for a writ of certiorari to the Supreme Court of the State of Missouri granted.

No. 743. SOUTHERN RAILWAY COMPANY, petitioner, v. Thomas YOUNG. Nov. 12, 1917. Messrs. L. E. Jeffries, of Washington, D. C., Benjamin Lindsey Abney, of Columbia, S. C., and J. E. McDonald, of Winnsboro, S. C., for petitioner. Messrs. J. Fraser Lyon, of Columbia, S. C., and J. Harry Foster, of Rock Hill, S. C., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina denied.

No. 745. Morgan O. LLEWELLYN et al., petitioners, v. The STATE OF NEW MEXICO. Nov. 12, 1917. For opinion below, see State v. Llewellyn, 167 Pac. 414. Messrs. Francis C. Wilson, of Santa Fé, N. M., and S. P. Weisiger, of El Paso, Tex., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of New Mexico denied.

No. 64. The UNITED STATES of America ex rel. David BOWLEGS, a minor, etc., plaintiff in error, v. Franklin K. LANE, Secretary of the Interior. Nov. 15, 1917. In error to the court of appeals of the District of Columbia. Mr. James W. McNeill, of Washington, D. C., for plaintiff in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

No. 65. Thomas D. AITKEN et al., plaintiffs in error, v. The UNITED STATES of America. Nov. 15, 1917. In error to the Supreme Court of the Philippine Islands. Mr. C. L. Bouve, of Washington, D. C., for plaintiffs in error. Mr. Samuel T. Ansell, of Washington, D. C., for the United States. Dismissed pursuant to the tenth rule.

No. 42. AMERICAN RADIATOR COMPANY, plaintiff in error, v. John F. ROGGE, administrator of the estate of John F. Rogge, Jr., deceased. Nov. 19, 1917. In error to the Supreme Court of the State of New Jersey. For opinion below, see 86 N. J. Law, 436, 92 Atl. 85, judgment affirmed 87 N. J. Law, 314, 93 Atl. 1083. Mr. John Franklin Fort, of Newark, N. J., for plaintiff in error. Mr. John K. English, of Elizabeth, N. J., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Haire v. Rice, 204 U. S. 291, 27 Sup. Ct. 281, 51 L. Ed. 490; Thomas v. Iowa, 209 U. S. 258, 28 Sup. Ct. 487, 52 L. Ed. 782; Appleby v. Buffalo, 221 U. S. 524, 529, 31 Sup. Ct. 699, 55 L. Ed. 838.

No. 46. The GERMANIA REFINING COMPANY et al., plaintiffs in error, v. Oramel B. FULLER, Auditor General, et al. Nov. 19, 1917. In error to the Supreme Court of the State of Michigan. For opinion below, see 184 Mich. 618, 151 N. W. 605. Mr. Charles D. Chamberlin, of Cleveland, Ohio, for plaintiffs in error. Mr. Grant Fellows, of Hudson, Mich., for defendants in error.

PER CURIAM. Judgment affirmed with costs upon the authority of American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 19 Sup. Ct. 599, 43 L. Ed. 899; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 20 Sup. Ct. 631, 44 L. Ed. 708.

No. 47. CHICAGO CAR HEATING COMPANY, appellant, v. GOLD CAR HEATING & LIGHTING COMPANY. Nov. 19, 1917. Appeal from the District Court of the United States for the Northern District of Illinois. Mr. Otto Raymond Barnett, of Chicago, Ill., for appellant. Messrs. William A. Redding, of New York City, Edward Rector, of Chicago, Ill., and Arthur C. Fraser, of New York City, for appellee.

PER CURIAM. Judgment affirmed with costs upon the authority of Green v. Chicago, Burlington & Quincy Railway Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; W. S. Tyler Co. v. Ludlow-Saylor Wire Co., 236 U. S. 723, 35 Sup. Ct. 458, 59 L. Ed. 808.

No. 49. Francis Stephen MEDCRAF, appellant, v. Robert T. HODGE, as Sheriff of King County, Washington. Nov. 19, 1917. Appeal from the District Court of the United States for the Western District of Washington. Messrs. Samuel H. Piles and W. B. Stratton, both of Seattle, Wash., for appellant.

PER CURIAM. Judgment affirmed with costs upon the authority of Ex parte Royall, 117 U. S. 241, 251, 6 Sup. Ct. 734, 29 L. Ed. 868; In re Frederich, petitioner, 149 U. S. 70, 77, 13 Sup. Ct. 793, 37 L. Ed. 653; Markuson v. Boucher, 175 U. S. 184, 20 Sup. Ct. 76, 44 L. Ed. 124; Urquhart v. Brown, 205 U. S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760; Frank v. Mangum, 237 U. S. 309, 328, 329, 35 Sup. Ct. 582, 59 L. Ed. 969.

No. 59. BELLOWS FALLS POWER COMPANY, plaintiff in error, v. The COMMONWEALTH OF MASSACHUSETTS. Nov. 19, 1917. In error to the Supreme Judicial Court of the State of Massachusetts. For opinion be-

low, see 222 Mass. 51, 109 N. E. 891. Mr. Richard Y. Fitz Gerald, of Boston, Mass., for plaintiff in error. Messrs. Henry C. Attwill, of Lynn, Mass., and Wm. Harold Hitchcock, of Boston, Mass., for the Commonwealth of Massachusetts.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Equitable Life Assurance Society v. Brown, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co., 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; Manhattan Life Insurance Co. v. Cohen, 234 U. S. 123, 137, 34 Sup. Ct. 874, 58 L. Ed. 1245; Easterling Lumber Co. v. Pierce, 235 U. S. 380, 35 Sup. Ct. 133, 59 L. Ed. 279. See Hamilton Company v. Massachusetts, 6 Wall. 632, 18 L. Ed. 904.

No. 69. ENTERPRISE RAILWAY EQUIPMENT COMPANY, appellant, v. NORFOLK & WESTERN RAILWAY COMPANY. Nov. 19, 1917. Appeal from the District Court of the United States for the Northern District of Illinois. Mr. H. N. Low, for appellant. Messrs. Theodore W. Reath, of Philadelphia, Pa., and Robert J. Fisher, of Washington, D. C., for appellee.

PER CURIAM. Judgment affirmed with costs upon the authority of Green v. Chicago, Burlington & Quincy Railway Company, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; W. S. Tyler Co. v. Ludlow-Saylor Wire Co., 236 U. S. 723, 35 Sup. Ct. 458, 59 L. Ed. 808.

No. 712. NEW YORK SCAFFOLDING COMPANY, petitioner, v. LIEBEL-BINNEY CONSTRUCTION COMPANY. Nov. 19, 1917. For opinion below, see 243 Fed. 577. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

No. 713. NEW YORK SCAFFOLDING COMPANY, petitioner, v. CHAIN BELT COMPANY et al. Nov. 19, 1917. For opinion below, see Chain Belt Co. v. New York Scaffolding Co., 245 Fed. 747. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted.

No. 79. John JOHNSTONE, plaintiff in error, v. Andrew SCHMIDT et al. Nov. 20, 1917. In error to the Supreme Court of the State of North Dakota. For opinion below, see Schmidt v. Johnstone, 31 N. D. 53, 153 N. W. 293. Messrs. C. L. Young and F. C. Heffron, of Dickinson, N. D., for plaintiff in error. Mr. James E. Trask, of St. Paul, Minn., for defendants in error. Dismissed with costs, pursuant to the tenth rule.

No. 86. James McDOWALL et al., plaintiffs in error, v. Edward I. DONOVAN et al. Nov. 22, 1917. In error to the Supreme Court of the State of North Dakota. Mr. Edward Engerud, of Fargo, N. D., for plaintiffs in error. Mr. Samuel Herrick, of Washington, D. C., for defendants in error. Dismissed with costs, pursuant to the tenth rule.

No. 87. George H. MUNROE et al., plaintiffs in error, v. Edward I. DONOVAN et al. Nov. 22, 1917. In error to the Supreme Court of the State of North Dakota. For opinion below, see 31 N. D. 228, 153 N. W. 461. Mr. Edward Engerud, of Fargo, N. D., for plaintiffs in error. Mr. Samuel Herrick, of Washington, D. C., for defendants in error. Dismissed with costs, pursuant to the tenth rule.

No. 57. CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY, plaintiff in error, v. Joseph M. McCOLLUM, administrator of the estate of Joseph William Roebuck. Nov. 26, 1917. In error to the Supreme Court of the State of Indiana. For opinion below, see Cinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206. Messrs. Morison R. Waite, of Cincinnati, Ohio, J. W. Fesler, Harvey J. Elam and Howard S. Young, all of Indianapolis, Ind., for plaintiff in error. Messrs. Merrill Moores, J. Burdette Little, and William F. Elliott, all of Indianapolis, Ind., for defendant in error.

PER CURIAM. Judgment affirmed with costs upon the authority of Louisville & Nashville Railroad Company v. Melton, 218 U. S. 36, 52, 53, 30 Sup. Ct. 676, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160; Mutual Loan Company v. Martell, 222 U. S. 225, 235, 32 Sup. Ct. 74, 56 L. Ed. 175, Ann. Cas. 1913B, 521; St. Louis, Iron Mountain & Southern Ry. Co. v. Arkansas, 240 U. S. 518, 36 Sup. Ct. 443, 60 L. Ed. 776.

No. 744. MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, petitioner, v. The UNITED STATES OF AMERICA. Nov. 26, 1917. For opinion below, see 245 Fed. 60. Mr. F. M. Miner, of Minneapolis, Minn., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 755. HARGADINE - McKITTRICK DRY GOODS COMPANY, petitioner, v. Christian J. ZEITINGER et al. Nov. 26, 1917. For opinion below, see Zeitinger v. Hargadine-McKittrick Dry Goods Co., 244 Fed. 719. Mr. Charles A. Houts, of St. Louis, Mo., for petitioner. Messrs. Matt G. Reynolds, Randolph Laughlin, Julian Laughlin and Chase Morsey, all of St. Louis, Mo., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(245 U. S. 229)

HITCHMAN COAL & COKE CO. v. MITCHELL et al.

(Argued March 2 and 3, 1916. Restored to Docket for Reargument March 13, 1916. Reargued Dec. 15 and 18, 1916. Decided Dec. 10, 1917.)

No. 11.

1. COURTS ⟸345 — FEDERAL COURTS — APPEARANCE—EFFECT.

Under the federal practice, an appearance to object to the jurisdiction of the court does not bind the parties appearing to submit to the jurisdiction on the overruling of the objection.

2. INJUNCTION ⟸192 — PERSONS WHO MAY BE RESTRAINED—PERSONS NOT PARTIES.

In a suit for an injunction against officers of certain labor unions and others, it was error to grant personal relief by injunction against persons who, pending the suit, were chosen to succeed some of the original defendants as officers of such unions, but who were not served with process and did not appear, on the ground that they were before the court by representation, as there is no such privity between the holder of an office in a voluntary association and his successor as to bind the latter by process issued against the former, and the suit was not a representative one within equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix), providing that when a question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

3. APPEAL AND ERROR ⟸1043(5)—HARMLESS ERROR—ERRORS FAVORABLE TO APPELLANT.

In a suit to enjoin certain persons individually and as officers of labor unions, the error, if any, in enjoining them only in their individual capacities, and not in their official capacities, could not be complained of by them.

4. APPEAL AND ERROR ⟸877(3)—RIGHT TO ALLEGE ERROR—ERRORS AFFECTING PERSONS NOT PARTIES.

In a suit for injunction against officers of labor unions, a clause in the decree, enjoining as confederates all present and future members of the unions, was not a matter of which the defendants might complain.

5. INJUNCTION ⟸11 — SUBJECTS OF PROTECTION—INTERFERENCE WITH EMPLOYÉS.

Where one attempting to organize the employés of a mine was acting as agent of an organized body of men united in a purpose to close the mine unless the proprietor would make it a union mine, and who lacked the power to carry out that purpose only because they had not, as yet, persuaded a sufficient number of the miners to join with them, and employed such agent with the very object of securing the support of the necessary number of miners, the right to an injunction against his activities was not dependent on whether he had power or authority to shut down the mine.

6. INJUNCTION ⟸101(2)—SUBJECTS OF PROTECTION—INTERFERENCE WITH EMPLOYÉS.

An employer, operating a non-union mine and having agreements with his employés that they would not become members of a union, was as much entitled to an injunction to prevent the unionizing of the miners as the unionizing of the mine, assuming that there is a practical distinction between the two; the first being but a step in the process of unionizing the mine.

7. EVIDENCE ⟸260—DECLARATIONS OF CONSPIRATORS—PRELIMINARY EVIDENCE.

In order that the declarations and conduct of third parties may be admissible against defendant, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful, and the element of illegality may be shown by the declarations themselves.

8. EVIDENCE ⟸253(1) — DECLARATIONS OF CONSPIRATORS—ADMISSIBILITY.

Where H. was engaged in an effort to organize the coal mines of a particular district as the representative of a voluntary association of which defendants were active members, and in the execution of a purpose to which they had given consent, and in which some of them were actively co-operating, his declarations and conduct while so doing were evidence against defendants.

9. MASTER AND SERVANT ⟸3(1)—CONTRACTS OF EMPLOYMENT—CONDITIONS.

An employer is acting within his lawful rights in making non-membership in a union a condition of employment, and no explanation or justification for such course is needed.

10. CONSTITUTIONAL LAW ⟸89(4)—MASTER AND SERVANT ⟸15—REGULATION OF RELATION.

The right of an employer to make non-membership in a union a condition of employment is a part of the constitutional rights of personal liberty and private property which cannot be taken away even by legislation, unless through some proper exercise of the paramount police power.

11. INJUNCTION ⟸101(2)—SUBJECTS OF PROTECTION—INTERFERENCE WITH EMPLOYÉS.

Where an employer made non-membership in a labor union a condition of employment, with the free assent of its employés, the fact that the employment was at will and terminable by either party at any time did not affect its right to an injunction against the efforts of third parties to organize the employés.

12. MASTER AND SERVANT ⟸339—INTERFERENCE WITH RELATION BY THIRD PERSONS.

The right of employés to strike gives no right to a third party having no agency for the employés to instigate a strike, even though they have a grievance.

13. TRADE UNIONS ⟸1—RIGHT TO ORGANIZE.

Workingmen have a right to form unions and to enlarge their membership by inviting other workingmen to join, but this right, like all other rights, must be exercised with reasonable regard for the conflicting rights of others.

14. CONSPIRACY ⟸8—CONSPIRACY TO INJURE IN PROPERTY OR BUSINESS.

A combination to procure concerted breaches of contract by plaintiff's employés constitutes a violation of plaintiff's legal rights, though the measures resorted to stop short of physical violence or coercion through fear of such violence.

15. INJUNCTION ⟸101(2)—SUBJECTS OF PROTECTION—INTERFERENCE WITH EMPLOYÉS.

Plaintiff was operating a non-union mine under a mutual agreement, assented to by every employé, that it would not recognize the union, and that if any man wanted to become a member of the union he might do so, but could not be a member and remain in its employ. Defendants, with full notice of this working agreement and without any agency for the employés, but as representatives of an organization of mine workers in other states and in order to require the operation of the mine as a union mine, sent their agent to the mine, who with full notice of and for the very purpose of subverting the status arising from the working agreement and subjecting the mine to union control, proceeded, without physical violence, but by persuasion accompanied by deceptive statements, to induce the employés to join the union, and at the same time to break their agreement with plaintiff by remaining in its employ after joining, and this was done, not for the purpose of

enlarging the membership of the union, but of coercing plaintiff through a strike, or the threat of one, into recognition of the union. *Held*, that the purpose and the methods resorted to were unlawful and not justified as a fair exercise of the right to increase the membership of the union, and plaintiff was entitled to an injunction against such acts; the damage resulting from a strike being regarded as irremediable at law.

Mr. Justice Brandeis, Mr. Justice Holmes, and Mr. Justice Clarke, dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Suit by the Hitchman Coal & Coke Company against John Mitchell and others. A final decree of the District Court in favor of plaintiff (202 Fed. 512) was reversed by the Circuit Court of Appeals for the Fourth Circuit (Mitchell v. Hitchman Coal & Coke Co., 214 Fed. 685, 131 C. C. A. 425), and plaintiff brings certiorari. Decree of the Circuit Court of Appeals reversed, and decree of the District Court modified and affirmed.

Mr. Hannis Taylor, of Washington, D. C., and Mr. George R. E. Gilchrist, of Wheeling, W. Va., for petitioner.

Mr. Charles E. Hogg, of Point Pleasant, W. Va., and Mr. Charles J. Hogg, of Charleston, W. Va., for respondents.

* 232 *Mr. Justice PITNEY delivered the opinion of the Court.

This was a suit in equity, commenced October 24, 1907, in the United States Circuit (afterwards District) Court for the Northern District of West Virginia, by the Hitchman Coal & Coke Company, a corporation organized under the laws of the state of West Virginia, against certain citizens of the state of Ohio, sued individually and also as officers of the United Mine Workers of America. Other non-citizens of plaintiff's state were named as defendants but not served with process. Those who were served and who answered the bill were T. L. Lewis, vice president of the U. M. W. A. and of the International Union U. M. W. A.; William Green, D. H. Sullivan, and "George" W. Savage (his correct Christian name is Gwilym), respectively president, vice president, and secretary-treasurer of district No. 6, U. M. W. A.; and A. R. Watkins, John Zelenka, and Lee Rankin, respectively president, vice president, and secretary-treasurer of subdistrict No. 5 of district No. 6.

* 233 *Plaintiff owns about 5,000 acres of coal lands situate at or near Benwood, in Marshall county, West Virginia, and within what is known as the "Pan Handle District" of that state, and operates a coal mine thereon, employing between 200 and 300 men, and having an annual output, in and before 1907, of about 300,000 tons. At the time of the filing of the bill, and for a considerable time before and ever since, it operated its mine "non-union," under an agreement with its men to the effect that the mine should be run on a non-union basis, that the employés should not become connected with the union while employed by plaintiff, and that if they joined it their employment with plaintiff should cease. The bill set forth these facts, inter alia, alleged that they were known to defendants and each of them, and "that the said defendants have unlawfully and maliciously agreed together, confederated, combined and formed themselves into a conspiracy, the purpose of which they are proceeding to carry out and are now about to finally accomplish, namely: to cause your orator's mine to be shut down, its plant to remain idle, its contracts to be broken and unfulfilled, until such time as your orator shall submit to the demand of the union that it shall unionize its plant, and having submitted to such demand unionize its plant by employing only union men who shall become subject to the orders of the union," etc. The general object of the bill was to obtain an injunction to restrain defendants from interfering with the relations existing between plaintiff and its employés in order to compel plaintiff to "unionize" the mine.

A restraining order having been granted, followed by a temporary injunction, the served defendants filed answers, and thereupon made a motion to modify the injunction, which was refused. (C. C.) 172 Fed. 963. An appeal taken by defendants from this order was dismissed by the Circuit Court of Appeals. Lewis v. Hitchman Coal & Coke Co., 176 Fed. 549, 100 C. C. A. 137.* After- * 234
wards they applied for and obtained leave to withdraw their answers and file others; the order, however, prescribed that the withdrawn answers were "not to be removed from the file." The new answers denied all material averments of the bill, some of which had been admitted in the former answers. Plaintiff, having filed replications, obtained an order that the former answers should be treated as evidence on behalf of the plaintiff upon the issue joined. Upon this evidence and other evidence introduced before the court orally, the case was submitted, with the result that a final decree was made January 18, 1913, granting a perpetual injunction. (D. C.) 202 Fed. 512. This was reversed by the Circuit Court of Appeals June 1, 1914 (214 Fed. 685, 131 C. C. A. 425), but the mandate was stayed pending an application to this court for a writ of certiorari. Afterwards an appeal was allowed. This court dismissed the appeal, but granted the writ of certiorari (241 U. S. 644, 36 Sup. Ct. 450, 60 L. Ed. 1218), the record on appeal to stand as a return.

[1, 2] The final decree of the District Court included an award of injunction against John Mitchell, W. B. Wilson, and Thomas Hughes, who while named as de-

fendants in the bill were not served with process and entered no appearance except to object to the jurisdiction of the court over them. Under the federal practice, the appearance to object did not bind these parties to submit to the jurisdiction on the overruling of the objection (Harkness v. Hyde, 98 U. S. 476, 479, 25 L. Ed. 237; Southern Pacific Co. v. Denton, 146 U. S. 202, 206, 13 Sup. Ct. 44, 36 L. Ed. 942; Mexican Central Railway v. Pinkney, 149 U. S. 194, 209, 13 Sup. Ct. 859, 37 L. Ed. 699; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Davis v. C., C., C. & St. L. Ry., 217 U. S. 157, 174, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. [N. S.] 823, 18 Ann. Cas. 907), and since the injunction operates only in personam, it was erroneous to include them as defendants. It also was erroneous to include personal relief by injunction against certain named parties who, pending suit, were chosen to succeed some of *235 the original defendants as officers of the international, district, and subdistrict* unions, but who were not served with process and did not appear, they being included upon the ground that they were "before the court by representation through service having been had upon their said predecessors in office." This suit was commenced, and was carried to final decree in the trial court, before the taking effect of the present equity rules (226 U. S. 629, 33 Sup. Ct. xix), and hence is governed by the former rule 48 (210 U. S. 524, 29 Sup. Ct. xxxi), under which the rights of absent parties were expressly reserved.

[3, 4] But these procedural difficulties do not affect that part of the decree which awarded an injunction against the answering defendants (Lewis, Green, Sullivan, Savage, Watkins, Zelenka, and Rankin) "individually" and not as officers of the union or its branches except as to Savage, against whom the decree goes in both his individual and official capacities, he alone having retained at the time of the final decree the same office he held at the beginning of the suit. If there was error in excluding the "official" responsibility of the others, it was not one of which they could complain, and it was not assigned for error upon their appeal to the Circuit Court of Appeals. If they were subject to injunction at all, they were so in their individual capacities. Whether the decree will bind their successors in office, or their fellow members of the union, is a question to be determined hereafter, if and when proceedings are taken to enforce the injunction against parties other than the answering defendants.

We proceed, therefore, to consider the case as it stands against the answering defendants.

The District Court based its decision upon two grounds: (1) That the organization known as the United Mine Workers of America, and its branches, as conducted and managed at the time of the suit and for many years before, was a common-law conspiracy in unreasonable restraint of trade, and also and especially a conspiracy against the rights of non-union miners in West Virginia; *236 and (2) that the defendants, in an effort to compel the plaintiff to enter into contractual relations with the union relating to the employment of labor and the production of coal, although having knowledge of express contracts existing between plaintiff and its employés which excluded relations with the union, endeavored by unlawful means to procure a breach of these contracts by the employés.

A brief recital of previous transactions between the parties becomes material. The union is a voluntary and unincorporated association which was organized in the year 1890 in the states of Ohio and Indiana, and afterwards was extended to other states. It is made up of national or "international," district, subdistrict, and local unions. District No. 6 comprises the coal districts of Ohio and the Panhandle of West Virginia. Subdistrict No. 5 of that district comprises five counties and parts of counties in Ohio, and the Panhandle.

The answering defendants were and are active and influential members—leaders—of the union, as well as officers. Savage, Lewis, and Sullivan have been members from its formation in 1890, and have held important offices in it and attended the national conventions. The others are long-time members, and possessed an influence indicated by the offices they held, but not limited to the duties of those offices.

From 1897 to 1906 what were known as joint interstate conferences were held annually or biennially between officials of the union and representatives of the operators in the "Central Competitive Field" (which includes Western Pennsylvania, Ohio, Indiana, and Illinois, but not West Virginia), for the purpose of agreeing upon the scale of wages and the conditions of employment in that field. In addition there were occasional conferences of the same character affecting other states and districts. *237

* Plaintiff's mine is within the territorial* limits of subdistrict No. 5 of district No. 6. Coal-mining operations were commenced there in the early part of the year 1902, and the mine was operated "non-union" until April, 1903, when, under threats from the union officials, including defendants Watkins and Sullivan, that a certain unionized mine in Ohio, owned by the same proprietors, would be closed down if the men at the Hitchman were not allowed to organize, plaintiff consented to the unionization of the latter mine. This went into effect on the 1st of April, 1903, and upon the very next day the men were called out on strike because of a disagreement with the company as to the basis upon which mining should be paid for.

The strike continued until May 23d, requiring plaintiff to cease operations and preventing it from fulfilling its contracts, the most important of which was one for the daily supply of engine coal to the Baltimore & Ohio Railroad at a coaling station adjoining the mine. The financial loss to plaintiff was serious. The strike was settled, and the men resumed work upon the basis of a modification of the official mining scale applicable to the Hitchman mine.

Again, in the spring of 1904, there was difficulty in renewing the scale. A temporary scale, agreed upon between operators and miners for the month of April, 1904, was signed in behalf of the Hitchman Company on the 18th of April. Two days later the men at the Hitchman struck, and the mine remained idle for two months, during which time plaintiff sustained serious losses in business and was put to heavy expense in obtaining coal from other sources to fill its contract with the Baltimore & Ohio Railroad Company. The strike was settled by the adoption of the official scale for the Panhandle District, with amendatory local rules for the Hitchman mine.

238 After this there was little further trouble until April 1, 1906, when a disagreement arose between the union and an association of operators with which plaintiff was not connected—the association being in fact made up of its competitors—about arranging the terms of the scale for the ensuing two years. At the same time a similar disagreement arose between the operators and the union officials in the Central Competitive Field. The result was a termination of the interstate conferences and a failure to establish any official scale for the ensuing two years, followed by a widespread strike, or a number of concurrent strikes, involving the most of the bituminous coal-producing districts. There was absolutely no grievance or ground of disagreement at the Hitchman mine, beyond the fact that the mining scale expired by its own terms on March 31st, and the men had not received authority from the union officials either to renew it or to agree to a new one in its place. Plaintiff came to an understanding with the local union to the effect that if its men would continue at work the company would pay them from April 1st whatever the new scale might be, except that if the new scale should prove to be lower than that which expired on March 31st, there should be no reduction in wages, while if the scale was raised the company would pay the increased amount, dating it back to April 1st. This was satisfactory to the men; but as the question of a new scale was then under discussion at a conference between the officials of the union and the representatives of the Operators' Association, and plaintiff's employés wished to get the sanction of their officers, the manager of the Hitchman mine got into communication with those officials, including defendant Green, president of district No. 6, and endeavored to secure their assent to the temporary arrangement, but without success. Then a committee of the local union, including Daugherty, its president, took up the matter with Green and received permission to mine and load engine coal* until further notice* 239 from him. Under this arrangement the men remained at work for about two weeks. On April 15th, defendant Zelenka, vice president of the subdistrict, visited the mine, called a meeting of the miners, and addressed them in a foreign tongue, as a result of which they went on strike the next day, and the mine was shut down until the 12th of June, when it resumed as a "non-union" mine, so far as relations with the U. M. W. A. were concerned.

During this strike plaintiff was subjected to heavy losses and extraordinary expenses with respect to its business, of the same kind that had befallen it during the previous strikes.

About the 1st of June a self-appointed committee of employés called upon plaintiff's president, stated in substance that they could not remain longer on strike because they were not receiving benefits from the union, and asked upon what terms they could return to work. They were told that they could come back, but not as members of the United Mine Workers of America; that thenceforward the mine would be run non-union, and the company would deal with each man individually. They assented to this, and returned to work on a non-union basis. Mr. Pickett, the mine superintendent, had charge of employing the men, then and afterwards, and to each one who applied for employment he explained the conditions, which were that while the company paid the wages demanded by the union and as much as anybody else, the mine was run non-union and would continue so to run; that the company would not recognize the United Mine Workers of America; that if any man wanted to become a member of that union he was at liberty to do so; but he could not be a member of it and remain in the employ of the Hitchman Company; that if he worked for the company he would have to work as a non-union man. To this each man employed gave his assent,* understanding that while* 240 he worked for the company he must keep out of the union.

Since January, 1908 (after the commencement of the suit), in addition to having this verbal understanding, each man has been required to sign an employment card expressing in substance the same terms. This has neither enlarged nor diminished plaintiff's rights, the agreement not being such as is required by law to be in writing.

Under this arrangement as to the terms of employment, plaintiff operated its mine from June 12, 1906, until the commencement of the suit in the fall of the following year.

During the same period a precisely similar

method of employment obtained at the Glendale mine, a property consisting of about 1,200 acres of coal land adjoining the Hitchman property on the south, and operated by a company having the same stockholders and the same management as the Hitchman; the office of the Glendale mine being at the Hitchman Coal & Coke Company's office. Another mine in the Panhandle, known as the Richland, a few miles north of the Hitchman, likewise was run "non-union."

In fact, all coal mines in the Panhandle and elsewhere in West Virginia, except in a small district known as the Kanawha field, were run "non-union," while the entire industry in Ohio, Indiana, and Illinois was operated on the "closed-shop" basis, so that no man could hold a job about the mines unless he was a member of the United Mine Workers of America. Pennsylvania occupied a middle ground, only a part of it being under the jurisdiction of the union. Other states need not be particularly mentioned.

The unorganized condition of the mines in the Panhandle and some other districts was *241 recognized as a serious interference with the purposes of the union in the *Central Competitive Field, particularly as it tended to keep the cost of production low, and, through competition with coal produced in the organized field, rendered it more difficult for the operators there to maintain prices high enough to induce them to grant certain concessions demanded by the union. This was the subject of earnest and protracted discussion in the annual international convention of the U. M. W. A. held at Indianapolis, Indiana, in the month of January, 1907, at which all of the answering defendants were present as delegates and participated in the proceedings. The discussion was based upon statements contained in the annual reports of John Mitchell, as president of the union (joined as a defendant in the bill but not served with process), and of defendant Lewis as vice president, respecting the causes and consequences of the strike of 1906, and the policy to be adopted by the union for the future. In these reports it was made to appear that the strike had been caused immediately by the failure of the joint convention of operators and miners representing the central and southwestern competitive fields, held in the early part of the year 1906, to come to an agreement for a renewal of the mining scale; that the strike was widespread, involving not less than 400,000 mine workers, was terminated by "district settlements," with variant results in different parts of the territory involved, and had not been followed by a renewal of the former relations between the operators and miners in the Central Competitive Field. Another result of the strike was a large decrease in the membership of the union. Two measures of relief were proposed: First, that steps be taken to re-establish the joint interstate conferences; and, second, the organization of the hitherto unorganized fields, including the Panhandle district of West Virginia, under closed-shop agreements, with all men about the mines included in the membership of the United Mine *242 Workers of America. In the course of the * discussion the purpose of organizing West Virginia in the interest of the unionized mine workers in the Central Competitive Field, and the probability that it could be organized only by means of strikes, were repeatedly declared and were disputed by nobody. All who spoke advocated strikes, differing only as to whether these should be nation-wide or sectional. Defendant Lewis, in his report, recommended an abandonment of the policy of sectional settlements which had been pursued in the previous year. This recommendation, interpreted as a criticism of the policy pursued under the leadership of President Mitchell in the settlement of the 1906 strike, was the subject of long and earnest debate, in the course of which Lewis said:

"When we organize West Virginia, when we organize the unorganized sections of Pennsylvania, we will organize them by a strike movement."

And again, towards the close of the debate:

"No one has made the statement that we can organize West Virginia without a strike."

Defendant Green took part, favoring the view of Mr. Lewis that strikes should be treated nationally instead of sectionally. In the course of his remarks he said:

"I say to you, gentlemen, one reason why I opposed the policy that was pursued last year was because over in Ohio we were peculiarly situated. We had West Virginia on the south and Pennsylvania on the east, and after four months of a strike in Eastern Ohio we had reached the danger line. We felt keenly the competition from West Virginia, and during the suspension our miners in Ohio chafed under the object lesson they had. They saw West Virginia coal go by, train-load after train-load passing their doors, when they were on strike. This coal supplied the markets that they should have had. There is no disguising the fact, something must be done to remedy this condition. Year after year Ohio has had to go home and *243 strike in some portion of the district to enforce * the interstate agreement that was signed up here. * * * I confess here and now that the overwhelming sentiment in Ohio was that a settlement by sections would not correct the conditions we complained of. Now, something must be done; it is absolutely necessary to protect us against the competition that comes from the unorganized fields east of us."

Mr. Mitchell opposed the view of defendant Lewis, reiterating an opinion, repeatedly expressed before, that West Virginia and the other unorganized fields, "would not be thoroughly organized except as the result of a successful strike," but declaring that "they will not be organized at all, strike or no strike, unless we are able to support the men

in those fields from the first day they lay down their tools. * * * Now, I believe it is possible, indeed I believe it is probable, that in the not distant future we will be able to inaugurate a movement in West Virginia and the other unorganized fields that will involve them in a strike, and then we will expect you to furnish the sinews of war, as you have done in the past, to keep these men in idleness."

The discussion continued during three days, and at the end of it the report of a committee which expressed disagreement with Vice President Lewis' opposition to sectional settlements and recommended "a continuation in the future of the same wise, conservative business-like policies" that had been pursued by President Mitchell, was adopted by a viva voce vote.

The plain effect of this action was to approve a policy which, as applied to the concrete case, meant that in order to relieve the union miners of Ohio, Indiana, and Illinois from the competition of the cheaper product of the non-union mines of West Virginia, the West Virginia mines should be "organized" by means of strikes local to West Virginia, the strike benefits to be paid by assessments upon the union miners in the other states mentioned, while they remained at work.

*244 This convention was followed by an annual convention of subdistrict 5 of district 6, held in the month of March, 1907, at which defendants Watkins and Rankin were present as president and secretary of the subdistrict. Defendant Lewis, as national vice president, occupied the chair during several of the sessions. Defendant Zelenka was present as a delegate, and also Thomas Hughes, who, while named as a defendant in the present suit, was not served with process. Watkins and Rankin in their reports recommended the complete unionization of the mines in the Panhandle counties, with particular reference to the Hitchman, the Glendale, the Richland, and two others; and as a result it was resolved "that the subdistrict officers, together with the district officers, be authorized to take up the work of organizing every mine in the subdistrict as quickly as it can be done."

Evidently in pursuance of this resolution, defendants Green, Zelenka, and Watkins, about July 1, 1907, called at plaintiff's office and laid before its general manager, Mr. Koch, a proposition for the unionization of the mine. He declined to consider it, but at their request laid it before plaintiff's board of directors, who rejected the proposition, and the manager informed Green of this. In one of the interviews Koch informed these defendants of the terms of plaintiff's working agreement with its employés to the effect that the mine was to be run non-union and they were not to become members of the union.

About the same time, a Mr. McKinley, who was operating the Richland mine non-union, was interviewed by the union leaders, notified of the resolution adopted by the subdistrict convention, and, having asked that his mine be let alone, was met with the threat that they would secure the support of his men, and that if he did not recognize the union they would shut down his mine.* In one of* 245 the interviews that ensued he was told that it was their purpose to organize the Glendale, the Hitchman, the Richland, and some other mines; that at the Glendale they had twenty-four men who had joined the organization, "and that they had sixty men who had signed up or had agreed to join the organization at Hitchman, and that they were going to shut the mine down as soon as they got a few more men." With respect to their progress at his own mine he was kept in the dark until about the middle of October, 1907, when, through the activities of the organizer Hughes, they succeeded in shutting it down, and it remained closed until a restraining order was allowed by the court, immediately after which it resumed non-union.

The evidence renders it clear that Hughes was sent into the Panhandle to organize all the mines there, in accordance with the resolution of the subdistrict convention. The bill made a statement of his activities, and alleged that he was acting as an organizer for the union. Defendants' final answers made a complete denial, but in this are contradicted by admissions made in the earlier answers and by other and undisputed evidence. The only defendant who testified upon the subject declared that Hughes was employed by district No. 6 as an organizer, but denied that he had power or authority to shut down the Hitchman mine.

He arrived at that mine some time in September, 1907, and remained there or in that vicinity until the latter part of October, conducting a campaign of organization at the Hitchman and at the neighboring Glendale and Richland mines.

The evidence shows that he had distinct and timely notice that membership in the union was inconsistent with the terms of employment at all three mines, and a violation of the express provisions of the agreement at the Hitchman and Glendale.

* Having unsuccessfully applied to Koch and* 246 McKinley for their co-operation, Hughes proceeded to interview as many of the men as he could reach and to hold public meetings in the interest of the union. There is clear and unconfradicted evidence that he did not confine himself to mere persuasion, but resorted to deception and abuse. In his public speeches he employed abusive language respecting Mr. Pickett, William Daugherty,

and Jim Jarrett.[1] He prophesied, in such a way that ignorant, foreign-born miners, such as he was addressing, naturally might believe him to be speaking with knowledge, that the wages paid by the Hitchman would be reduced unless the mine was unionized. The evidence as to the methods he employed in personally interviewing the miners, while meager, is significant. Myers, a Hitchman miner, testified:

"He told me that he was a good friend of Mr. Koch, and that Mr. Koch had nothing against having the place organized again. He said he was a friend of his, and I made the remark that I would ask Mr. Koch and see if it was so; and he said no, that was of no use because he was telling me the truth."

He did not confine his attentions to men who already were in plaintiff's employ, but in addition dissuaded men who had accepted employment from going to work.

A highly significant thing, giving character to Hughes' entire course of conduct, is that while his solicitation of the men was more or less public, as necessarily it had to be, he was careful to keep secret the number and the names of those who agreed to join the union. Myers, being asked to allow his name *247 to be entered on a book*that Hughes carried, tried to see the names already entered, "but he would not show anything; he told me he had it, and I asked him how many names was on it, and he said he had about enough to 'crack off.'" To Stewart, another Hitchman miner, he said "he was forming a kind of secret order among the men; he said he had a few men—he did not state the number of them—and he said each man was supposed to give him so much dues to keep it going, and then he said after he got the majority he would organize the place." Pickett, the mine superintendent, had learned of only five men at the Glendale who were inclined to join Hughes' movement; but when these were asked to remain outside of the mine for a talk, fifteen other men waited with them, and upon being reminded that while the company would not try to prevent them from becoming members of the union, they could not be members and at the same time work for the Glendale Company, they all accepted this as equivalent to a notice of discharge. And, as has been stated, the owner of the Richland, while repeatedly threatened with unionization, was kept in the dark as to the progress made by the organizer amongst his employés until the mine was actually shut down.

[5] The question whether Hughes had "power or authority" to shut down the Hitchman mine is beside the mark. We are not here concerned with any question of ultra vires, but with an actual threat of closing down plaintiff's mine, made by Hughes while acting as agent of an organized body of men who indubitably were united in a purpose to close it unless plaintiff would conform to their wishes with respect to its management, and who lacked the power to carry out that purpose only because they had not as yet persuaded a sufficient number of the Hitchman miners to join with them, and hence employed Hughes as an "organizer" and sent him to the mine with the very*object* of securing the support of the necessary number of miners. They succeeded with respect to one of the mines threatened (the Richland), and preparations of like character were in progress at the Hitchman and the Glendale at the time the restraining order was made in this cause. *248

[6] If there be any practical distinction between organizing the miners and organizing the mine, it has no application to this case. Unionizing the miners is but a step in the process of unionizing the mine, followed by the latter almost as a matter of course. Plaintiff is as much entitled to prevent the first step as the second, so far as its own employés are concerned, and to be protected against irreparable injury resulting from either. Besides, the evidence shows, without any dispute, that defendants contemplated no halfway measures, but were bent on organizing the mine, the "consent" of plaintiff to be procured through such a control of its employés as would render any further independent operation of the mine out of the question. This is evident from the discussions and resolutions of the international and subdistrict conventions, from what was said by defendants Green, Zelenka, and Watkins to plaintiff's manager, and to the operator of the Richland, and from all that was said and done by Hughes in his effort to organize the Hitchman, Glendale, and Richland mines.

In short, at the time the bill was filed, defendants, although having full notice of the terms of employment existing between plaintiff and its miners, were engaged in an earnest effort to subvert those relations without plaintiff's consent, and to alienate a sufficient number of the men to shut down the mine, to the end that the fear of losses through stoppage of operations might coerce plaintiff into "recognizing the union" at the cost of its own independence. The methods resorted to by their "organizer" were such as have been described. The legal consequences remain for discussion. *249

*[7] The facts we have recited are either admitted or else proved by clear and undisputed evidence and indubitable inferences therefrom. The proceedings of the international and subdistrict conventions were shown by the introduction of official verbatim reports, properly authenticated. It is objected that these proceedings, especially in so far as they include the declarations and con-

[1] Mr. Pickett was superintendent of the Hitchman and Glendale mines, and it was with him that the miners made their agreements to refrain from membership in the union; Daugherty and Jarrett were miners at the Hitchman, and had been, respectively, president and financial secretary of the local union at the time of the 1906 strike, when the local deserted the U. M. W. A.

duct of others than the answering defendants, are not admissible because the existence of a criminal or unlawful conspiracy is not made to appear by evidence aliunde. The objection is untenable. In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves. The rule of evidence is commonly applied in criminal cases, but is of general operation; indeed, it originated in the law of partnership. It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them. Pleasants v. Fant, 22 Wall. 116, 119, 22 L. Ed. 780; Connecticut Mutual Life Ins. Co. v. Hillmon, 188 U. S. 208, 218, 23 Sup. Ct. 294, 47 L. Ed. 446; Story, Part. §§ 107, 108; 1 Greenleaf, Ev. §§ 112, 113 (184 b, 184 c); 2 Starkie, Ev. (2d Ed.) 25, 26; King v. Hardwick, 11 East, 578, 585, 589; Sandilands v. Marsh, 2 Barn. & Ald. 673, 679; Wood v. Braddick, 1 Taunt. 104, 105; Van Reimsdyk v. Kane (Story, J.), 1 Gall. 630, 635, 28 Fed. Cas. 1067, 1069; Aldrich v. Warren, 16 Me. 465,*468; Pierce v. Wood, 23 N. H. 519, 531; Page v. Parker, 40 N. H. 47, 62; State v. Thibeau, 30 Vt. 100, 105; Jenne v. Joslyn, 41 Vt. 478, 484; Locke v. Stearns, 1 Metc. (Mass.) 560, 563, 35 Am. Dec. 382; Lowe v. Dalrymple, 117 Pa. 564, 568, 12 Atl. 567; Main v. Aukam, 4 App. D. C. 51, 56.

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[8] Upon a kindred principle, the declarations and conduct of an agent, within the scope and in the course of his agency, are admissible as original evidence against the principal, just as his own declarations or conduct would be admissible. Barreda v. Silsbee, 21 How. 146, 164, 165, 16 L. Ed. 86; Vicksburg & Meridian R. R. v. O'Brien, 119 U. S. 99, 104, 7 Sup. Ct. 118, 30 L. Ed. 299; La Abra Silver Mining Co. v. United States, 175 U. S. 423, 498, 20 Sup. Ct. 168, 44 L. Ed. 223. And since the evidence of Hughes' agency is clear and undisputed—that as the representative of a voluntary association of which the answering defendants were active members, and in the execution of a purpose to which they all had given consent, and in which some of them were actively co-operating, he was engaged in an effort to organize the coal mines of the Panhandle district—it is equally clear that his declarations and conduct while so doing are evidential against the defendants.

What are the legal consequences of the facts that have been detailed?

[9, 10] That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing non-membership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to "run union" were a sufficient explanation of its resolve to run "non-union," if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of "collective bargaining," it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through the union to enter into*agreements with employers willing* to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power. Adair v. United States, 208 U. S. 161, 174, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764; Coppage v. Kansas, 236 U. S. 1, 14, 35 Sup. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C, 960. In the present case, needless to say, there is no act of legislation to which defendants may resort for justification.

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[11] Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employés, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. That the employment was "at will," and terminable by either party at any time, is of no consequence. In Truax v. Raich, 239 U. S. 33, 38, 36 Sup. Ct. 7, 9 (60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283), this court ruled upon the precise question as follows:

"It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employé has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion, and, by the weight*of authority, the unjustified* interference of third persons is actionable although the employment is at will" (citing many cases).

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In short, plaintiff was and is entitled to the good will of its employés, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that by properly treating its employés, and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations. See Brennan v. United Hatters (cited with approval in Truax v. Raich, supra), 73 N. J. Law, 729, 749, 65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698; Brown v. Honiss, 74 N. J. Law, 501, 514, 68 Atl. 150 et seq.; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 767, 53 Atl. 230; Walker v. Cronin, 107 Mass. 555, 565–566; Moran v. Dunphy, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289, and cases there cited; L. D. Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 117, 85 N. E. 897, 23 L. R. A. (N. S.) 1236, etc.

The right of action for persuading an employé to leave his employer is universally recognized—nowhere more clearly than in West Virginia—and it rests upon fundamental principles of general application, not upon the English statute of laborers. Thacker Coal Co. v. Burke, 59 W. Va. 253, 255, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, 8 Ann. Cas. 885, 886; Walker v. Cronin, 107 Mass. 555, 567; Angle v. Chicago, St. Paul, etc., Railway, 151 U. S. 1, 13, 14 Sup. Ct. 240, 38 L. Ed. 55; Noice Adm'x v. Brown, 39 N. J. Law, 569, 572.

We return to the matters set up by way of justification or excuse for defendants' interference with the situation existing at plaintiff's mine.

*253 [12] The case involves no question of the rights of employés. • Defendants have no agency for plaintiff's employés, nor do they assert any disagreement or grievance in their behalf. In fact, there is none; but, if there were, defendants could not, without agency, set up any rights that employés might have. The right of the latter to strike would not give to defendants the right to instigate a strike. The difference is fundamental.

It is suggested as a ground of criticism that plaintiff endeavored to secure a closed non-union mine through individual agreements with its employés, as if this furnished some sort of excuse for the employment of coercive measures to secure a closed union shop through a collective agreement with the union. It is a sufficient answer, in law, to repeat that plaintiff had a legal and constitutional right to exclude union men from its employ. But it may be worth while to say, in addition: First, that there was no middle ground open to plaintiff; no option to have an "open shop" employing union men and non-union men indifferently; it was the union that insisted upon closed-shop agreements, requiring even carpenters employed about a mine to be members of the union, and making the employment of any non-union man a ground for a strike; and secondly, plaintiff was in the reasonable exercise of its rights in excluding all union men from its employ, having learned, from a previous experience, that unless this were done union organizers might gain access to its mine in the guise of laborers.

[13] Defendants set up, by way of justification or excuse, the right of workingmen to form unions, and to enlarge their membership by inviting other workingmen to join. The right is freely conceded, provided the objects of the union be proper and legitimate, which we assume to be true, in a general sense, with respect to the union here in question. Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 439, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. The cardinal error of defendants' position 254* lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others. Brennan v. United Hatters, 73 N. J. Law, 729, 749, 65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698. The familiar maxim, "Sic utere tuo ut alienum non lædas"—literally translated, "So use your own property as not to injure that of another person," but by more proper interpretation, "so as not to injure the rights of another" (Broom's Leg. Max. [8th Ed.] 289)—applies to conflicting rights of every description. For example, where two or more persons are entitled to use the same road or passage, each one in using it is under a duty to exercise care not to interfere with its use by the others, or to damage them while they are using it. And a most familiar application is the action for enticing an employé, in which it never was a justification that defendant wished to retain for himself the services of the employé. 1 Black. Com. 429; 3 Id. 142.

Now, assuming defendants were exercising, through Hughes, the right to invite men to join their union, still they had plain notice that plaintiff's mine was run "non-union," that none of the men had a right to remain at work there after joining the union, and that the observance of this agreement was of great importance and value both to plaintiff and to its men who had voluntarily made the agreement and desired to continue working under it. Yet defendants, far from ex-

ercising any care to refrain from unnecessarily injuring plaintiff, deliberately and advisedly selected that method of enlarging their membership which would inflict the greatest injury upon plaintiff and its loyal employés. Every Hitchman miner who joined Hughes' "secret order" and permitted his name to be entered upon Hughes' list was guilty of a breach of his contract of employment and acted a lie whenever thereafter he entered plaintiff's mine to work. Hughes not only connived at this, but must be deemed to have caused and procured it, for it was the main feature of defendants' plan, the sine qua non of their programme. Evidently it was deemed to be necessary, in order to "organize the Panhandle by a strike movement," that at the Hitchman, for example, man after man should be persuaded to join the union, and having done so to remain at work keeping the employer in ignorance of their number and identity, until so many had joined that by stopping work in a body they could coerce the employer and the remaining miners to "organize the mine," that is, to make an agreement that none but members of the union should be employed, that terms of employment should be determined by negotiation not with the employés but with union officers—perhaps residents of other states and employés of competing mines—and that all questions in controversy between the mine operator and the miners should likewise be settled with outsiders.

True, it is suggested that under the existing contract an employé was not called upon to leave plaintiff's employ until he actually joined the union and that the evidence shows only an attempt by Hughes to induce the men to agree to join, but no attempt to induce them to violate their contract by failing to withdraw from plaintiff's employment after actually joining. But in a court of equity, which looks to the substance and essence of things and disregards matters of form and technical nicety, it is sufficient to say that to induce men to agree to join is but a mode of inducing them to join, and that when defendants "had sixty men who had signed up or agreed to join the organization at Hitchman," and were "going to shut the mine down as soon as they got a few more men," the sixty were for practical purposes, and therefore in the sight of equity, already members of the union, and it needed no formal ritual or taking of an oath to constitute them such; their uniting with the union in the plan to subvert the system of employment at the Hitchman mine, to which they had voluntarily agreed and upon which their employer and their fellow employés were relying, was sufficient.

But the facts render it plain that what the defendants were endeavoring to do at the Hitchman mine and neighboring mines cannot be treated as a bona fide effort to enlarge the membership of the union. There is no evidence to show, nor can it be inferred, that defendants intended or desired to have the men at these mines join the union, unless they could organize the mines. Without this, the new members would be added to the number of men competing for jobs in the organized districts, while non-union men would take their places in the Panhandle mines. Except as a means to the end of compelling the owners of these mines to change their method of operation, the defendants were not seeking to enlarge the union membership.

In any aspect of the matter, it cannot be said that defendants were pursuing their object by lawful means. The question of their intentions—of their bona fides—cannot be ignored. It enters into the question of malice. As Bowen, L. J., justly said, in the Mogul Steamship Case, 23 Q. B. Div. 613:

"Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse."

And the intentional infliction of such damage upon another, without justification or excuse, is malicious in law. Bitterman v. Louisville & Nashville R. R., 207 U. S. 205, 223, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; Brennan v. United Hatters, 73 N. J. Law, 729, 744, et seq., 65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698, and cases cited. Of course, in a court of equity, when passing upon the right of injunction, damage threatened, irremediable by action at law, is equivalent to damage done. And we cannot deem the proffered excuse to be a "just cause or excuse," where it is based, as in this case, upon an assertion of conflicting rights that are sought to be attained by unfair methods, and for the very purpose of interfering with plaintiff's rights, of which defendants have full notice.

[14] Another fundamental error in defendants' position consists in the assumption that all measures that may be resorted to are lawful if they are "peaceable"—that is, if they stop short of physical violence, or coercion through fear of it. In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employés constitutes such a violation. Flaccus v. Smith, 199 Pa. 128, 48 Atl. 894, 54 L. R. A. 640, 85 Am. St. Rep. 779; South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A. C. 239, 244, 250, 253; Jonas Glass Co. v. Glass Bottle Blowers' Association, 77 N. J. Eq. 219, 223, 79 Atl. 262, 41 L. R. A. (N. S.) 445.

The present is not a case of merely withholding from an employer an economic need—as a supply of labor—until he assents to be governed by union regulations. Defendants have no supply of labor of which plain-

tiff stands in need. By the statement of defendant Lewis himself, made in his formal report to the Indianapolis convention of 1907, out of more than 370,000 coal miners in the states of Pennsylvania, Maryland, Virginia, and West Virginia, less than 80,000 (about 22 per cent.) were members of the Union. Considering the Panhandle separately, doubtless the proportion was even smaller, and the supply of non-union labor ample. There is no reason to doubt that if defendants had been actuated by a genuine desire to increase the membership of the union without unnecessary injury to the known rights of plaintiff, they would have permitted their proselytes
*258 to withdraw from plaintiff's employ when and as they became *affiliated with the union—as their contract of employment required them to do—and that in this event plaintiff would have been able to secure an adequate supply of non-union men to take their places. It was with knowledge of this, and because of it, that defendants, through Hughes as their agent, caused the new members to remain at work in plaintiff's mine until a sufficient number of men should be persuaded to join so as to bring about a strike and render it difficult if not practically impossible for plaintiff to continue to exercise its undoubted legal and constitutional right to run its mine "non-union."

It was one thing for plaintiff to find, from time to time, comparatively small numbers of men to take vacant places in a going mine, another and a much more difficult thing to find a complete gang of new men to start up a mine shut down by a strike, when there might be a reasonable apprehension of violence at the hands of the strikers and their sympathizers. The disordered condition of a mining town in time of strike is matter of common knowledge. It was this kind of intimidation, as well as that resulting from the large organized membership of the union, that defendants sought to exert upon plaintiff, and it renders pertinent what was said by this court in the Gompers Case, 221 U. S. 418, 439, 31 Sup. Ct. 492, 497 (55 L. Ed. 797, 34 L. R. A. [N. S.] 874) immediately following the recognition of the right to form labor unions:

"But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many
*259 against the one."

*Defendants' acts cannot be justified by any analogy to competition in trade. They are not competitors of plaintiff; and if they were their conduct exceeds the bounds of fair trade. Certainly, if a competing trader should endeavor to draw custom from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition.

[15] Upon all the facts, we are constrained to hold that the purpose entertained by defendants to bring about a strike at plaintiff's mine in order to compel plaintiff, through fear of financial loss, to consent to the unionization of the mine as the lesser evil, was an unlawful purpose, and that the methods resorted to by Hughes—the inducing of employés to unite with the union in an effort to subvert the system of employment at the mine by concerted breaches of the contracts of employment known to be in force there, not to mention misrepresentation, deceptive statements, and threats of pecuniary loss communicated by Hughes to the men—were unlawful and malicious methods, and not to be justified as a fair exercise of the right to increase the membership of the union.

There can be no question that plaintiff was threatened with danger of an immediate strike as a result of the activities of Hughes. The effect of his arguments and representations is not to be judged from the testimony of those witnesses who rejected his overtures. Naturally, it was not easy for plaintiff to find men who would testify that they had agreed with Hughes to break their contract with plaintiff. One such did testify. But the true measure of the extent of his operations and the probability of his carrying them to success are indicated by
his *declaration to Myers that he had about *260
enough names at the Hitchman to "crack off," by the statement to McKinley that twenty-four men at the Glendale mine had joined the organization, and sixty at the Hitchman, and by the fact that they actually succeeded in shutting down the Richland about the middle of October. The declaration made concerning the Glendale is corroborated by the evidence of what happened at that mine.

That the damage resulting from a strike would be irremediable at law is too plain for discussion.

Therefore, upon the undisputed facts of the case, and the indubitable inferences from them, plaintiff is entitled to relief by injunction. Having become convinced by three costly strikes, occurring within a period of as many years, of the futility of attempting to operate under a closed-shop agreement with the union, it established the mine on a non-union basis, with the unanimous approval of its employés—in fact upon their suggestion—and under a mutual agreement, assent-

ed to by every employé, that plaintiff would continue to run its mine non-union and would not recognize the United Mine Workers of America; that if any man wanted to become a member of that union he was at liberty to do so, but he could not be a member and remain in plaintiff's employ. Under that agreement plaintiff ran its mine for a year and more, and, so far as appears without the slightest disagreement between it and its men, and without any grievance on their part. Thereupon defendants, having full notice of the working agreement between plaintiff and its men, and acting without any agency for those men, but as representatives of an organization of mine workers in other states, and in order to subject plaintiff to such participation by the union in the management of the mine as necessarily results from the making of a closed-shop agreement, sent their agent to the mine, who, with full notice of, and for the very purpose of subverting,* the status arising from plaintiff's working agreement and subjecting the mine to the union control, proceeded, without physical violence, indeed, but by persuasion accompanied with threats of a reduction of wages and deceptive statements as to the attitude of the mine management, to induce plaintiff's employés to join the union and at the same time to break their agreement with plaintiff by remaining in its employ after joining; and this for the purpose not of enlarging the membership of the union, but of coercing plaintiff, through a strike or the threat of one, into recognition of the union.

As against the answering defendants, plaintiff's right to an injunction is clear; as to the others named as defendants, but not served with process, the decree is erroneous, as already stated.

Respecting the sweep of the injunction, we differ somewhat from the result reached by the District Court.

So far as it restrains: (1) Interfering or attempting to interfere with plaintiff's employés for the purpose of unionizing plaintiff's mine without its consent, by representing or causing to be represented to any of plaintiff's employés, or to any person who might become an employé of plaintiff, that such person will suffer or is likely to suffer some loss or trouble in continuing in or in entering the employment of plaintiff, by reason of plaintiff not recognizing the union, or because plaintiff runs a non-union mine; (2) interfering or attempting to interfere with plaintiff's employés for the purpose of unionizing the mine without plaintiff's consent, and in aid of such purpose knowingly and willfully bringing about the breaking by plaintiff's employés of contracts of service known at the time to exist with plaintiff's present and future employés; (3) knowingly and willfully enticing plaintiff's employés, present or future, to leave plaintiff's service on the ground that plaintiff does not recognize the United Mine Workers of America or runs a non-union mine,* etc.; (4) interfering or attempting to interfere with plaintiff's employés so as knowingly and willfully to bring about the breaking by plaintiff's employés, present and future, of their contracts of service, known to the defendants to exist, and especially from knowingly and willfully enticing such employés, present or future, to leave plaintiff's service without plaintiff's consent; (5) trespassing on or entering upon the grounds and premises of plaintiff or its mine for the purpose of interfering therewith or hindering or obstructing its business, or with the purpose of compelling or inducing, by threats, intimidation, violent or abusive language, or persuasion, any of plaintiff's employés to refuse or fail to perform their duties as such; and (6) compelling or inducing or attempting to compel or induce, by threats, intimidation, or abusive or violent language, any of plaintiff's employés to leave its service or fail or refuse to perform their duties as such employés, or compelling or attempting to compel by like means any person desiring to seek employment in plaintiff's mine and works from so accepting employment therein—the decree is fully supported by the proofs. But it goes further, and awards an injunction against picketing and against acts of physical violence, and we find no evidence that either of these forms of interference was threatened. The decree should be modified by eliminating picketing and physical violence from the sweep of the injunction, but without prejudice to plaintiff's right to obtain an injunction hereafter against these forms of interference if proof shall be produced, either in proceedings supplemental to this action or in an independent action, that such an injunction is needed.

The decree of the Circuit Court of Appeals is reversed, and the decree of the District Court is modified as above stated, and as so modified it is affirmed, and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

* Mr. Justice BRANDEIS, dissenting.

This suit was begun October 24, 1907. The Hitchman Coal & Coke Company, plaintiff below, is the owner of a coal mine in West Virginia. John Mitchell and nine others, defendants below, were then the chief executive officers of the United Mine Workers of America and of its district and subdistrict organizations having "jurisdiction" over the territory in which plaintiff's mine is situated; and were sued both individually and as such officers. The mine had been "unionized" about three years prior to April 16, 1906; and until about that date was operated as a "union" mine, under a collective agreement with a local union of the United Mine Workers of America. Then a strike was declared

by the union; and a short shut-down followed. While the strike so declared was still in force, as the bill alleges, the company reopened the mine as a closed non-union mine. Thereafter persons applying for work were required as a condition of obtaining employment to agree that they would not, while in the service of the company, be a member of the union, and if they joined the union would withdraw from the company's employ.[2]

*264 * * Alleging that efforts were being made illegally to unionize its mine "without its consent," the company brought in the United States Circuit (now District) Court for the Northern District of West Virginia this suit to enjoin such efforts. District Judge Dayton granted a restraining order upon the filing of the bill. An order was entered May 26, 1908, continuing it as a temporary injunction. A motion to modify the same was denied, September 21, 1909 ([C. C.] 172 Fed. 963). An appeal from this order was dismissed by the Circuit Court of Appeals, March 11, 1910 (176 Fed. 549, 100 C. C. A. 137). The case was then heard on the merits; defendants having denied in their answer all the charges of unlawful conduct set forth in the bill; and on January 18, 1913, a decree was entered for a perpetual injunction substantially in the form of the restraining order ([D. C.] 202 Fed. 512). This decree was reversed by the Circuit Court of Appeals on June 1, 1914 (214 Fed. 685, 131 C. C. A. 425); but a stay was granted pending an application to this court for a writ of certiorari. The company appealed to this court and also applied for a writ of certiorari. The appeal was dismissed, as the jurisdiction of the Circuit (District) Court was rested wholly upon diversity of citizenship, plaintiff being a corporation organized under the laws of West Virginia and all the defendants citizens and residents of other States (241 U. S. 644, 36 Sup. Ct. 450, 60 L. Ed. 1218). A writ of certiorari was granted, however, March 13, 1916. The case was argued at that term and a reargument was ordered.

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The District Court held that the United Mine Workers of America with its subordinate branches constitutes an unlawful organization—illegal both under the law of West Virginia and under the Federal Anti-Trust Act; that its long continued effort to unionize the mines of West Virginia had not been "in the interest either of the betterment of mine labor in the state or of upholding that free commerce in coal between the states guaranteed by federal law, but to restrain and even destroy it" for the benefit of rival operators and producers in Ohio, Western Pennsylvania, Indiana, and Illinois, competitive fields in which the mines had been unionized; and that "in pursuit of its unlawful purposes" the union "have sought and still seek to compel the plaintiff * * * to submit to contractual relations with it as an organization relating to the employment of labor and production contrary to the will and wish of the company; that its officers in pursuance of such unlawful effort to monopolize labor and restrain trade, and with knowledge of the express contracts existing between the plaintiff and its employés have unlawfully sought to cause the breach of the said contracts on the part of its said employés."

The decree, besides the usual injunction against threat, intimidation, force, or violence, and against inducing breaches of employés' contracts or trespassing upon plaintiff's property, enjoined defendants (and others hereinafter described), among other things, from:

*266 1. "Representing ["for the purpose of unionizing plaintiff's mine without plaintiff's consent"] * * * to any of plaintiff's employés or to any person who might become an employé of plaintiff, that such person * * * is likely to suffer some loss or trouble in continuing in or in entering the employment of plaintiff, * * * representing * * * to such employé * * * that such loss or trouble * * * may come by reason of plaintiff not recognizing the United Mine Workers of America, or because plaintiff runs a non-union mine."

2. "* * * Knowingly and willfully enticing ["for the purpose of unionizing plaintiff's mine, without plaintiff's consent"] plaintiff's employés present or future * * * to leave plaintiff's service, giving or assigning * * * as a reason * * * for leaving of plaintiff's service, that plaintiff does not recognize the United Mine Workers of America, or that plaintiff runs a non-union mine."

[2] About two months after the restraining order was issued in this case the plaintiff company began the practice of requiring applicants for work to sign employment cards in the following terms:

"I am employed by and work for the Hitchman Coal & Coke Company with the express understanding that I am not a member of the United Mine Workers of America, and will not become so while an employé of the Hitchman Coal & Coke Company; that the Hitchman Coal & Coke Company is run non-union and agrees with me that it will run non-union while I am in its employ. If at any time I am employed by the Hitchman Coal & Coke Company I want to become connected with the United Mine Workers of America or any affiliated organization, I agree to withdraw from the employment of said company, and agree that while I am in the employ of that company I will not make any efforts amongst its employés to bring about the unionizing of that mine against the company's wish. I have either read the above or heard the same read."

Prior to that time, the agreement rested in oral understanding merely, and is sufficiently indicated in the following excerpts from the testimony of the mine superintendent as to what he told the men applying for employment:

"I also told them that any man who wanted to become a member of the United Mine Workers—that that was his business—but he could not be a member of the United Mine Workers and be affiliated with the United Mine Workers and be under the employ of the Hitchman Coal & Coke Company, or be under the jurisdiction of the United Mine Workers; that the mine was run non-union so far as the United Mine Workers of America were concerned.

"Q. You mean you made every man understand that while he worked for the Hitchman Company he must keep out of the union?

"A. Yes, sir; or at least they said they understood it."

3. "* * * Knowingly and willfully enticing plaintiff's employés, present or future * * * to leave plaintiff's service without plaintiff's consent, against plaintiff's will and to plaintiff's injury."

4. "* * * Establishing a picket * * * for the purpose of inducing * * * by * * * persuasion * * * any person * * * coming to plaintiff's mine to accept employment * * * to refuse * * * to accept service with plaintiff."

5. "* * * Interfering in any manner whatsoever, either by * * * persuasion or entreaty with any person in the employ of plaintiff who has contracted with and is in the actual service of plaintiff to * * * induce him to quit the service of plaintiff * * * or assisting or abetting in any manner" his doing so.

Three of the defendants—Mitchell, Wilson and Hughes—were never served with process and did not enter any appearance except to object to the jurisdiction of the court over them. Of the remaining seven all but two, *267 had, prior to the entry of the final decree, ceased to hold *any office either in the United Mine Workers of America or in any of the district or subdistrict organizations. Nevertheless the decree directed that the injunction issue against each of the ten original defendants, "individually," and also in their official capacities against their successors in office (who were named in the decree) although these had not been served with process or been named in the bill; the court declaring such persons to be "before the court by representation through service having been made upon their said predecessors in office, sued as such officers and as members of the United Mine Workers of America." The decree extended the injunction, among others, also to "all persons now members of said United Mine Workers of America, and all persons who though not now members do become members of said United Mine Workers of America.

The Circuit Court of Appeals, reversing the decree of the District Court, held that the United Mine Workers of America was not an unlawful organization under the laws of West Virginia, that its validity under the federal Anti-Trust Act could not be considered in this proceeding; that so long as defendants "refrained from resorting to unlawful measures to effectuate" their purpose "they could not be said to be engaged in a conspiracy to unionize plaintiff's mine"; that "the evidence failed to show that any unlawful methods were resorted to by these defendants in this instance"; and specifically that there was nothing in the individual contracts which barred defendants from inducing the employés to join the union. With these conclusions I agree substantially.

First: The alleged illegality of the United Mine Workers of America under the law of West Virginia.

The United Mine Workers of America does not appear to differ essentially in character and purpose from other international unions which, like it, are affiliated with the American Federation of Labor. Its membership is said *268 to be larger than that of any other; and it may be more powerful. But the common law does not limit the size of unions or the degree to which individual workmen may by union increase their bargaining power. As stated in Gompers v. Buck Stove & Range Co., 221 U. S. 418, 439, 31 Sup. Ct. 492 (55 L. Ed. 797, 34 L. R. A. [N. S.] 874):

"The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association."

We do not find either in the decisions or the statutes of West Virginia anything inconsistent with the law as declared by this court. The union is not an unlawful organization, and is not in itself an unlawful conspiracy. We have no occasion to consider the legality of the specific provisions contained in its constitution or by-laws.

Second: The alleged illegality of the United Mine Workers of America under the federal Anti-Trust Act.

The District Judge undertook to pass upon the legality of the United Mine Workers of America under the federal Anti-Trust Act; but the question was not in issue in the case. It had not been raised in the bill or by answer. Evidence bearing upon the issue was properly objected to by defendants and should have been excluded.

Third: The alleged conspiracy against the West Virginia Mines.

It was doubtless the desire of the United Mine Workers to unionize every mine on the American continent and especially those in West Virginia which compete directly with the mines of Western Pennsylvania, Ohio, Indiana, and other states already unionized. That desire and the purpose to effect it were not unlawful. They were part of a reasonable effort to improve the condition of workingmen engaged in the industry by strengthening their bargaining power through unions; and extending the field of union power. No *269 conspiracy to shut down or otherwise injure West Virginia was proved, nor was there *any* averment in the bill of such conspiracy, or any issue otherwise raised by the pleadings which justified the consideration of that question by the District Court.[3]

Fourth: "Unionizing plaintiff's mine without plaintiff's consent."

The fundamental prohibition of the injunction is against acts done "for the purpose of unionizing plaintiff's mine without plaintiff's consent." Unionizing a shop does not mean inducing the employés to become members

[3] This alleged conspiracy not being in issue, the District Court improperly allowed the introduction, and considered, a mass of documents referring to various mine workers' conventions, and joint conventions of miners and operators held years previous to the filing of the bill. Judge Dayton laid great stress on reported declarations of the delegates to these conventions, although the declarations of alleged co-conspirators were obviously inadmissible, there being no foundation for the conspiracy charge.

*270 of the union.[4] It means inducing the employer to enter into a collective agreement with the union governing the relations of the employer to the employés. Unionizing implies, therefore, at least formal consent of the employer. Both plaintiff and defendants insisted upon exercising the right to secure contracts for a closed shop. The plaintiff sought to secure the closed non-union shop through individual agreements with employés. The defendants sought to secure the closed union shop through a collective agreement with the union. Since collective bargaining is legal, the fact that the workingmen's agreement is made not by individuals directly with the employer, but by the employés with the union and by it, on their behalf, with the employer is of no significance in this connection. The end being lawful, defendant's efforts to unionize the mine can be illegal, only if the methods or means pursued were unlawful; unless indeed there is some special significance in the expression "unionizing without plaintiff's consent."

It is urged that a union agreement curtails the liberty of the operator. Every agreement curtails the liberty of those who enter into it. The test of legality is not whether an agreement curtails liberty, but whether the parties have agreed upon something which the law prohibits or declares otherwise to be inconsistent with the public welfare. The operator by the union agreement *binds himself: (1) To employ only members of the union; (2) to negotiate with union officers instead of with employés individually the scale of wages and the hours of work; (3) to treat with the duly constituted representatives of the union to settle disputes concerning the discharge of men and other controversies arising out of the employment. These are the chief features of a "unionizing" by which the employer's liberty is curtailed. Each of them is legal. To obtain any of them or all of them men may lawfully strive and even strike. And, if the union may legally strike to obtain each of the things for which the agreement provides; why may it not strike or use equivalent economic pressure to secure an agreement to provide them?

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It is also urged that defendants are seeking to "coerce" plaintiff to "unionize" its mine. But coercion, in a legal sense, is not exerted when a union merely endeavors to induce employés to join a union with the intention thereafter to order a strike unless the employer consents to unionize his shop. Such pressure is not coercion in a legal sense. The employer is free either to accept the agreement or the disadvantage. Indeed, the plaintiff's whole case is rested upon agreements secured under similar pressure of economic necessity or disadvantage. If it is coercion to threaten to strike unless plaintiff consents to a closed union shop, it is coercion also to threaten not to give one employment unless the applicant will consent to a closed non-union shop. The employer may sign the union agreement for fear that labor may not be otherwise obtainable; the workman may sign the individual agreement, for fear that employment may not be otherwise obtainable. But such fear does not imply coercion in a legal sense.

In other words an employer, in order to effectuate the closing of his shop to union labor, may exact an agreement to that effect from his employés. The agreement *itself being a lawful one, the employer may withhold from the men an economic need—employment—until they assent to make it. Likewise an agreement closing a shop to non-union labor being lawful, the union may withhold from an employer an economic need—labor—until he assents to make it. In a legal sense an agreement entered into, under such circumstances, is voluntarily entered into; and as the agreement is in itself legal, no reason appears why the general rule that a legal end may be pursued by legal means, should not be applied. Or, putting it in other words, there is nothing in the character of the agreement which should make unlawful means used to attain it, which in other connections are recognized as lawful.

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[4] A witness for the defendants testified as follows: "There is a difference between unionizing a mine and unionizing the employés in a mine; unionizing the employés is having the men join the organization; unionizing a mine is creating joint relations between the employers and employés; a mine cannot be unionized unless the employer enters into contractual relations with the union; it is not the policy or purpose of the United Mine Workers as an organization to coerce a man into doing a thing against his will; this distinction between unionizing a mine and unionizing the employés of a mine has existed since the organization came about, and this method of unionizing a mine existed in 1906 and 1907."

A witness for the plaintiff testified that "the term 'union,' when applied to mining, means the United Mine Workers, and a union mine is a mine that is under their jurisdiction and so recognized. * * *" The contrary is "non-union or open shop." And further: "The men might be unionized at a mine and the mine owners not recognize the union. That would in effect be an open shop. When I said 'unionize the employés' I meant practically all of the employés; but a union mine, as I understand it, is one wherein the closed shop is practically enforced." In such case, the witness explained, the operator would be practically in contract relation with the organization.

It was also testified: "The difference between organizing the men at the mine and organizing the mine is that when the miners are organized the work of organizing the mine is only just started. They next proceed to meet with the operator who owns the mine, or operates it, for the purpose of making contracts or agreements. Under the constitution and methods of the United Mine Workers a mine cannot be organized without the consent of the owner, and it is not the object or purpose of the United Mine Workers to do so, and never has been; it has never been attempted as far as witness knows. After a mine has been organized, the agreement between the employer and the organization is paramount. The constitution of the organization has nothing to do with the workings afterwards; that agreement does not take away from the operator the control of his men."

Fifth: There was no attempt to induce employés to violate their contracts.

The contract created an employment at will; and the employé was free to leave at any time. The contract did not bind the employé not to join the union; and he was free to join it at any time. The contract merely bound him to withdraw from plaintiff's employ, if he joined the union. There is evidence of an attempt to induce plaintiff's employés to agree to join the union; but none whatever of any attempt to induce them to violate their contract. Until an employé actually joined the union he was not, under the contract, called upon to leave plaintiff's employ. There consequently would be no breach of contract until the employé both joined the union and failed to withdraw from plaintiff's employ. There was no evidence that any employé was persuaded to do that or that such a course was contemplated. What perhaps was intended was to secure agreements or assurances from individual employés that they would join the union when a large number of them should have consented to do so; with the purpose, *273 when such time arrived, to have them join the union together and strike—unless plaintiff consented to unionize the mine. Such a course would have been clearly permissible under the contract.

Sixth: Merely persuading employés to leave plaintiff's employ or others not to enter it, was not unlawful.

To induce third persons to leave an employment is actionable if done maliciously and without justifiable cause although such persons are free to leave at their own will. Truax v. Raich, 239 U. S. 33, 38, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; Thacker Coal Co. v. Burke, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091. It is equally actionable so to induce others not to enter the service. The individual contracts of plaintiff with its employés added nothing to its right in this connection, since the employment was terminable at will.

As persuasion, considered merely as a means, is clearly legal, defendants were within their rights if, and only if, their interference with the relation of plaintiff to its employés was for justifiable cause. The purpose of interfering was confessedly in order to strengthen the union, in the belief that thereby the condition of workmen engaged in mining would be improved; the bargaining power of the individual workingman was to be strengthened by collective bargaining; and collective bargaining was to be insured by obtaining the union agreement. It should not, at this day, be doubted that to induce workingmen to leave or not to enter an employment in order to advance such a purpose, is justifiable when the workmen are not bound by contract to remain in such employment.

Seventh: There was no "threat, violence or intimidation."

The decree enjoined "threats, violence or intimidation." Such action would, of course, be unlawful though employed in a justifiable cause. But there is no evidence that any of the defendants have resorted to such means. The propaganda among plaintiff's employés was conducted almost entirely by one man, the defendant Hughes, a district No. 6 organizer. His actions were orderly and peaceable, consisting of informal talks with the men, and a few quietly conducted public meetings [5] in which he argued the benefits of organization and pointed out to the men that, although the company was then paying them according to the union scale, there would be nothing to prevent a later reduction of wages unless the men united. He also urged upon the men that if they lost their present jobs, membership in the union was requisite to obtaining employment in the union mines of the neighboring states. But there is no suggestion that he exceeded the moderate bounds of peaceful persuasion, and indeed, if plaintiff's witnesses are to be believed, men with whom Hughes had talked, his argument made no impression on them, and they expressed to him their satisfaction with existing conditions at the mine. *274

When this suit was filed no right of the plaintiff had been infringed and there was no reasonable ground to believe that any of its rights would be interfered with; and, in my opinion, the Circuit Court of Appeals properly reversed the decree of the District Court, and directed that the bill be dismissed.

Mr. Justice HOLMES and Mr. Justice CLARKE concur in this dissent.

(245 U. S. 275)

EAGLE GLASS & MFG. CO. v. ROWE et al.

(Submitted Dec. 18, 1916. Decided Dec. 10, 1917.)

No. 23.

1. COURTS ⇐382(2)—REVIEW OF DECISIONS OF CIRCUIT COURT OF APPEALS—RIGHT TO APPEAL.

Where federal jurisdiction was invoked solely upon the ground of diversity of citizenship, a judgment of the Circuit Court of Appeals was not reviewable by appeal.

2. COURTS ⇐407(5)—CIRCUIT COURT OF APPEALS—REVIEW OF INTERLOCUTORY ORDERS.

Where, by consent of the parties, a case has been submitted for a final determination of the

[5] Following is a notice of one of Hughes' meetings which was torn from a telegraph pole in the street by the plaintiff's mine superintendent:

"Notice to the miners of the Hitchman mine. There will be a mass meeting Friday evening at 6.30 p. m. at Nick Heil's Base Ball Grounds, for the purpose of discussing the principals of organization. President Wm. Green will be present. All miners are cordially invited to attend."

merits, or upon the face of the bill there is no ground for equitable relief, the appellate court may finally dispose of the merits upon an appeal from an interlocutory order; but where an application for a temporary injunction was submitted upon affidavits taken ex parte without opportunity for cross-examination and without any consent that the court proceed to a final determination of the merits, the Circuit Court of Appeals could not determine the merits, unless it appeared upon the face of the bill that there was no ground for equitable relief.

3. INJUNCTION ⊜101(2)—SUBJECTS OF PROTECTION—INTERFERENCE WITH EMPLOYÉS.
That employés were at liberty to quit the employment at pleasure did not deprive an employer of its right to injunctive relief against interference with its employés by third persons seeking to unionize them.

4. MASTER AND SERVANT ⊜339—INTERFERENCE WITH RELATION BY THIRD PERSONS.
The right of employés to quit their employment gave third persons no right to instigate a strike.

5. INJUNCTION ⊜101(3)—SUBJECTS OF PROTECTION—INTERFERENCE WITH EMPLOYÉS.
Plaintiff was operating a non-union plant under individual agreements with its employés, each of whom on entering its employment signed a paper declaring that he was not a member of a union, and would not become a member while in its employment, and that if he desired to become connected with a union, he would withdraw from such employment, and that he would make no effort to bring about the unionizing of the plant against plaintiff's wish. Defendants, with notice of these facts, were making efforts through an organizer and threatening further efforts to induce some of the employés to quit the employment, and to persuade others secretly to join the union, but remain at work until a sufficient number had joined to enable them to compel the unionization of the shop by threatening to strike, and it also appeared that the organizer had used money and threatened to use dynamite to reinforce his other efforts to coerce plaintiff into agreeing to the unionization of the plant. *Held*, that the methods pursued were not lawful methods of inducing employés to join the union, but entitled plaintiff to an injunction.

Mr. Justice Brandeis, Mr. Justice Holmes, and Mr. Justice Clarke, dissenting.

Appeal from and Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Suit by the Eagle Glass & Manufacturing Company against Thomas W. Rowe, individually, and as President of the American Flint Glass Workers' Union, and others. A decree granting a temporary injunction was reversed by the Circuit Court of Appeals for the Fourth Circuit (Hill v. Eagle Glass & Mfg. Co., 219 Fed. 719, 135 C. C. A. 417) and plaintiff appeals, and petitions for a writ of certiorari. Appeal dismissed, writ of certiorari granted, and decree of the Circuit Court of Appeals affirmed in part, and reversed and remanded in part.

Mr. George R. E. Gilchrist, of Wheeling, W. Va., and Mr. Hannis Taylor, of Washington, D. C., for appellant.

Mr. John A. Howard, of Wheeling, W. Va., for appellees.

*276 * Mr. Justice PITNEY delivered the opinion of the Court.

This case is quite similar to Hitchman Coal & Coke Company v. Mitchell et al., No. 11, this day decided, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. ——, and was submitted at the time of the argument of that case. It was a suit in equity, commenced July 28, 1913, in the United States District Court for the Northern District of West Virginia. This was after that court had rendered its final decree in the Hitchman Case (202 Fed. 512), and the decree awarding a temporary injunction herein was made before the reversal of the final decree in the Hitchman Case by the Circuit Court of Appeals (214 Fed. 685, 131 C. C. A. 425).

The plaintiff, Eagle Glass & Manufacturing Company, is a West Virginia corporation, having its principal office and its manufacturing plant in that state. The object of the bill was to restrain the defendants, officers and members of the American Flint Glass Workers' Union, a voluntary association having its principal office at Toledo, in the state of Ohio, form interfering with the relations existing between plaintiff and its employés for the purpose of compelling plaintiff to "unionize" its factory. The original defendants, Thomas W. Rowe, Joseph Gillooly, and three others, were among the chief executive officers of the union, and were sued individually and as such officers. The federal jurisdiction was invoked on the ground of diversity of citizenship, it being alleged that all of the defendants were citizens of the state of Ohio.

Upon the filing of the bill, with numerous affidavits verifying its averments, and showing that plaintiff's factory was run as a non-union shop under individual agreements with its employés, each employé having signed a *277 paper declaring that he was not a member of the American Flint Glass Workers' Union and would not become a member while an employé of the Eagle Company, that the company agreed that it would run non-union while he was in its employ, that if at any time while so employed he desired to become connected with the union he would withdraw from the employ of the company, and that while in its employ he would not make any effort amongst its employés to bring about the unionizing of the plant against the company's wish; that the defendants, with notice of this, were making efforts through Gillooly as organizer, and threating further efforts to induce some of plaintiff's employés to quit its employ, and to persuade others secretly to join the union and remain at work in plaintiff's factory contrary to the terms of their agreement until a sufficient number had joined so as to be able by threatening to quit in a body to compel the unionization of the shop; and that by the activities of defendants the plaintiff was threatened with irreparable injury; the District Court granted a restraining order.

Process requiring defendants to answer the bill was promptly issued, but was served upon Gillooly alone, together with the restraining order. At the request of an attorney, a general appearance was entered for the other defendants. Gillooly filed an answer, amounting to a plea to the jurisdiction of the court, based upon the allegation that he was a resident and citizen of the state of West Virginia, and not of the state of Ohio as alleged in the bill. Upon this answer and affidavits in support of it he moved to dissolve the restraining order and dismiss plaintiff's suit, and thereupon, on the ground that he was a citizen of West Virginia, an order was made dismissing the bill as to him, without prejudice, and retaining the suit as to the other defendants. Plaintiff moved for a temporary injunction against them, whereupon the attorney at whose request their appearance had *278 been entered moved to strike it out on the ground that his request was due to inadvertence and in fact he had no authority to appear for them. His motion was granted; but in the meantime plaintiff obtained leave to file and did file an amended bill, adding as defendants Peter J. Glasstetter and seven other parties named, residents of Steubenville, Ohio, and citizens of that state, and averring that they were members of the American Flint Glass Workers' Union, had constituted the original defendants, including Gillooly, their agents and representatives, and had assisted and were supporting them in their efforts to unionize plaintiff's employés and to force plaintiff to recognize the union. Process to answer the amended bill was issued and was served upon the added defendants, the remaining original defendants being returned "not found." Afterwards, and upon proper notice to the served defendants, plaintiff renewed its motion for a temporary injunction, basing it upon the original bill, exhibits, and accompanying affidavits, the amended bill, and some additional affidavits. Meanwhile the served defendants, who may be called the Steubenville defendants, filed answers denying knowledge of the matters alleged in the bill, denying that they had constituted Gillooly and the other original defendants their agents or representatives, or had assisted or supported them in the effort to unionize plaintiff's employés and force plaintiff to recognize the American Flint Glass Workers' Union, admitting that they were members of a local union of glass workers at Steubenville which was affiliated with the principal union, and averring that except their relation as members of the local union they had no connection or relation with the other defendants, were not officers, agents, representatives, or organizers of the union, and even in their capacity as members of their local had not by act, word, or deed authorized, assisted, aided, or encouraged any of the other defendants in doing any *279 of the things alleged in the bill or amended bill. These answers were supported by affidavits of the answering defendants which were not specifically rebutted by the plaintiff.

The court, having struck out the entry of appearance for the original defendants other than Gillooly, made a decree granting a temporary injunction to restrain the defendants in the cause from interfering with plaintiff's employés, the form of the injunction being modeled upon that ordered by the final decree made in Hitchman Coal & Coke Co. v. Mitchell et al.

The answering defendants appealed to the Circuit Court of Appeals, and that court (219 Fed. 719, 135 C. C. A. 417) reversed the decree; holding that as the Steubenville defendants submitted affidavits that they were only members, not officers, of a local union, that the original defendants, who were the general officers of the union, were not authorized to represent them in the alleged illegal acts and that they knew nothing of the efforts to unionize plaintiff's factory, and as plaintiff had made no showing to the contrary, it was erroneous to issue a temporary injunction against the defendants (other than Gillooly) named in the bill and amended bill; that as Rowe and the other general officers were not served, no relief could be given against them unless it could be said that they were brought before the court by representation when the Steubenville defendants were brought in; and that as plaintiff had no case against the latter defendants for participation in the alleged torts, there was no such common or general interest as authorized a decree against the defendants not served by virtue of the service upon and appearance of the Steubenville defendants. Having said this to show error in the decree awarding a temporary injunction, the court concluded its opinion as follows:

"All the questions involved in the merits of the appeal were decided adversely to the appellee by this court in Mitchell v. Hitchman Coal & Coke Co., 214 Fed. 685 [131 C. C. A. 425]."

*280 Thereupon a decree was made reversing the decree of the District Court, and remanding the cause with directions not only to dissolve the injunction, but to "dismiss the bill in accordance with the opinion of this court." The mandate was stayed pending application to this court for a writ of certiorari. Afterwards an appeal was allowed by one of the Circuit Court judges, together with a supersedeas. The transcript on appeal having been filed in this court, an application for a writ of certiorari was afterwards presented, consideration of which was postponed to the hearing of the appeal.

[1] Since it appears from the averments of the bill and amended bill that the federal jurisdiction was invoked solely upon the ground of diversity of citizenship, it is evident that, as in the Hitchman Case, the appeal must be dismissed. 241 U. S. 644, 36 Sup. Ct. 450, 60 L. Ed. 1218. But, as in that case, we grant the writ of certiorari, the record on appeal to stand as the return

to the writ. And, as the case was submitted on the merits, we proceed to dispose of them.

So far as the decision of the Circuit Court of Appeals dissolved the temporary injunction upon the ground that the Steubenville defendants had denied, and plaintiff had not adduced sufficient evidence to sustain, the averment of the amended bill that they had constituted Gillooly and the other original defendants their agents and representatives and had assisted and supported them in their efforts to unionize plaintiff's employés and force plaintiff to recognize the American Flint Glass Workers' Union, we see no reason to disturb the decision.

[2] But the court went further, and directed a dismissal of the bill. Since the cause had not gone to final hearing in the District Court, the bill could not properly be dismissed upon appeal unless it appeared that the court was in possession of the materials necessary to enable it to do full and complete justice between the parties. Where by consent of parties the case has been submitted for a final determination of the merits, or upon the face of the bill there is no ground for equitable relief, the appellate court may finally dispose of the merits upon an appeal from an interlocutory order. Smith v. Vulcan Iron Works, 165 U. S. 518, 525, 17 Sup. Ct. 407, 41 L. Ed. 810; Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 494, 20 Sup. Ct. 708, 44 L. Ed. 856; Castner v. Coffman, 178 U. S. 168, 184, 20 Sup. Ct. 842, 44 L. Ed. 1021; Harriman v. Northern Securities Co., 197 U. S. 244, 287, 25 Sup. Ct. 493, 49 L. Ed. 739; U. S. Fidelity Co. v. Bray, 225 U. S. 205, 214, 32 Sup. Ct. 620, 56 L. Ed. 1055; Denver v. New York Trust Co., 229 U. S. 123, 136, 33 Sup. Ct. 657, 57 L. Ed. 1101. But in this case the application for a temporary injunction was submitted upon affidavits taken ex parte, without opportunity for cross-examination, and without any consent that the court proceed to final determination of the merits. Hence there was no basis for such a determination on appeal unless it appeared upon the face of the bill that there was no ground for equitable relief. That this was in effect the decision of the Circuit Court of Appeals is evident from the fact that it was rested upon the authority of Mitchell v. Hitchman Coal & Coke Co. In that case the same court had expressed the following opinion (214 Fed. 685, 714, 131 C. C. A. 425, 454):

"The court below also reached the conclusion that the defendants have caused and are attempting to cause the non-union members employed by the plaintiff to break a contract which it has with the nun-union operators. The contract in question is in the following language:

" 'I am employed by and work for the Hitchman Coal & Coke Company with the express understanding that I am not a member of the United Mine Workers of America, and will not become so while an employé of the Hitchman Coal & Coke Company; that the Hitchman Coal & Coke Company is run non-union and agrees with me that it will run non-union while I am in its employ. If at any time while I am employed by the Hitchman Coal & Coke Company I want to become connected with the United Mine Workers of America, or any affiliated organization, I agree to withdraw from the employment of said company, and agree that while I am in the employ of that company that I will not make any efforts amongst its employés to bring about the unionizing of that mine against the company's wish. I have either read the above or heard the same read.'

"It will be observed that by the terms of the contract that either of the parties thereto may at will terminate the same, and while it is provided that so long as the employé continues to work for the plaintiff he shall not join this organization, nevertheless there is nothing in the contract which requires such employés to work for any fixed or definite period. If at any time after employment any of them should decide to join the defendant organization, the plaintiff could not under the contract recover damages for a breach of the same. In other words, the employés under this contract, if they deem proper, may at any moment join a labor union, and the only penalty provided therefor is that they cannot secure further employment from the plaintiff. Therefore, under this contract, if the non-union men, or any of them, should see fit to join the United Mine Workers of America on account of lawful and persuasive methods on the part of the defendants, and as a result of such action on their part were to be discharged by the plaintiff, it could not maintain an action against them on account of such conduct on their part. Such being the case, it would be unreasonable to hold that the action of the defendants would render the United Mine Workers of America liable in damages to the plaintiff because they had employed lawful methods to induce the non-union miners to become members of their organization.

"Under these circumstances we fail to see how this contract can be taken as a basis for restraining the defendants from using lawful methods for the purpose of inducing the parties to the contract to join the organization."

[3-5] This reasoning, essential to the decision reached, is erroneous for several reasons, as we have now held in reversing the Hitchman decree, viz.: (a) Because plaintiff was entitled by law to be protected from interference with the good will of its employés, although they were at liberty to quit the employment at pleasure; (b) because the case involved no question of the rights of employés, and their right to quit the employment gave to defendants no right to instigate a strike; and (c) because the methods pursued by the defendants were not lawful methods.

The present case, according to the averments of the bill and amended bill, differs from the Hitchman Case principally in this: That it appeared that Gillooly, as organizer, had used money and had threatened to use dynamite to reinforce his other efforts to coerce plaintiff into agreeing to the unionization of its works. The system of employment at the Eagle Glass Company factory was precisely the same as that at the Hitchman mine. The written contract of employment inaugurated at the Eagle Glass Works more than a month prior to the filing of the bill in this case followed precisely the form established at the Hitchman mine shortly after the filing

of the bill in that case. And the activities of Gillooly among the plaintiff's employés, and the motive and purpose behind those activities, as alleged in the bill, show the same elements of illegality to which we have called attention in our opinion in the Hitchman Case. Plaintiff is entitled to an opportunity, on final hearing, to prove these allegations as against those defendants who are within the jurisdiction of the court, and to connect them with the activities of Gillooly.

The decree of the Circuit Court of Appeals, so far as it directed that the temporary injunction be dissolved will be affirmed, but so far as it directed a dismissal of the bill it must be reversed, and the cause will be remanded to the District court for further proceedings in conformity to this opinion.

Decree reversed.

*284 *Mr. Justice BRANDEIS dissenting.

This suit was commenced July 9, 1913, in the District Court of the United States for the Northern District of West Virginia. The plaintiff, the Eagle Glass & Manufacturing Company, is a West Virginia corporation having its principal place of business in that state. The defendants, Rowe and four others, were then the chief executive officers of the American Flint Glass Workers' Union. The defendants were sued individually and as such officers. Jurisdiction was rested wholly on diversity of citizenship, defendants being alleged to be all citizens of Ohio.

Plaintiff's factory was run as a non-union shop under individual agreements with its employés by which each was required, as a condition of employment, to sign an agreement that he would withdraw from plaintiff's employment if he joined the union. The employment was terminable at the will of either party. The bill alleged that defendants were conspiring to unionize its factory, and prayed that they, their agents and associates, be enjoined from interfering with plaintiff's employés "for the purpose of unionizing your orator's glass factory without your orator's consent." District Judge Dayton granted a sweeping restraining order, which enjoined defendants, among other things, from picketing "for the purpose of interviewing or talking to any person or persons on said railroad or street cars coming to or near plaintiff's glass factory to accept employment with the plaintiff, for the purpose of inducing * * * them * * * by persuasion * * * to refuse or fail to accept service with plaintiff" and from the use of "persuasion or entreaty" to induce any person in its employ to leave the same.

Only one of the five defendants named in the bill was served with process. He, Gillooly, filed an answer alleging that he was a *285 citizen and resident of West Virginia; and a hearing was had upon the issue thus raised. The court, being satisfied that Gillooly was a citizen of West Virginia, ordered, on August 13, 1913, that the bill be dismissed as to him "without prejudice"; and directed that the bill be retained as to all other defendants named therein. Plaintiff then moved for a temporary injunction. But the counsel who had formerly represented Gillooly called the attention of the court to the fact that there was then before the court no person against whom an injunction could issue, since he had entered his appearance only for Gillooly and did not intend to appear for the other defendants who had not been served. He accordingly moved, on his own behalf, that the record be corrected. This motion was heard October 27, 1913, was taken under advisement and was granted on January 14, 1914. But meanwhile, on November 27, 1913, the District Judge granted plaintiff leave to amend its bill by adding as defendants, eight other citizens of Ohio who, it alleged, were members of the American Flint Glass Workers' Union and "have assisted and are now supporting" the five persons originally named as defendants.

The eight members of the union—so joined as defendants by the amended bill—being served with process within the state of West Virginia, filed on January 14, 1914, their sworn answers to the bill, alleging among other things:

"Fourth. These respondents admit that they are members of a local union of glass workers at Steubenville, Ohio, which local union is affiliated with the American Flint Glass Workers' Union, and that, except their relation as members of their local union, they have no connection or relation whatever with the other defendants, that they are not officers, agents, representatives or organizers of their local union, or of the American Flint Glass Workers' Union, and that even in their capacity as members of their local union they have not by any act, *286 word, or deed of *theirs in any manner, authorized, assisted, aided or abetted or encouraged any of the other defendants in doing any of the things alleged against them (the other defendants) in the bill of complaint or the amended bill of complaint."

The allegation in the answer was supported by further affidavits of the parties, which were uncontradicted. The District Court, nevertheless, granted on January 17, 1914, a temporary injunction against all the then defendants (including these eight) substantially in the terms of the restraining order.

On January 30, 1917, the eight took an appeal to the Circuit Court of Appeals, assigning as errors, among others:

"3. The court had no jurisdiction to grant an injunction because there was no service of process on any of the parties named as defendants except on these defendants, and the record shows that they are not really defendants, but are named as defendants merely as a pretext resorted to by the plaintiff in order to get jurisdiction.

"4. Because the temporary injunction is granted against these defendants on the sole ground that they are members of the union named in the bill."

On January 13, 1915, the Circuit Court of Appeals unanimously reversed the decree of

the District Court with directions to dissolve the injunction and dismiss the bill (219 Fed. 719, 135 C. C. A. 417; saying, among other things:

"Rowe and others, general officers of the union, were not served, and, therefore, no relief could be given against them unless it could be said they were brought before the court by representation when Glasstetter and others, mere members of the local union, were ordered to be made parties and appeared. * * *

"When the allegation of a general or common interest to many persons is denied, the duty devolves on the court to determine whether the common or general interest exists before decreeing against those who are alleged to be in court by representation. The plaintiff had no pretense of a case against Glasstetter and the other defendants, brought in by amendment for participating or aiding the defendants not served, in the alleged torts committed by them, and, therefore, there was no such common or general interest as authorized the court's decree against the defendants served, by virtue of the service and appearance of the defendants brought in by amendment."

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Plaintiff took an appeal to this court, and also filed a petition for writ of certiorari. The decision upon the petition was postponed.

It is clear that the appeal must be dismissed, as the jurisdiction of the District Court rests wholly upon diversity of citizenship. Hitchman Coal & Coke Co. v. Mitchell, 241 U. S. 644, 36 Sup. Ct. 450, 60 L. Ed. 1218. The petition for certiorari having been granted, the decree should, in my opinion, be affirmed for the reasons stated by the Circuit Court of Appeals and in the dissent in Hitchman Coal & Coke Company v. John Mitchell et al., 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. ——.

Mr. Justice HOLMES and Mr. Justice CLARKE concur in this dissent

(245 U. S. 178)

LOONEY, Attorney General of Texas, v. CRANE CO.

(Argued May 3, 1916. Restored to Docket for Reargument May 21, 1917. Reargued Nov. 6, 1917. Decided Dec. 10, 1917.)

No. 16.

1. COMMERCE ⟸69 — CONSTITUTIONAL LAW ⟸287—CORPORATIONS ⟸641—TAXATION ⟸113 — FRANCHISE AND PERMIT TAXES — VALIDITY.

Rev. St. Tex. 1911, art. 3837, providing that each foreign corporation obtaining a permit to do business in the state shall pay a specified fee, the amount of which is based on its capital stock, and section 7394, requiring every foreign corporation to pay annually a franchise tax, the amount of which is based on the authorized capital stock, unless the capital stock issued and outstanding, plus the surplus and undivided profits, exceeds the authorized capital stock, in which case the franchise tax is based thereon, as applied to an Illinois corporation engaged in both interstate and intrastate commerce, and having its domicile and principal establishment in Illinois, but having depots and warehouses in Texas, impose a direct burden on interstate commerce, and constitute a taking of property without due process, in that the taxing authority of the state is thereby exerted over property and rights wholly beyond the confines of the state, and not subject to its jurisdiction, and the fact that each tax also asserted a power which the state undoubtedly possessed, to control the doing of business within the state by corporations and to tax the intrastate business of such corporations, cannot render them valid.

2. STATUTES ⟸64(8)—PARTIAL INVALIDITY—EFFECT.

Even if the franchise tax separately considered were not invalid, it could not be upheld, as the provisions dealing with the permit and franchise taxes are necessarily interdependent.

3. COURTS ⟸303(2) — JURISDICTION OF FEDERAL COURTS—"SUIT AGAINST THE STATE."

A suit by a foreign corporation against the Secretary of State and Attorney General of a state to enjoin the enforcement by them of statutes imposing permit and franchise taxes on such corporation is not a suit against the state within Const. Amend. 11, providing that the judicial power of the United States shall not extend to any suit against one of the states by citizens of another state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suit Against the State.]

Appeal from the District Court of the United States for the Northern District of Texas.

Suit by the Crane Company against Ben F. Looney, Attorney General of the State of Texas. From an order granting an interlocutory injunction (Crane Co. v. Looney [D. C.] 218 Fed. 260), defendant appeals. Affirmed.

Mr. Benj. F. Looney, Atty. Gen., and Mr. C. M. Cureton, of Austin, Tex., for appellant. Mr. Joseph Manson McCormick, of Dallas, Tex., for appellee.

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*Mr. Chief Justice WHITE delivered the opinion of the Court.

Chartered in 1865 by the Legislature of Illinois, the Crane Company had its domicile and principal establishment at Chicago. It carried on its chartered business of manufacturing and dealing in hardware, railway supplies, building materials, agricultural implements, etc., not only in Illinois but in other states, by the shipment of merchandise on orders obtained through the solicitation of its agents and sent to Chicago for execution, or orders sent to Chicago through the mail. The company, moreover, established agencies in other states to which goods were also shipped from Chicago or from other points where they were bought and shipment directed, from which agencies such goods were sold and delivered either in the original or broken packages as was most convenient. Such agencies also became supply depots from which interstate commerce was carried on by filling orders received from other states.

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*In the state of Texas for the purpose of facilitating the carrying on of its business by all the methods stated, the company acquired real estate at Dallas, and built a depot or warehouse, and also had a warehouse at another place in the state.

In 1889 Texas enacted a statute entitled, "An act to require foreign corporations to file their articles of incorporation with the Secretary of State, and imposing certain conditions upon such corporations transacting business in this state. * * *" Acts of 1889, p. 87. This act not only compelled the filing of the charter with the Secretary of State, but exacted for a permit to do business a minimum charge of $25 based upon $100,000 of capital stock and an increased amount predicated upon capital stock until the exaction amounted to $200, which was the limit, and the permit which was authorized to be issued by the Secretary of State was limited to ten years' duration. The tax imposed therefor, if the permit was enjoyed for the stated period, could not in any event exceed $20 a year, whatever might be the amount of capital stock of the corporation.

As early as 1893 what was denominated a franchise tax was provided, imposing upon each and every domestic as well as foreign corporation having a permit the duty of paying $10 a year. Acts of 1893, p. 158. In 1897 this described franchise tax was modified. Acts of 1897, p. 168. As to domestic corporations, while retaining the minimum charge of $10, the maximum was raised to $50. And as to foreign corporations the minimum was raised from $10 to $25 and the maximum limit was removed by fixing percentages of charges upon the capital stock increasing without limitation. Without in detail following the legislation as to taxes denominated as franchise from the date stated down to the period when this suit was commenced, it suffices to say that the tax itself was preserved with some increases in the bases upon which it was to be calculated; but in 1907 it was enacted both as to domestic and permitted foreign corporations that in case the capital stock of a corporation "issued and outstanding, plus its surplus and undivided profits, shall exceed its authorized capital stock," the franchise tax should be calculated upon the aggregate of such amounts, thereby increasing to that extent the levy. Acts of 1907, p. 503; Revised Statutes (1911) art. 7394.

The authorized capital stock of the Crane Company was $17,000,000, which was paid up and issued and just prior to the institution of this suit the surplus and undivided profits of the company amounted to $8,129,000. The total assessed value in Texas of its real estate, money there employed and merchandise there held amounted to $301,179. The company's gross receipts and gross sales in all its business in all the states for the year 1913 amounted to $39,831,000, of which only $1,019,750 had any relation to the state of Texas and nearly one-half of this amount was the result of transactions purely of an interstate commerce character arising from the sale and shipment of goods from other states to purchasers in Texas who ordered them and from the shipment from Texas to other states for the purpose of filling orders sent from such states.

The Crane Company was assessed and paid taxes in Texas as other taxpayers on its real estate, its money on hand in Texas and its stock in trade in that state. In 1905, having filed its articles of incorporation with the Secretary of State, it paid the permit tax of $200 for the ten-year period as prescribed by the permit act of 1889. From 1904 down to and including 1914 the company paid the yearly franchise tax, the amount increasing from $480 in 1904 to $1,948 in 1914, the increase presumably resulting from the increase of rate of such tax by the legislation which we have indicated and from the fact that by the amendment of the act of 1907 the surplus and undivided profits of the company became susceptible of being taken into view in addition to its authorized capital stock.

In the same year in which the legislation was enacted providing for the taxation on the basis of surplus and undivided profits for the purpose of the franchise tax there was also enacted a law vastly increasing the amount of the permit tax. Acts of 1907, S. S., p. 500; Revised Statutes (1911) art. 3837. We say vastly increasing because, although the standard for the levy of that tax, the authorized capital stock, was retained, the maximum limit which was $200 for ten years under the previous law was removed and the percentages of levy on the authorized capital stock were so augmented that the permit for which the company paid to the Secretary of State $200 for ten years in 1905 under the new law would have required the company to pay in order to do business in the state the sum of $17,040.

Shortly before its existing permit for ten years taken in 1905 expired the company commenced the present suit in the court below against the Secretary of State and the Attorney General to enjoin the enforcement by them of the statutes embracing the permit tax and the franchise tax on the grounds that both were repugnant (*a*) to the commerce clause of the Constitution of the United States because imposing a direct burden on interstate commerce; (*b*) to the due process clause of the Fourteenth Amendment because constituting a taking of property; and (*c*) to the equal protection clause of the Fourteenth Amendment based upon what were urged to be discriminatory provisions in the acts. The parties having been fully heard on an application for an interlocutory injunction on the pleadings and by affidavits from which the case as we have stated it indisputably results by a court organized under the act of Congress of June 18, 1910 (36 Stat. 557, c. 309, § 17; Judicial Code, § 266 [Comp. St. 1916, § 1243]), the interlocutory injunction was granted and the enforcement of the laws restrained, the matter being now before us on an appeal from such order. (D. C.) 218 Fed. 260.

Passing the contention as to the denial of the equal protection of the laws, which as we shall see it is unnecessary to consider, we come to dispose of the two other contentions, that is, the direct burden on interstate commerce and the want of due process.

[1] It may not be doubted under the case stated that intrinsically and inherently considered both the permit tax and the tax denominated as a franchise tax were direct burdens on interstate commerce and moreover exerted the taxing authority of the state over property and rights which were wholly beyond the confines of the state and not subject to its jurisdiction and therefore constituted a taking without due process. It is also clear, however, that both the permit tax and the franchise tax exerted a power which the state undoubtedly possessed, that is, the authority to control the doing of business within the state by a foreign corporation and the right to tax the intrastate business of such corporation carried on as the result of permission to come in. The sole contention, then, upon which the acts can be sustained is that although they exerted a power which could not be called into play consistently with the Constitution of the United States, they were yet valid because they also exercised an intrinsically local power. But this view can only be sustained upon the assumption that the limitations of the Constitution of the United States are not paramount but are subordinate to and may be set aside by state authority as the result of the exertion of a local power. In substance, therefore, the proposition must rest upon the theory that our dual system of government has no existence because the exertion of the lawful powers of the one involves the negation or destruction of the rightful authority of the other. But original discussion is *unnecessary since to state the proposition is to demonstrate its want of foundation and because the fundamental error upon which it rests has been conclusively established. Indeed the cases referred to were concerned in various forms with the identical questions here involved and authoritatively settled that the states are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the state in violation of the Constitution, or because of the right to exclude to exert the power to tax the property of the corporation and its activities, outside of and beyond the jurisdiction of the state in disregard, not only of the commerce clause, but of the due process clause of the Fourteenth Amendment. Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; Pullman Co. v. Kansas, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423; International Textbook Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; Atchison, Topeka & Santa Fé Railway Co. v. O'Connor, 223 U. S. 280, 283, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050.

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The dominancy of these adjudications is plainly shown by the fact that as the result of the decision in the leading case (Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355), the Supreme Court of the state of Texas, recognizing the repugnancy of the permit tax law here in question to the Constitution of the United States, enjoined its enforcement (Western Union Telegraph Co. v. State, 103 Tex. 306, 126 S. W. 1197), and following that ruling the Legislature of the state has amended both the permit tax law and the franchise tax law now before us, presumably in an effort to cure the demonstrated repugnancy of the statutes before amendment to the Constitution of the United States. Of course, whether the amendments as adopted accomplished the purpose intended, is a matter which we are not called upon to consider and as to which we express no opinion.

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*But despite the controlling decisions dealing with cases in substance identical in fact and principle with the case here presented and the effect given to them in Texas as to one of the statutes here involved, it is now insisted that the statutes are not repugnant to the Constitution of the United States and that error was committed in deciding to the contrary. This is rested on cases decided since those to which we have referred. Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127; St. Louis, Southwestern Railway Co. v. Arkansas, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed. 265; Kansas City, Fort Scott & Memphis Railway Co. v. Kansas, 240 U. S. 227, 36 Sup. Ct. 261, 60 L. Ed. 617; Kansas City Memphis & Birmingham Railroad Co. v. Stiles, 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176. The proposition is, therefore, that these cases overruled the previous decisions. The incongruity of the contention will be manifest when it is observed that not only did the cases relied upon contain nothing expressly purporting to overrule the previous cases, but on the contrary in explicit terms declared that they did not conflict with them and that they proceeded upon conditions peculiar to the particular cases.

The demonstration of error in the argument which results from this situation might well cause us to go no further in its consideration. In view, however, of the gravity of the subject to which the argument relates and the misconception and resulting confusion in doctrine which might result from silence, we briefly notice it. In the first place it is apparent in each of the cases that as the statutes under consideration were found not to be on their face inherently

repugnant either to the commerce or due process clause of the Constitution, it came to be considered whether by their necessary operation and effect they were repugnant to the Constitution in the particulars stated, and this inquiry it was expressly pointed out was to be governed by the rule long ago announced in Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 698, 15 Sup. Ct. 268, *190 270 (39 L. Ed. 311) that "the substance, and not the shadow, determines the validity of the exercise of the power." In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes with the Constitution which was found to exist resulted from particular provisions contained in each of them which so qualified and restricted their operation and necessarily so limited their effect as to lead to such result. These conditions related to the subject-matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied. It is thus manifest on the face of all of the cases that they in no way sustained the assumption that because a violation of the Constitution was not a large one, it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Constitution.

It follows, therefore, that the cases which the argument relies upon do not in any manner qualify the general principles expounded in the previous cases upon which we have rested our conclusion since the later cases rested upon particular provisions in each particular case which it was held caused the general and recognized rule not to be applicable.

[2] Some suggestion is made in argument of the possibility of treating the franchise tax as not repugnant to the Constitution although that result be necessarily reached as to the permit tax. But we are of opinion that the proposition is without merit as the interdependence of the two provisions obviously results from the character of the subjects with which they deal and the mode in which the statutes deal with them. Indeed that conclusion would seem to necessarily follow from the legislative history of both and *191 the concordant nature of their development. It finds additional and strongly persuasive support from the fact that although the controlling effect of the ruling in Western Union Telegraph Co. v. Kansas, supra, was applied by the state court to only one of the statutes, the permit tax, when the curative power of legislation was exerted it was made applicable to both and both were therefore modified. Aside from this view, however, as from the history which we have given of the franchise tax, its provisions were clearly intended to reach all activities and property of the corporation wherever situated, that statute when separately considered would come directly within the control of the doctrine of the previous cases upon which our conclusion is based.

[3] There is a contention to which we have hitherto postponed referring, that the court below was without jurisdiction because the suit against the state officers to enjoin them from enforcing the statutes in the discharge of duties resting upon them was in substance and effect a suit against the state within the meaning of the Eleventh Amendment. But the unsoundness of the contention has been so completely established that we need only refer to the leading authorities. Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Western Union Telegraph Co. v. Andrews, 216 U. S. 165, 30 Sup. Ct. 286, 54 L. Ed. 430; Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278, 33 Sup. Ct. 312, 57 L. Ed. 510.

It follows from what we have said that the court below was right in awarding an interlocutory injunction to restrain the enforcement of the assailed statutes and its order so doing must be and the same is

Affirmed.

(245 U. S. 330)

KORBLY v. SPRINGFIELD INST. FOR SAVINGS et al.

SPRINGFIELD INST. FOR SAVINGS et al. v. KORBLY.

(Argued Nov. 8, 1917. Decided Dec. 10, 1917.)

Nos. 26, 27.

1. BANKS AND BANKING ⟸248(2)—NATIONAL BANKS—DISCRETION OF COMPTROLLER—ASSESSMENTS.

A large executive discretion is given to the Comptroller in respect to adjusting assessments made by him so that national bank shareholders may not be burdened by paying more than is necessary or at a time when the money for any reason cannot be advantageously used.

2. BANKS AND BANKING ⟸248(2)—NATIONAL BANKS—DECISION OF COMPTROLLER—RECALLING ASSESSMENTS.

The Comptroller had power to recall a first assessment against national bank shareholders either in whole or in part, and to thereafter make a second assessment when an arrangement with shareholders failed to produce the expected result.

3. APPEAL AND ERROR ⟸671(4)—REVIEW—MATTERS CONSIDERED.

There being no definite expression in the record as to whether payments by national bank shareholders to receiver to assist in paying the bank's indebtedness were to be applied on the shareholders' statutory liability, the Supreme Court on appeal is required to decide which contention is more reasonable and probable considering all facts and circumstances stipulated and proved.

4. APPEAL AND ERROR ⊂⊃909(5)—PRESUMPTION—LEGALITY OF ACTION.

There being no evidence to the contrary, the Supreme Court on appeal will adopt the assumption of ordinary life and of law that trustees for shareholder savings banks acted lawfully in making payments to receiver of insolvent national bank.

5. PAYMENT ⊂⊃41(2) — APPLICATION IN ABSENCE OF APPROPRIATION BY PARTIES.

In respect to payments made by shareholder savings banks to receiver of a national bank, regard must be had to the rule that, where neither party has applied payments before controversy has arisen, the courts will make application in a manner to accomplish the ends of justice.

6. BANKS AND BANKING ⊂⊃248(1)—NATIONAL BANKS—PAYMENT BY SHAREHOLDERS TO RECEIVER—APPLICATION.

Payments by shareholder savings banks to receiver of a national bank to aid in payment of national bank's liabilities made under a verbal arrangement and approval of the Comptroller *held* to have been made with intention that they should be applied to diminish the statutory liability of the shareholder banks, natural justice, as distinguished from a technical conclusion, requiring such construction, and since payments not to be so applied would be substantially unauthorized gifts.

Mr. Justice Van Devanter and Mr. Justice Pitney, dissenting.

Appeals from the United States Circuit Court of Appeals for the First Circuit.

Appeals by Charles A. Korbly, receiver of the Pynchon National Bank, and the Springfield Institution for Savings and others, from judgment of the United States Circuit Court of Appeals for the First Circuit (Springfield Inst. for Savings v. Pepper, 134 C. C. A. 502, 218 Fed. 814) affirming a judgment in favor of the Springfield Institution for Savings and others. Affirmed.

Mr. Charles G. Gardner, of Springfield, Mass., for Korbly, receiver. Messrs. Boyd B. Jones, of Boston, Mass., and William H. Brooks, of Holyoke, Mass., for Springfield Inst. for Savings.

*331 *Mr. Justice CLARKE delivered the opinion of the Court.

These two cases are appeals from the Circuit Court of Appeals for the First Circuit, which were heard and will be decided together.

The Pynchon National Bank of Springfield, Mass., with a capital stock of $200,000, divided into 2,000 shares of $100 each, became insolvent and in June, 1901, the Comptroller of the Currency appointed a receiver to liquidate its affairs.

Upon examination there were found among its assets bonds of the American Writing Paper Company, of the par value of $577,000, which the bank had purchased at a discount, but which, at the time of the transaction we are about to consider, had so depreciated that they were worth on the market only 65 cents on the dollar.

A consideration of the condition of the bank resulted on March 18, 1902, in an assessment by the Comptroller on the shareholders of their full statutory liability of 100 per cent., payable on the 15th day of the following May.

Thereupon a plan was devised under which it was proposed that all of the shareholders, except the three defendant savings banks, should purchase from the receiver the paper company bonds at 95 cents on the dollar, each shareholder to purchase one bond of $1,000 for every three shares of stock owned by him. This purchase price was an advance over the market price of 30 cents on the dollar and the excess payment by each shareholder would equal 82 per cent. of the assessment which had been made by the Comptroller. Because they lacked corporate power to invest in such bonds the savings banks with the approval of the Comptroller and shareholders were to pay to the receiver the required advance over the market price without purchasing their quota of the bonds.

The Comptroller cordially approved of this proposed purchase, and in a letter to the board of directors of the *insolvent bank, *332 the contents of which were intended to be and were communicated to its shareholders while the plan was under consideration, he stated that it would result in a settlement of the affairs of the bank highly satisfactory for all interests concerned, and that he was satisfied that if such sale of the bonds were made the receiver would be able to promptly pay all of the creditors in full, but that if the plan failed and it became necessary to sell the bonds on the market there would be no escape from an assessment of 100 per cent. against the shareholders.

This proposed settlement was approved by all of the shareholders, and the defendant banks made payment to the receiver as follows: The Springfield Institution for Savings, $30,360.17; the Springfield Five Cents Savings Bank, $9,820; and the Hampden Savings Bank, $5,319.16. For these payments the banks did not receive any consideration other than the joining of the other shareholders in the plan, together with the anticipated saving of 18 per cent. of the assessment which the Comptroller had made against them. The bonds allotted the banks were sold at the market price.

After the completion of this bond transaction, the receiver, under instructions from the Comptroller, on July 22, 1902, wrote to the shareholders as follows:

"Large amounts of securities sold make it probable that the payment of the assessment will not be required. The Comptroller has accordingly decided to withdraw this assessment and I have been instructed to suspend any action to enforce its payment. This withdrawal is made, however, without prejudice to the right

of the Comptroller to levy and collect any assessment or assessments that may hereafter be necessary."

The results anticipated from this action on the part of the shareholders were not realized, and in order to satisfy the still unpaid debts of the bank and interest and costs of administration, the Comptroller on December 28, 1906, made a second assessment of $49 on each share of stock. The banks refusing to pay this second assessment, this suit was instituted against them in the District Court, and resulted in a holding in favor of the defendants, which was affirmed by the Circuit Court of Appeals in the decision which is now under review.

It will be necessary to consider but two questions, viz.: (1) Was the second assessment invalid because the Comptroller did not withdraw and had no legal authority to withdraw the first assessment? and (2) was it the understanding that the payments made by the savings banks should be applied on the assessment for their statutory liability, so that they remained liable for only 18 per cent. additional?

[1, 2] From the earliest days of the administration of the National Banking Act to this case attempts have been made in many forms to give to it a technical construction which would so restrict the powers of the Comptroller as to greatly delay and impede the settlement of the affairs of insolvent banks. But this court has uniformly declined to narrow the act by construction and has placed a liberal interpretation upon its provisions to promote its plain purpose of expeditiously and justly winding up the affairs and paying the debts of such unfortunate institutions. Studebaker v. Perry, 184 U. S. 258, 22 Sup. Ct. 463, 46 L. Ed. 528; Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476; United States v. Knox, 102 U. S. 422, 26 L. Ed. 216; Bushnell v. Leland, 164 U. S. 684, 17 Sup. Ct. 209, 41 L. Ed. 598; and Bowden v. Johnson, 107 U. S. 251, 2 Sup. Ct. 246, 27 L. Ed. 386. There is nothing in the act to prevent the Comptroller from withdrawing an assessment before it is paid, or when it is partly paid, if it should be concluded that further payment is not necessary, and no form is prescribed in which such action shall be taken by him. A large executive discretion is given to the Comptroller in this respect to adjust the assessments made to the exigencies of each case, so that the shareholders may not be burdened by paying more than is necessary or at a time when the money for any reason cannot be advantageously used. The wisdom of giving such large discretion to the Comptroller finds excellent illustration in the case before us. All persons interested in this bond transaction were convinced in July, 1902, that further payment than that which had been made would not be needed, and a construction should not be given to the act, its specific terms not requiring it, which would prevent such action as was taken by the Comptroller in withdrawing for the time being the unpaid portion of the first assessment. We conclude that the claim that the Comptroller did not have power to recall the first assessment in whole or in part is unsound in principle and wholly unsupported by the terms of the act or by court decisions.

The remaining question is: Was it the understanding that the payments to the receiver should be applied upon the statutory liability of the savings banks for which assessment, then in full force, had been made by the Comptroller?

The case was tried in large part upon a stipulation as to the facts, which contains the following:

"Inasmuch as it was ultra vires of savings banks under the statutes of the commonwealth, as the receiver and comptroller at the time well knew, to purchase such bonds as an investment, it was arranged with the knowledge and approval of the comptroller and the receiver that the savings banks in question, instead of purchasing their proportion of the bonds, should pay the difference between their market value and what the national bank paid for them."

And also this:

The checks of the banks were received "without any agreement on the part of the Comptroller or receiver that the payments thereby made should in whole or in part discharge the liability of the savings banks for or on account of the indebtedness of the national bank and any stock assessments, excepting so far if at all, as such agreement or obligation may be lawfully implied from the facts stated in this stipulation and such evidence as may be introduced."

It is argued for the receiver that if it had been understood or intended that the payments by the banks should be credited on the outstanding assessment this would very certainly have found written expression, if not elsewhere, in the receipts given and received for the payments.

It is notable that, although this bond purchase involved more than half a million dollars, the terms and purposes of it were not expressed in any writing, either between the shareholders themselves or between the receiver and the shareholders, which indicates that the transaction, while large, seemed simple to the men of affairs engaged in it, and that to their minds, at least, the implication from the payments to be made could not be doubtful. The shareholders who purchased the bonds had the prospect—how valuable it was the record does not indicate, but still a prospect—of recouping their losses through a later increase in the market value of the bonds, but the savings banks had no such prospect, because, not having legal authority to make such purchase, their payment of what equaled 82 per cent. of the assessment against them was a naked payment, without chance of reimbursement, in whole or in part, from any source.

The evidence introduced in addition to

the stipulation of facts is slight, consisting of contemporaneous entries in the corporation record and account books of the banks, and the indorsement on the checks by which payment was made. This evidence is not conclusive, but the implications from it, such as they are, are favorable to the contention of the banks.

[3] Since no clearly definite expression is found in the record either that these payments were or were not to be applied on the shareholding liability of the savings banks, *336 we are required to decide which contention of the parties is the more reasonable and probable, having regard to all the facts and circumstances, stipulated and proved in the case.

[4-6] There being no evidence to the contrary, we must adopt the assumption of ordinary life and of law that the trustees for the savings banks acted lawfully, within the limits of their powers, and we must also have regard to the long-settled rule of law that where neither the debtor nor the creditor has applied payments before controversy has arisen, the courts will make application of them in a manner to accomplish the ends of justice. United States v. Kirkpatrick, 9 Wheat. 720, 6 L. Ed. 199; National Bank v. Mechanics' Bank, 94 U. S. 437, 439, 24 L. Ed. 176. When to this we add that natural justice, as distinguished from a technical conclusion, requires that the savings banks be allowed credit for the payments that they have made, since thereby the creditors of the insolvent bank may get the benefit of the full statutory liability of the shareholders without a new and unanticipated obligation being imposed on the stockholding banks, we are compelled to resolve any doubt in which the record might otherwise leave us in favor of the defendants. It is impossible for us to conclude that the officials of these savings banks, trustees as they were for their depositors and stockholders, and having in mind the limitations on their powers, as the stipulation declares that they and the receiver did have, should have made these considerable payments in such a manner as not to at all diminish the statutory liability of their banks, especially since payments not made to be applied on the assessment would be substantially unauthorized gifts, for, as we have said, the banks had no prospect, as the other stockholders had, of being reimbursed for such payments by the possible rise in the market value of the bonds.

*337 It results that the decree of the Circuit Court of Appeals must be affirmed, but not on the ground stated in the opinion of that court, and that the second assessment must be held void because excessive. This, however, without prejudice to the making of another assessment by the Comptroller upon the shareholding banks for the difference, if needed, between the amount paid and the amount of an assessment for the full statutory liability.

Affirmed.

Mr. Justice VAN DEVANTER and Mr. Justice PITNEY dissent.

(245 U. S. 337)

UNITED STATES v. CALIFORNIA BRIDGE & CONSTRUCTION CO.

CALIFORNIA BRIDGE & CONSTRUCTION CO. v. UNITED STATES.

(Argued Nov. 9 and 12, 1917. Decided Dec. 10, 1917.)

Nos. 39 and 40.

1. UNITED STATES ⊂⊃72—CONTRACTS—MODIFICATION OR RESCISSION.

Where one contracting with the government to build certain structures at a navy yard was informed before the contract was executed that the location pointed out to its president had not been officially determined upon, and that another location might be selected, as was done, but, apparently concluding that the contract was an improvident one, and for various reasons, some with and more without merit, delayed going forward with the work, the government's action in declaring the contract void upon the recommendation of a board of three naval officers was justified under an option in the contract to declare it void if the contractor should fail to perform its obligations thereunder.

2. JUDGMENT ⊂⊃584—ESTOPPEL BY JUDGMENT —BASIS OF DOCTRINE—"RES ADJUDICATA."

The doctrine of estoppel by judgment or res judicata proceeds upon the principle that one person shall not litigate a second time with the same person, or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined upon its merits by a court of competent jurisdiction in a judgment in personam in a former suit.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Res Adjudicata.]

3. JUDGMENT ⊂⊃627 — PERSONS WHO MAY TAKE ADVANTAGE OF BAR—PRINCIPAL AND SURETY.

A contract with the government provided for the construction of certain structures at a designated navy yard, without designating the precise location in the navy yard, and there was a dispute as to whether the contractor was told before the contract was signed that another location than the one pointed out to its president might finally be selected. Another location was selected, and the contractor having delayed in going forward with the work, the government canceled the contract. In an action by the government against the contractor's surety, it was decided that, as against the surety, the government was not justified in requiring the construction on the changed location. *Held*, that this judgment did not estop the government from asserting the right to change the location in a subsequent action between it and the contractor, as the legal rights of the contractor and the surety depended on whether the first location was represented as having been finally determined upon before they executed the contract, and this might have been represented to the surety, and not to the contractor.

4. UNITED STATES ⊂⊃75—CONTRACTS—BREACH —RIGHTS OF GOVERNMENT.

The government annulled a contract for the construction of certain structures for default of

the contractor, and entered into a contract with another contractor substantially identical with the first contract, but in the progress of the work made four supplemental contracts, one of which reduced the cost, and the other three of which involved increases, and which together constituted a deviation from the original contract, involving a cost of about 6 per cent. of the total contract price. *Held*, that the work performed under the second contract was not so substantially that which the original contractor contracted to perform as to permit the recovery from it of the difference in cost between the two contracts.

Appeals from the Court of Claims.

Suit by the California Bridge & Construction Company against the United States. From a judgment of the Court of Claims (50 Ct. Cl. 40) for an insufficient amount, the claimant appeals, and from so much of the judgment as denied a recovery on its counterclaim, the government brings a cross-appeal. Affirmed.

Mr. George A. King, of Washington, D. C., for Bridge Co.

Mr. Assistant Attorney General Thompson, for the United States.

*337

*Mr. Justice CLARKE delivered the opinion of the Court.

These two cases are appeals from the Court of Claims which were heard and will be decided together, the second being a cross-appeal from the judgment denying recovery on the government's counterclaim.

The California Bridge & Construction Company, hereinafter referred to as the Bridge Company, on December 21, 1898, with the American Surety Company of New York, Albert Brown and Thomas Prather as its sureties, entered into a written contract with the United States to furnish the materials for and to completely construct, within six months from the date of the contract, a sawmill, boiler house, and steel chimney "at the United States navy yard, Mare Island, California."

*339

*On January 2, 1901, claiming to act under an option therein contained, the government declared the contract void, and the Bridge Company was notified that the work would be completed at its expense. Under a second contract the work was completed by another contractor.

In its amended petition the Bridge Company claimed that the government had terminated the contract without warrant and sought to recover for materials furnished, expenses incurred, and anticipated profits. The government denied all liability to the plaintiff and in a counterclaim prayed for a judgment for the difference between the amount of the plaintiff's contract and the cost of completing the work, plus liquidated damages.

The substance of the Bridge Company's first claim is that when, for the purpose of informing itself with a view to bidding on the proposed work, its president and secretary visited the navy yard, a location for the construction, hereinafter designated the "first location," was shown to them, duly staked out, and that its bid was based upon this representation, that after the contract was executed, without the consent of the Bridge Company, this location was changed to another, hereinafter designated the "second location," still within the navy yard, but one upon which it was much more difficult and expensive to construct the work than upon the first location, and that the government refused to agree to make a reasonable allowance for such increased expense, and wrongfully annulled the contract to the damage of the claimant.

To this branch of the case the defense is that, at the time the officials of the plaintiff visited the navy yard and also when the contract was signed, the precise location of the plant had not been officially determined upon, that they were then so informed, and made their bid with that understanding, and that the contract was lawfully annulled for delay in going forward with the performance of it.

*340

*[1] The case is here for review on a finding of facts by the Court of Claims, in which it is stated that when the president of the Bridge Company visited the navy yard before the contract was signed he was authoritatively informed "that the site of the structure was not definite," and that "the location was liable to be changed to some other place within the limits of the navy yard." The correspondence, appearing in the finding of facts, which passed between the parties before the contract was annulled makes it clear beyond controversy that the Bridge Company when it executed the contract fully understood that another location than the one pointed out might finally be selected.

Not long after the contract was signed, as if concluding that it was an improvident one, which it wished to modify, the Bridge Company, for various reasons, some with and more without merit, delayed in going forward with the work, with the result that after much discussion, on January 2, 1901, in a letter addressed to the Bridge Company, the government, asserting that it was acting under the option reserved in the contract, declared it void and gave notice to the Bridge Company that the work would be completed at its expense.

The contract contained a provision giving to the government the option to declare it void if the parties of the first part should fail in any respect to perform their obligations under it and we agree with the Court of Claims in concluding that this action by the government, taken upon the recommendation of a board of three naval officers, was entirely justified.

The Bridge Company further relies upon a judgment rendered in the federal Circuit Court for the Eastern District of Pennsyl-

vania in favor of its surety the American Surety Company of New York, as estopping the government from claiming either in defense or in aid of its counterclaim that it *341 had the lawful right to require the company to erect the structure contracted for on the second site.

As a general proposition, the claim that the principal and surety in a contract of suretyship are in such privity that a judgment in favor of the latter works an estoppel in favor of the former arrests attention more by its novelty than by its difficulty, having regard to the several defenses which a surety may have on its contract which the principal may not have. Especially is this true in such a case as we have here, in which the contract of suretyship consists simply in the signing of the construction contract by the Surety Company "as surety," so that the rights and obligations of the parties to it must be derived wholly from the law of suretyship.

In dealing with this contention of the Bridge Company, it will not be necessary for us to enter into the refinements of the decisions with respect to privity and privies.

[2] The doctrine of estoppel by judgment, or res judicata, as a practical matter, proceeds upon the principle that one person shall not a second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined, upon its merits, by a court of competent jurisdiction, in a judgment in personam in a former suit. Hopkins v. Lee, 6 Wheat. 109, 113, 5 L. Ed. 218; Washington, Alexandria & Georgetown Packet Co. v. Sickles, 24 How. 333, 16 L. Ed. 650; Id., 5 Wall. 580, 18 L. Ed. 550; Lovejoy v. Murray, 3 Wall. 1, 18, 18 L. Ed. 129; Litchfield v. Goodnow, 123 U. S. 549, 8 Sup. Ct. 210, 31 L. Ed. 199; Southern Pacific Co. v. United States, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355; Fayerweather v. Ritch, 195 U. S. 276, 25 Sup. Ct. 58, 49 L. Ed. 193; Bigelow v. Old Dominion Copper Mining Co., 225 U. S. 111, 127, 32 Sup. Ct. 641, 56 L. Ed. 1009, Ann. Cas. 1913E, 875; Bigelow on Estoppel, c. 3.

[3] The suit in which this judgment claimed as an estoppel was rendered was commenced by the government against the American Surety Company and others, as sureties *342 of the Bridge Company on the building contract, to recover the difference between the amount which the government was compelled to pay for the completed work and the amount for which the Bridge Company had contracted to complete it. The Surety Company was the only defendant which was served or appeared in the suit. With respect to this judgment the Court of Claims finds that in the Circuit Court the surety company pleaded non assumpsit and a special plea based on the action of the United States "in assuming to change the contract by changing the site of the buildings to be erected, to which change the surety had not assented," and also that the Circuit Court "submitted to the jury the question whether, under the contract and the circumstances attending its execution the United States could require claimants to erect the structure contemplated by the contract at a site other than as stated, and that the jury brought in a verdict for the surety company, and judgment was entered accordingly." No writ of error was procured to review this judgment.

Obviously, the finding and judgment thus described by the Court of Claims must be understood as deciding that the government was not justified in requiring the construction to be on the "second location" as against the Surety Company, which was the only defendant served or appearing in that action, but not as so holding as against the Bridge Company, which was a stranger to it, and therefore the judgment in that case cannot serve as an estoppel in this one unless the issue relied upon the Surety Company in the Circuit Court case to defeat the claim of the government for damages was precisely the same as is relied upon in this case by the Bridge Company for the same purpose, and a brief discussion of the record will show that such is not the fact.

It is to be noted that the contract provides for the completing of the required construction "at the United States navy yard, Mare *343 Island, California," without designation of the precise location in the navy yard, and therefore, since the "first" and "second" locations were both within the limits of the yard, it was necessary to determine from evidence aliunde the writing whether the "first location" was represented to either the Surety Company or to the Bridge Company as having been finally determined upon before they executed the contract, and the information which each received as to this fact would determine its legal rights with respect to the claim of the government for damages.

The defense in the former case turned on the information which the Surety Company received as to the precise location in the navy yard of the proposed construction before it executed the contract—whether it was informed as to the "first location" and as to whether that location had been finally or only tentatively determined upon—and the claim of the Bridge Company in this case turns on the information, also with respect to the "first location" which that company received before signing the contract. But since there was no relation between the two companies, such that either was or is chargeable with the knowledge which the other had on this disputed subject, and since the notice which one of them had may have been entirely different from that which the other received, clearly the Surety Company may have been

informed that the "first location" had been definitely determined upon and may have executed the contract with that understanding, as the judgment in its favor in the Circuit Court implies, while, at the same time, as the government claims in this case, the Bridge Company, prior to and at the time of the signing of the contract, may have been informed that the "first location" was tentative only and subject to change, as the Court of Claims has found to be true.

*344 Thus, since the legal liability of the Surety Company and the Bridge Company depend as to each upon peculiar facts, of each case, and as one could very well be liable and the other not, it is plain that the issue determined in the Circuit Court case was not the same as that which was presented in this case and that therefore the claim of estoppel by former judgment is without merit and must be denied.

[4] There remains to be considered the cross-appeal of the government.

After the contract with the Bridge Company was annulled the government entered into a contract with another contractor, identical with the former one, except for some unimportant additions to the specifications. But, in the progress of the work, four supplemental contracts were deemed necessary by the government, and were entered into in writing with the second contractor and his surety.

The first of these supplemental contracts related to change in the length and size of the foundation piles to be used, involving an estimated reduction in payment to be made of almost $3,000; the second provided for an addition to the number of piles provided for in the second contract; the third covered changes in the character of various parts of the foundation to be constructed, and the fourth provided for changes in walls, doors, stairways and for the adding a foundation for a bulkhead wall. While the additional cost involved in the changes provided for in three of these supplemental contracts is less than the reduction in cost of the changes provided for in the other one of them, yet, since they constitute a deviation from the original contract, involving a cost of about 6 per cent. of the total contract price, and since each of these supplemental contracts required an agreement with the new contractor which involved an estimate of the expense of making the changes contemplated by them, we agree with the Court of Claims in concluding that it cannot be said that the work performed under the second contract was so substantially that which the Bridge Company contracted to perform as to permit the recovery of the difference in cost between the two under the familiar rules applicable to the subject.

*345

The history of the negotiation between the Bridge Company and the government before the first contract was annulled, as it appears in the finding of facts, makes it highly inequitable that the claim of liquidated damages should be allowed. The recovery of the Bridge Company, limited as it was to the value of the materials delivered by it and used by the government, is approved. It results that the judgment of the Court of Claims is

Affirmed.

(245 U. S. 166)

UNITED STATES ex rel. ARANT v. LANE, Secretary of Interior.

(Argued Nov. 13 and 14, 1917. Decided Dec. 10, 1917.)

No. 44.

1. COURTS ⊜388—FEDERAL SUPREME COURT —REVIEW OF DECISIONS OF COURTS OF DISTRICT OF COLUMBIA.

Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1159 [Comp. St. 1916, § 1227]) § 250, provides that any final judgment or decree of the Court of Appeals of the District of Columbia may be reviewed by the Supreme Court in certain cases, including cases in which the existence or scope of any power or duty of an officer of the United States is drawn in question and cases in which the construction of any law of the United States is drawn in question, and that, except as provided in the next succeeding section, judgments and decrees of such court shall be final in all cases not reviewable as therein provided. *Held*, that judgments or decrees of such court are not final in cases involving the interpretation and effect of an act of Congress general in character or the general duty or power of an officer under a law of the United States as distinguished from merely local authority.

2. COURTS ⊜388—FEDERAL SUPREME COURT —REVIEW OF DECISIONS OF COURTS OF DISTRICT OF COLUMBIA.

Judicial Code, § 251 (Comp. St. 1916, § 1228), provides that in any case in which the judgment or decree of the Court of Appeals of the District of Columbia is made final by the preceding section it shall be competent for such court to certify to the Supreme Court any questions of law concerning which it desires the instruction of that court. *Held* that, where the judgment or decree of the Court of Appeals is not final under section 250 (section 1227), that court has no authority to certify questions to the Supreme Court, as this is the unambiguous command of the statute, and moreover the difference between the language used in section 251 and that used in section 239 (section 1216) authorizing Circuit Courts of Appeals to certify questions in any case within their jurisdiction shows a legislative intent to restrict the Court of Appeals of the District of Columbia to cases in which its judgments or decrees are final.

3. COURTS ⊜90(4)—FORMER DECISIONS AS AUTHORITIES—CONSTRUCTION OF STATUTES.

Even though the Supreme Court has determined controversies presented by certificates from the Court of Appeals of the District of Columbia in cases in which its judgments or decrees would not be final, where no question was raised concerning the power of that court to certify questions, such cases are not authoritative on the question as to the power to certify.

On Certificate from the Court of Appeals of the District of Columbia.

Mandamus proceedings by the United States, on relation of William F. Arant, against Franklin K. Lane, Secretary of the Interior. From a judgment dismissing the

proceeding, the relator appealed to the Court of Appeals of the District of Columbia, which certified the case to the Supreme Court. Dismissed for want of jurisdiction.

Mr. H. Prescott Gatley, of Washington, D. C., for Arant.

Mr. Assistant Attorney General Warren, for Secretary Lane.

*167 *Mr. Chief Justice WHITE delivered the opinion of the Court.

Without competitive examination or certification under the Civil Service Law in 1903 William F. Arant, the relator and appellant, was appointed by the Secretary of the Interior superintendent of a national park in Oregon. Following his refusal in 1913 to resign, when requested by the Secretary, he was summarily removed without specification of charges or hearing, and upon his refusal to vacate was ousted by the United States marshal. Nearly two years afterwards this proceeding for mandamus to restore the relator to office was commenced. The return, referring to the act of Congress governing the civil service (Act of August 24, 1912, c. 389, 37 Stat. 555), especially challenged the assertion that the relator was within the provisions of that law inhibiting removal without charges and hearing and asserted that the right to appoint and remove from the office in question was excepted out of such provisions. A demurrer to the return as stating no defense was overruled and from the judgment dismissing the proceeding the case was taken to the Court of Appeals of *168 the District, which, desiring to be instructed as to its duty, after certifying the case as above stated, propounded two questions for our consideration: First, whether the relator was subject to be summarily removed without charges or hearing thereon; and, second, if not, whether in consequence of the long delay he was barred by laches from the right to relief.

As the power of the court below to submit the questions for our solution is challenged, that subject requires first to be considered. The power must find its sanction in the following provision of section 251 of the Judicial Code (Comp. St. 1916, § 1228):

"It shall also be competent for said Court of Appeals, in any case in which its judgment or decree is made final under the section last preceding, at any time to certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for their proper decision,"

—this being followed by a clause conferring authority on this court in such case either to answer the questions or to order up for review the whole case and dispose of it.

[1, 2] It is not open to controversy that the judgments or decrees of the court below are not made final by section 250 in cases involving the interpretation and effect of an act of Congress general in character or the general duty or power of an officer under the law of the United States as contradistinguished from merely local authority. American Security & Trust Co. v. District of Columbia, 224 U. S. 491, 32 Sup. Ct. 553, 56 L. Ed. 856; McGowan v. Parish, 228 U. S. 312, 33 Sup. Ct. 521, 57 L. Ed. 849; United Surety Co. v. American Fruit Co., 238 U. S. 140, 35 Sup. Ct. 828, 59 L. Ed. 1238; Newman v. Frizzell, 238 U. S. 537, 35 Sup. Ct. 881, 59 L. Ed. 1446. This being true, it is apparent that, as this case is of the character just stated, it was not one coming within the authority conferred to certify, which is confined to cases where the judgments or decrees of the court are made final under section 250. The unambiguous command of the text excludes the necessity for interpretation. But if it be conceded for the sake of argument that there is necessity for interpretation, the *169 briefest consideration will reveal the coincidence between the animating spirit of the provision and the obvious result of its plain text. It is undoubted that the authority to certify conferred upon the Court of Appeals of the District by section 251 did not previously exist in that court in any case. The Circuit Courts of Appeals, however, had undoubtedly under the Act of 1891, a power to certify. Section 6, 26 Stat. 828, c. 517. But while by the terms of that act such authority apparently extended to "every such subject within its appellate jurisdiction," it came to be settled that by limitations found in the text such power to certify was restricted to cases in which the judgments or decrees of the Circuit Courts of Appeals were final, and therefore not susceptible of being of right otherwise reviewed in this court. Columbus Watch Co. v. Robbins, 148 U. S. 266, 268, 13 Sup. Ct. 594, 37 L. Ed. 445; Bardes v. Hawarden First National Bank, 175 U. S. 526, 527, 20 Sup. Ct. 193, 44 L. Ed. 261. Coming to provide concerning this situation the Judicial Code enlarged the power of a Circuit Court of Appeals by conferring authority to certify "any case within its appellate jurisdiction" (section 239 [Comp. St. 1916, § 1216]), but in giving power to certify for the first time to the Court of Appeals of the District expressly limited it to cases "in which its judgment or decree is made final" (section 251 [section 1228]). The expansion of authority conferred upon the Circuit Courts of Appeals at the same time that the restricted authority was conferred upon the Court of Appeals of the District makes manifest the legislative intent to give a greater power in the one case than in the other.

[3] It is true that in Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, and Equitable Surety Co. v. McMillan, 234

U. S. 448, 34 Sup. Ct. 803, 58 L. Ed. 1394, controversies were determined on certificates made and questions based thereon by the Court of Appeals of the District. But in both cases the judgment or decree of the court below if rendered would have been final within the purview of section 250 of the Judicial Code; the first, because it arose under *170 the patent laws, and the second, because it concerned an act of Congress of local application. Even, however, upon the assumption that the cases are susceptible of a different view, as no question was raised in either concerning the power to certify and the limitation to which it was subjected by the statute, the mere fact that the cases were entertained affords no ground for holding them as authoritative on the question before us and thereby causing the statute to embrace a power which it excluded by both its letter and spirit. United States v. More, 3 Cranch, 159, 172, 2 L. Ed. 397; Louisville Trust Co. v. Knott, 191 U. S. 225, 236, 24 Sup. Ct. 119, 48 L. Ed. 159.

As therefore there was no authority in the court below to certify and propound the questions, the certificate must be and it is

Dismissed for want of jurisdiction.

(245 U. S. 298)

SEABOARD AIR LINE RY. v. STATE OF NORTH CAROLINA.

(Submitted Nov. 7, 1917. Decided Dec. 10, 1917.)

(No. 18.)

1. COMMERCE ⟸61(1)—REGULATION—TRANSPORTATION OF INTOXICATING LIQUORS.

In view of the Webb-Kenyon Law (Act March 1, 1913, c. 90, 37 Stat. 699 [Comp. St. 1916, § 8739]) divesting intoxicating liquors of their interstate character in certain cases, Pub. Laws N. C. 1913, c. 44, § 5, requiring railroad companies to keep a book in which shall be entered the name of every person to whom intoxicating liquor is shipped, with the amount, kind, date of receipt, etc., is within the power of the state as applied to interstate shipments, as the state might have made the shipment of intoxicants a penal offense irrespective of any personal right in the consignee to have and consume the liquor, and the greater power included the power of permitting shipments on conditions intended to secure publicity.

2. COMMERCE ⟸8(11) — EXCLUSIVE OR CONCURRENT POWERS OF CONGRESS AND THE STATES.

Interstate Commerce Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384, as amended by Act June 18, 1910, c. 309, § 12, 36 Stat. 553 (Comp. St. 1916, § 8583, pars. 6, 7), prohibiting carriers subject thereto from disclosing information concerning shipments, was intended to apply to matters within the exclusive control of the federal government, and when, by the Webb-Kenyon Law, interstate shipments of intoxicating liquors became subject to state legislation, its provisions necessarily ceased to be paramount in respect to such shipments.

Mr. Justice Van Devanter dissenting.

In Error to the Supreme Court of the State of North Carolina.

The Seaboard Air Line Railway was convicted of an offense, and its conviction was affirmed by the Supreme Court of North Carolina (State v. Seaboard Air Line Ry., 169 N. C. 295, 84 S. E. 283), and it brings error.

Mr. Murray Allen, of Raleigh, N. C., for plaintiff in error.

Messrs. James S. Manning, of Raleigh, N. C., and Robert H. Sykes, of Durham, N. C., for the State of North Carolina.

*299 *Mr. Justice McREYNOLDS delivered the* opinion of the court.

Pertinent provisions of "An act to secure the enforcement of the laws against the sale and manufacture of intoxicating liquors" established by the General Assembly of North Carolina March 3, 1913 (Pub. Laws 1913, c. 44, p. 76), are copied in the margin.[1] Sec-

[1]Public Laws of North Carolina 1913, c. 44, p. 76:

"Sec. 1. That it shall be unlawful for any person, firm, corporation, association or company, by whatever name called, other than druggists and medical depositories duly licensed thereto, to engage in the business of selling, exchanging, bartering, giving away for the purpose of direct or indirect gain, or otherwise handling spirituous, vinous or malt liquors in the state of North Carolina. Any person, firm or corporation or association violating the provisions of this act shall be guilty of a misdemeanor.

"Sec. 2. That it shall be unlawful for any person, firm, association or corporation by whatever name called, other than druggists and medical depositories duly licensed thereto, to have or keep in his, their or its possession, for the purpose of sale, any spirituous, vinous or malt liquors; and proof of any one of the following facts shall constitute prima facie evidence of the violation of this section:

"First: The possession of a license from the government of the United States to sell or manufacture intoxicating liquors; or

"Second: The possession of more than one gallon of spirituous liquors at any one time, whether in one or more places; or

"Third: The possession of more than three gallons of vinous liquors at any one time, whether in one or more places; or

"Fourth: The possession of more than five gallons of malt liquors at any one time, whether in one or more places; or

"Fifth: The delivery to such person, firm, association or corporation of more than five gallons of spirituous or vinous liquors, or more than twenty gallons of malt liquors within any four successive weeks, whether in one or more places; or

"Sixth: The possession of intoxicating liquors as samples to obtain orders thereon. * * *

"Sec. 3. Upon the filing of complaint, under oath, by a reputable citizen, or information furnished under oath by an officer charged with the execution of the law, before a justice of the peace, recorder, mayor, or other officer authorized by law to issue warrants, charging that any person, firm, corporation, association or company, by whatever name called, has in his, their or its possession, at a place or places specified, more than one gallon of spirituous or vinous liquors or more than five gallons of malt liquors for the purpose of sale, a warrant shall be issued commanding the officer to whom it is directed to search the place or places described in such complaint or information. * * *

"Sec. 5. All express companies, railroad companies, or other transportation companies doing business in this state are required hereby to keep a separate book in which shall be entered immediately upon receipt thereof the name of the person to whom the liquor is shipped, the amount and kind received, and the date when received, the date when deliv-

*300 tion 5 requires railroad companies to keep a separate book in which shall be entered the name of every person to whom intoxicating liquor is shipped, together with amount, kind, date of receipt, etc., to be followed by the consignee's signature acknowledging delivery. And it further provides that the book shall be open for inspection by any officer or citizen, and makes failure so to do a misdemeanor.

Plaintiff in error was indicted at the May term, 1914, superior court, Wake county, upon a charge of violating section 5 by refusing, in the preceding January, to permit a citizen to inspect its record showing shipments of spirituous and malt liquors transported from Virginia into that county, "said record containing the names of the consignee, consignor, date of receipt and delivery of said shipments, and to whom delivered."

The jury returned a special verdict in which they found:

"That R. L. Davis, on a date prior to the starting of this prosecution, he being at that time a citizen of the county of Wake, state of North Carolina, went to the office of the defendant company during its business hours, and while said office was open, and demanded of the agent that he be allowed to inspect the book kept by the defendant showing shipments of liquor from points outside of the state of North Carolina to the city of Raleigh;" "the agent of the defendant stated that he was instructed to and did refuse to allow * * * the inspection;" "Davis had no legal process and did not make any demand under any legal process, and at the time of the alleged demand he was neither a state nor federal officer of any kind of any state or territory;" "he was seeking information from said book for the purpose of prosecuting persons suspected of violating the law of North Carolina;" and "was seeking general information as to shipments of whisky into the city of Raleigh from points in another state, and that he had in his mind specially an effort to see what evidence could be procured against one or more specific parties in the city of Raleigh, meaning by the words 'general information' that he was seeking to ascertain who were the consignees of liquor and the quantities they were receiving, for the purpose of prosecuting such *302 parties as may be charged or suspected with the violation of the prohibition laws of the state;" and that he "had no authority except that which existed, if any, by virtue of the fact that he was at that time a citizen of the state."

Upon this special verdict the state Supreme Court adjudged plaintiff in error guilty as charged, 169 N. C. 295, 84 S. E. 283, and it now maintains the judgment is erroneous, for reasons following:

I. Section 5, c. 44, is void because an attempt by the state to regulate interstate commerce, in that it imposes as a condition precedent to delivery that the carrier shall keep a separate book containing name of person to whom liquor is shipped, amount and kind received, date of receipt and delivery, by whom and to whom delivered; and the consignee is required to receipt therefor before delivery.

II. In order to comply with section 5 by permitting records of interstate shipments of liquor to be inspected by a mere citizen, the carrier would necessarily violate the provisions of section 15, Act to Regulate Commerce, as amended June 18, 1910 (36 Stat. 539, 551, 553 [Comp. St. 1916, § 8583, pars. 6, 7]), which prohibit such action except under circumstances specified. (These are copied below.)[2]

*III. The Webb-Kenyon Law (Act of Con- *303 gress March 1, 1913, entitled "An act divesting intoxicating liquors of their interstate character in certain cases," 37 Stat. 699) cannot affect the application of these principles to shipments destined to points in Wake county, because it relates to liquors intended

ered, by whom delivered, and to whom delivered, after which record shall be a blank space, in which the consignee shall be required to sign his name, or if he cannot write, shall make his mark in the presence of a witness, before such liquor is delivered to such consignee, and which said book shall be open for inspection to any officer or citizen of the state, county, or municipality any time during business hours of the company, and said book shall constitute prima facie evidence of the facts therein and will be admissible in any of the courts of this state. Any express company, railroad company, or other transportation company or any employé or agent of any express company, railroad company, or other transportation company violating the provisions of this section shall be guilty of a misdemeanor: Provided, upon the filing of a certificate signed by a reputable physician or two (2) reputable citizens that the consignee is unable, by reason of sickness or infirmities of age, to appear in person, then the said company is authorized to deliver any package to the agent of said consignee, and the agent shall sign the name of the consignee and his own name, and the certificate shall be filed of record."

[2] "An Act to Regulate Commerce," as amended June 18, 1910 (36 Stat. 539, 551, 553).

"Section 15. * * *

"It shall be unlawful for any common carrier subject to the provisions of this act, or any officer, agent, or employé of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used: Provided, that nothing in this act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the government of the United States, or of any state or territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

"Any person, corporation, or association violating any of the provisions of the next preceding paragraph of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than one thousand dollars."

to be received, possessed, sold or used in violation of state law; and to receive or possess liquor in any quantity in that county is not unlawful.

[1] For some years it has been the established policy of North Carolina "approved by popular vote and expressed and enforced by the general and many local statutes, that, except in very restricted instances, the manufacturing and sale of intoxicating liquors shall not be allowed." Smith v. Express Company (1914) 166 N. C. 155, 157, 82 S. E. 15, 16. Since our decision in Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311, 320, 324, 37 Sup. Ct. 180, 184 (61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845), it has not been open to serious question that the Webb-Kenyon Law is a valid enactment; that "its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught"; and that under it a *304 state may inhibit*shipments therein of intoxicating liquors from another by a common carrier although intended for the consignee's personal use where such use is not actually forbidden. Plainly, therefore, after that enactment nothing in the laws or Constitution of the United States restricted North Carolina's power to make shipment of intoxicants into Wake county a penal offense irrespective of any personal right in a consignee there to have and consume liquor of that character.

The challenged act instead of interposing an absolute bar against all such shipments, as it was within the power of the state to do, in effect permitted them upon conditions intended to secure publicity, to the end that public policy might not be set at naught by subterfuge and indirection. The greater power includes the less.

[2] The provisions of section 15, Act to Regulate Commerce, here relied on were intended to apply to matters within the exclusive control of the federal government; and when by a subsequent act Congress rendered interstate shipments of intoxicating liquors subject to state legislation, those provisions necessarily ceased to be paramount in respect of them.

The judgment of the court below is Affirmed.

Mr. Justice VAN DEVANTER dissents.

(245 U. S. 304)

CRANE v. CAMPBELL, Sheriff.

(Argued and submitted Nov. 15, 1917. Decided Dec. 10, 1917.)

No. 53.

1. COURTS ⟸394(4) — FEDERAL SUPREME COURT — REVIEW OF DECISIONS OF STATE COURTS.

On writ of error to a state court, the validity of a state statute under the state Constitution is not open to consideration in the federal Supreme Court.

2. CONSTITUTIONAL LAW ⟸206(2), 274 — INTOXICATING LIQUORS ⟸17—REGULATION—VALIDITY OF STATUTES.

Laws Idaho 1915, c. 11, defining prohibition districts, and regulating and prohibiting the manufacture, sale, transportation, and traffic in intoxicating liquors so far as it undertakes to render criminal the mere possession of whisky for personal use, does not violate Const. Amend. 14, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, as a state may absolutely prohibit the manufacture, gift, purchase, sale, or transportation of intoxicating liquors, and may adopt such measures as are reasonably appropriate or needful to render the exercise of this power effective.

In Error to the Supreme Court of the State of Idaho.

Habeas corpus by Ed. Crane against J. J. Campbell, Sheriff of Latah County, Idaho. The writ was quashed by the Supreme Court of Idaho (Ex parte Crane, 27 Idaho, 671, 151 Pac. 1006), and the petitioner brings error. Affirmed.

Messrs. T. A. Walters, of Boise, Idaho, and Frank L. Moore, of Moscow, Idaho, for defendant in error.

Mr. J. H. Forney, of Moscow, Idaho, for plaintiff in error.

*Mr. Justice McREYNOLDS delivered the *305 opinion of the Court.

An act of the Legislature of Idaho, approved February 18, 1915, "defining prohibition districts and regulating and prohibiting the manufacture, sale, * * * transportation for sale or gift, and traffic in intoxicating liquors," etc. (Session Laws of Idaho 1915, c. 11), provides:

"Sec. 2. It shall be unlawful for any person, firm, company or corporation, its officers or agents, to sell, manufacture or dispose of any intoxicating liquor or alcohol of any kind within a prohibition district or have in his or its possession or to transport any intoxicating liquor or alcohol within a prohibition district unless the same was procured and is so possessed and transported under a permit as hereinafter provided: Provided, that so long as the manufacture of intoxicating liquors for beverage purposes shall not be prohibited within the state by the Constitution or by general law applicable by its terms to the state as a whole, it shall not be unlawful for any person, company or corporation to manufacture intoxicating liquors for beverage purposes in a prohibition district for transportation to and sale outside of the prohibition district: Provided, that nothing in this act shall be construed to apply to the manufacture, transportation or sale of wood or denatured alcohol." *306

*"Sec. 15. It shall be unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors except as in this act provided."

"Sec. 22. It shall be unlawful for any person, firm, company, corporation or agent to have in his or its possession any intoxicating liquors of any kind for any use or purpose except the same shall have been obtained and is so possessed under a permit authorized by this act."

Plaintiff in error was arrested and held in custody by the sheriff, in default of bail, solely because charged with having "in his possession a bottle of whisky for his own use and benefit and not for the purpose of giving away or selling the same to any person" within Latah county, Idaho—a prohibition district—on May 16, 1915, in violation of the quoted sections. He sued out a writ of habeas corpus from the state Supreme Court and sought discharge upon the ground that those sections were in contravention of the Fourteenth Amendment, federal Constitution, and therefore void. The court held:

"The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scientific or mechanical purposes, or for compounding or preparing medicine, so that the possession of whisky, or of any intoxicating liquor, other than wine and pure alcohol for the uses above mentioned, is prohibited."

And further:

"We have reached the conclusion that this act is not in contravention of section 1 of the Fourteenth Amendment to the Constitution of the United States; * * * that it was passed by the Legislature with a view to the protection of the public health, the public morals and the public safety; that it has a real and substantial relation to those objects, and that it is, therefore, a *307 reasonable exercise of the police power of the state." In re Ed. Crane, 27 Idaho, 671, 151 Pac. 1006.

The writ was accordingly quashed and the petitioner remanded to custody.

[1] The question presented for our determination, is whether the Idaho statute, in so far as it undertakes to render criminal the mere possession of whisky for personal use, conflicts with that portion of the Fourteenth Amendment which declares:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

Its validity under the state Constitution is not open for our consideration; with its wisdom this court is not directly concerned.

[2] It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a state has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment. Bartemeyer v. Iowa, 18 Wall. 29, 21 L. Ed. 929; Beer Co. v. Massachusetts, 97 U. S. 25, 33, 24 L. Ed. 989; Mugler v. Kansas, 123 U. S. 623, 662, 8 Sup. Ct. 273, 31 L. Ed. 205; Crowley v. Christensen, 137 U. S. 86, 91, 11 Sup. Ct. 13, 34 L. Ed. 620; Purity Extract Co. v. Lynch, 226 U. S. 192, 201, 33 Sup. Ct. 44, 57 L. Ed. 184; Clark Distilling Co. v. Western Md. Ry. Co., 242 U. S. 311, 320, 321, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845; Seaboard Air Line Ry. v. North Carolina, 245 U. S. 298, 38 Sup. Ct. 96, 62 L. Ed. ——.

As the state has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. Booth v. Illinois, 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623, Silz v. Hesterberg, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75, Murphy v. California, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153, and Rast v. Van Deman & Lewis, 240 U. S. 342, 364, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455. And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary *308 and unreasonable or without proper relation to the legitimate legislative purpose.

We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no state may abridge. A contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible ways of getting them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the state.

The judgment of the court below must be Affirmed.

(245 U. S. 308)

DUNCAN TOWNSITE CO. v. LANE, Secretary of Interior.

(Argued Nov. 15, 1917. Decided Dec. 10, 1917.)

No. 51.

1. INDIANS ⟸13—LANDS—RIGHTS OF ALLOTTEES—CANCELLATION OF CERTIFICATES.

Section 23 of the Choctaw-Chickasaw Agreement, ratified and confirmed by Act July 1, 1902, c. 1362, 32 Stat. 644, provides that allotment certificates issued thereunder shall be conclusive evidence of the right of any allottee to the tract of land described therein. Act April 26, 1906, c. 1876, § 5, 34 Stat. 138, provides that all patents or deeds to allottees and other conveyances affecting lands of the five civilized tribes shall be recorded in the office of the commissioner, and when so recorded shall convey legal title. *Held* that, while enrollment under the agreement confers rights which cannot be taken away without notice and an opportunity to be heard, and while certificates of allotment entitle the holder to exclusive possession, enrollment and certificates may be canceled by the Secretary of the Interior for fraud or mistake until patent has been issued unless under the statute the power expires earlier by lapse of time, as the title conferred by the allotment is an equitable one, and the land remains subject to the supervisory power of the Land Department.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

2. VENDOR AND PURCHASER ⟸220 — BONA FIDE PURCHASERS — NATURE OF TITLE PURCHASED.

The doctrine of bona fide purchaser for value applies only to purchasers of the legal estate, and is a shield by which the purchaser of the legal title may protect himself against the holder of an equity, and not a sword by which the owner of the equity may overcome the holder of both the legal title and an equity.

3. MANDAMUS ⟸7—DISCRETION AS TO GRANT OF LAND.

Mandamus is an extraordinary remedial process which is not awarded as a matter of right, but in the exercise of a sound judicial discretion.

4. MANDAMUS ⟸85 — RIGHT TO WRIT — PROCEEDINGS RELATIVE TO PUBLIC LANDS.

Where the person in whose name certificates were issued under the Choctaw-Chickasaw Agreement, confirmed by Act July 1, 1902, had died before the date specified in that agreement and the Secretary of the Interior removed his name from the rolls, held the certificates for cancellation, and allotted the land to others, a bona fide purchaser of the certificates was not entitled to a writ of mandamus to compel the issuance of a patent, as he had only an equity, while the government held both the legal title and an equity to have the certificates set aside for fraud.

In Error to the Court of Appeals of the District of Columbia.

Petition by the Duncan Townsite Company for a writ of mandamus against Franklin K. Lane, Secretary of the Interior. Judgment in favor of the relator was reversed by the Court of Appeals of the District of Columbia (44 App. D. C. 63), and the relator brings error. Affirmed.

Mr. Charles H. Merillat, of Washington, D. C., for plaintiff in error.

Mr. Assistant Attorney General Kearful, for defendant in error.

*309 *Mr. Justice BRANDEIS delivered the opinion of the Court.

This is a petition for a writ of mandamus brought in the Supreme Court of the District of Columbia to compel the Secretary of the Interior to restore the name of Nicholas Alberson, deceased, to the rolls under the Choctaw-Chickasaw Agreement of July 1, 1902 (32 Stat. 641), and to execute and record a patent for land described in an allotment certificate issued in his name by the Dawes Commission.

Under that act only the names of persons alive September 25, 1902, were entitled to entry on the rolls. Alberson had died before that date. The entry of his name and the issue of the certificate were procured by fraud and perjury. These facts, now conceded, were established by the Commission to the Five Civilized Tribes; and the Secretary of the Interior upon recommendation of the Commission removed Alberson's name from the rolls, held the certificates for cancellation, and allotted the land to others. Notice of the hearing before the Commission was *310 given to Alberson's administrator and attorney of record, but not to the relator, who had, under the Oklahoma law, recorded the deed assigning the certificates and was in actual possession of the premises. The certificates had issued on or before April 7, 1906. The notation removing Alberson's name from the rolls was made January 11, 1908. The relator purchased the certificates before January 11, 1908, for value in good faith without knowledge of the fraud or notice of the proceedings for cancellation hereinbefore referred to. The Supreme Court entered judgment for the relator, commanding issue and record of the patent, but making no order in respect to restoring Alberson's name to the rolls. The relator acquiesced in the judgment; but on writ of error sued out by respondent the judgment was reversed by the Court of Appeals (44 App. D. C. 63); and the relator brings the case here on writ of error.

[1] The nature of the Choctaw-Chickasaw Agreement[1] and the rights incident to enrollment and allotment have been frequently considered by this court. Enrollment confers rights which cannot be taken away without notice and opportunity to be heard. Garfield v. Goldsby, 211 U. S. 249, 29 Sup. Ct. 62, 53 L. Ed. 168. Certificates of allotment, like receiver's receipts under the general land laws, entitle the holder to exclusive possession of the premises. Act July 1, 1902, § 23 (32 Stat. 641–644); United States v. Detroit Lumber Co., 200 U. S. 321, 337, 338, 26 Sup. Ct. 282, 50 L. Ed. 499. But enrollment and certificates may be canceled by the Secretary of the Interior for fraud or mistake (Lowe v. Fisher, 223 U. S. 95, 32 Sup. Ct. 196, 56 L. Ed. 364), because although the equitable title had passed (Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 593, 18 Sup. Ct. 208, 42 L. Ed. 591), the land remains subject to the supervisory power of the Land Department (Knight v. Lane, 228 U. S. 6, 33 Sup. Ct. 407, 57 L. Ed. 709), until issue of the patent (United States v. Wildcat, 244 U. S. 111, 37 Sup. Ct. 561, 61 L. Ed. 1024), unless under the statute the power expires earlier by lapse of *311 time* (Ballinger v. Frost, 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464). Under section 5 of the act of April 26, 1906 (chapter 1876, 34 Stat. 137), the legal title can be conveyed only by a patent duly recorded. Brown v. Hitchcock, 173 U. S. 473, 478, 19 Sup. Ct. 485, 43 L. Ed. 772. The provision in section 23 of the Act of July 1, 1902, that "allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein" has relation to rights between the holder and third parties. The title conferred by the allotment is an equitable one, so that supervisory power remained in the Secretary of the Interior.

[2] We are not required to decide whether, as suggested in Lowe v. Fisher, 223 U. S. 95,

[1] See, e. g., Stephens v. Cherokee Nation, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041; Woodward v. De Graffenreid, 238 U. S. 284, 35 Sup. Ct. 764, 59 L. Ed. 130.

107, 32 Sup. Ct. 196, 56 L. Ed. 364, the power to remove Alberson's name from the rolls had, because of section 2 of Act April 26, 1906, expired before the Secretary acted. For the Supreme Court of the district did not order the name restored, and its judgment was acquiesced in by the relator. The claim which the relator makes in this court rests wholly upon the fact that the relator was a bona fide purchaser for value. But the doctrine of bona fide purchaser for value applies only to purchasers of the legal estate. Hawley v. Diller, 178 U. S. 476, 484, 20 Sup. Ct. 986, 44 L. Ed. 1157. It "is in no respect a rule of property, but a rule of inaction." Pomeroy, Equity Jurisprudence, § 743. It is a shield by which the purchaser of a legal title may protect himself against the holder of an equity, not a sword by which the owner of an equity may overcome the holder of both the legal title and an equity. Boone v. Chiles, 10 Pet. 177, 210, 9 L. Ed. 388.

[3, 4] Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the *strict letter of the law but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles.[2] The relator having itself only an equity seeks the aid of the court to clothe it with the legal title as against the United States, which now holds both the legal title and the equity to have set aside an allotment certificate secured by fraud. A writ of mandamus will not be granted for such a purpose. See Turner v. Fisher, 222 U. S. 204, 32 Sup. Ct. 37, 56 L. Ed. 165. The judgment of the Court of Appeals is

Affirmed.

(245 U. S. 192)

SWEET et al. v. SCHOCK, County Treasurer, et al.

(Argued Nov. 15, 1917. Decided Dec. 10, 1917.)

No. 52.

1. TAXATION ⊂⊃181—PROPERTY SUBJECT TO TAXATION—INDIAN LANDS.

Act March 1, 1901, c. 676, 31 Stat. 861, and Act June 30, 1902, c. 1323, 32 Stat. 500, provided that lands allotted thereunder should be nontaxable and inalienable for 21 years, and a deed to land allotted thereunder to a Creek freedwoman contained a similar provision. Both acts provided for laying out townsites, and Indian Appropriation Act March 3, 1903, c. 994, 32 Stat. 996, provided that nothing therein contained should prevent the survey and platting of townsites, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior. Act April 26, 1906, c. 1876, § 19, 34 Stat. 144, and Act May 27, 1908, c. 199, § 4, 35 Stat. 313, provided that lands upon which restrictions were removed should be subject to taxation. After the passage of the Act of 1906 the allottee petitioned for the removal of the restrictions against alienation for the purpose of permitting her to sell part of the land for townsite purposes, and later she platted another part of the land. *Held*, that the land thereby became subject to taxation.

2. CONSTITUTIONAL LAW ⊂⊃100 — VESTED RIGHTS—EXEMPTION FROM TAXATION.

The allottee and her grantees were deprived of no vested right by the subjecting of the land to taxation, as this was simply enforcing against them the results of a bargain, presumably beneficial.

In Error to the Supreme Court of the State of Oklahoma.

Suit by Cornelia Sweet and others against Elmer E. Schock, as treasurer of Okmulgee County, Okl., and others. A decree for plaintiffs was reversed by the Supreme Court of Oklahoma (Schock v. Sweet, 45 Okl. 51, 145 Pac. 388), and plaintiffs bring error. Affirmed.

Mr. Francis W. Clements, of Washington, D. C., for plaintiffs in error.

Mr. S. P. Freeling, of Oklahoma City, Okl., for defendants in error.

*Mr. Justice McKENNA delivered the opinion of the Court.

Error to review a judgment of the Supreme Court of Oklahoma sustaining the taxation of lands which were *allotted to a Creek freedwoman under section 16 of the Allotment Act. 32 Stat. 500, c. 1323.

The suit was instituted by plaintiffs in error in the district court of Okmulgee county to enjoin defendant in error, as treasurer of the county, from selling the lands and placing a penalty thereon or taking any steps towards collecting the taxes.

Plaintiffs in error are the owners of certain lots in the city of Okmulgee, Oklahoma, deriving title to the same through mesne conveyance from Sarah Smith, a freedwoman and citizen of the Creek Nation, to whom the lands had been patented as a homestead.

A certain part of the lands was conveyed by Sarah Smith to one Nathan Boyd and was by him surveyed, platted and laid out in blocks, lots and streets as the Capitol Heights addition to the city of Okmulgee, and it is now a part of that city.

The remaining portion of the homestead land Sarah Smith also caused to be surveyed, laid out and platted in lots, blocks and streets as the Capitol Heights Second addition to the city of Okmulgee.

The county board of commissioners placed the lots upon the tax duplicates of the county and refused to remove them therefrom

[2] People ex rel. v. Assessors, 137 N. Y. 201, 33 N. E. 145; People ex rel. v. Jeroloman, 139 N. Y. 14, 34 N. E. 726; Commonwealth ex rel. Vandyke v. Henry, 49 Pa. 530; Indiana Road Machine Co. v. Keeney, 147 Mich. 184, 110 N. W. 530; United States v. Fisher, 39 App. D. C. 176, 181.

upon petition of plaintiffs in error, who thereupon commenced this suit. Decree was entered for plaintiffs in error, which was reversed by the Supreme Court of the state.

The land allotted to Sarah Smith and laid out in lots as described was allotted to her by deed executed April 23, 1904, under the acts of Congress of March 1, 1901, and June 30, 1902. 31 Stat. 861; 32 Stat. 500.

By the former act it was provided that the land should "be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years." Section 7. By the latter act it was provided, in amendment of the other act, that the land should "be and remain non-taxable, inalienable,* and free *194 from any incumbrance whatever for twenty-one years from the date of the deed therefor." Section 16.

Both acts provided for the laying out of townsites under certain circumstances, and by the Indian Appropriation Act of March 3, 1903 (32 Stat. 996), it was enacted "that nothing herein contained shall prevent the survey and platting, at their own expense, of townsites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior."

Sarah Smith availed herself of these provisions, that is, she petitioned the Commission to the Five Civilized Tribes for the removal of the restrictions against alienation for the purpose of permitting her to sell part of the land for townsite purposes. The Commission, after investigation, made a report to the Secretary of the Interior, recommending the removal of the restrictions. The Indian Office concurred in the recommendation and granted the petition and authorized her to sell the land. Thereupon (February 28, 1907) she conveyed 1.69 acres of the land by warranty deed to one Nathan Boyd, as has been said, who platted the land deeded to him in town lots, and Sarah Smith, after July 26, 1908, so platted the remainder of the land, and plaintiffs in error derive title from her and him.

[1, 2] The contentions of the parties are quite accurately opposed and are in short compass. Plaintiffs in error contend that when the land was allotted to Sarah Smith non-taxability was given it by a valid act of Congress and accompanied the land to her grantees, and this in consideration of the surrender by her of the rights she had in common with other members of the Creek Tribe to the tribal lands. The opposing contention is *195 that she devested the land of non-taxability by petitioning for and accepting *a right to alienate it. A determination between the contentions depends upon certain acts of Congress in addition to those we have mentioned, and their consideration and construction therefore become necessary.

The deed allotting the land to Sarah Smith, as we have seen, provided, in accordance with the act of Congress under which it was executed, that it should "be non-taxable and inalienable * * * for twenty-one years." It will be observed that the right (non-taxability) and the restriction (inalienability) were concomitants and necessarily they concerned alone the Indian, benefited her to the extent of the right, protected her by the extent of the restriction.

Accommodation to new conditions became necessary, and Congress, by an act passed March 3, 1903, hereinabove quoted, provided for the survey and platting of townsites out of allotted lands, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior, and permitted the "unrestricted alienation of lands for such purposes." A consequence of the exercise of the privilege so given was imposed by certain acts of Congress:

(1) That of April 26, 1906, section 19 of which is as follows:

"That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

(2) That of May 27, 1908, section 4 of which reads as follows:

"That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."

It was after the passage of the act of April 26, 1906, that Sarah Smith petitioned for the removal of the restrictions upon her homestead, that is, its alienation for townsite purposes, and conveyed to Boyd; and it *196 was *after the passage of the act of May 27, 1908, that she platted the land as stated. She and her grantees must, therefore, be deemed to have accepted the consequences of her acts, to wit, that the land thereafter should be subject to taxation. And this is not taking from her or them a vested right; it is simply enforcing against her and them the results of a bargain, and, it may be presumed, a beneficial bargain.

The contention of plaintiffs in error overlooks the fact that the Commission to the Five Civilized Tribes and the Secretary of the Interior are instruments of the government, delegated, it is true, to extend a privilege, but bound, in extending it, by the laws of the United States; that is, that they in granting it and Sarah Smith in accepting it did so under the conditions imposed by those laws; and Choate v. Trapp, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941, is not opposed.

In that case it was decided that an Indian of one of the Five Civilized Tribes had an equitable interest in tribal lands which when given up constituted a consideration for his allotment and its exemption from taxation, and a law of the state of Oklahoma taxing the allotment while in possession of the Indians was declared invalid.

The acts of Congress, confirming previous agreements, provided that the lands allotted should be non-taxable while the title remained in the original allottee and provided for alienation within certain periods. The state argued nevertheless that there was in fact no tax exemption but that the provision for it was but an additional prohibition against a forced sale[1] and that when restrictions against alienation were removed by the act of Congress of 1908 (35 Stat. 312) the provision for tax exemption went as a necessary part thereof. The contention was rejected, *197 and rightly so, and, as was aptly said by Mr. Justice Lamar, speaking for the court:

"The exemption and non-alienability were two separate * * * subjects. One conferred a right and the other imposed a limitation."

Under the circumstances it was a complete answer to the attempt which was made to make the right depend upon the limitation. And that, too, without the removal of the limitation being availed of by the Indian. As we have seen, to have availed himself of it would have relinquished the right, for by the express provision of the statute it only existed while the title remained in him.

The elements are different in the case at bar. Sarah Smith invoked a removal of the limitation, the restriction upon alienation, and could only receive the benefit of the law by accepting the consequences of the law. It would indeed have been anomalous to give her power to erect a town and convey its lots free from taxation.

New Jersey v. Wilson, 7 Cranch, 164, 3 L. Ed. 303, is adduced by plaintiffs in error to sustain their contention. That case passed upon a grant of the state of New Jersey to certain Indians, "with the privilege of exemption from taxation." It was decided that the privilege, though for the benefit of the Indians, was annexed by the terms which created it to the land itself, not to their persons. And this was an advantage to the Indians, it was said, "because, in the event of sale, on which alone the question could become material, the value would be enhanced by it." But it was further said it was not doubted that the state might have insisted on a surrender of the privilege as the sole condition on which a sale of the property should be allowed. Such condition is imposed by the acts of Congress which we have mentioned, when voluntarily invoked by an allottee. And there is no hardship in this. The right or privilege of exemption from taxation cannot be taken from an allottee's land while he retains the title. Its surrender may not be forced from him, but he may *198 yield it in bargain for another right or privilege; and any *improvident estimate of the right to be given up or to be received is guarded against by the requirement of the approval by the Commission to the Five Civilized Tribes and the Secretary of the Interior. And it can easily be seen that if exemption from taxation gave value to the land, the power to constitute towns was of greater value. The record shows the value of the lots to plaintiffs in error in the erected town, ranging from $25 to $1,700, a number being valued at $100, others at $200, $300, $400, and $1,500. We may observe that Sarah Smith was authorized to sell for not less than $125 an acre.

Judgment affirmed.

[1] Section 16 of the Allotment Act (32 Stat. 500) contains a prohibition of any incumbrance or sale of allotted lands in satisfaction of any debt or obligation of the allottee.

(245 U. S. 312)

HULL v. FARMERS' LOAN & TRUST CO.

(Argued Nov. 19, 1917. Decided Dec. 10, 1917.)

No. 66.

BANKRUPTCY ⇐143(10) — PROPERTY PASSING TO TRUSTEE—PROPERTY HELD IN TRUST.

A testator bequeathed property in trust for a son, with a provision that the son should have the principal of the trust fund whenever he should become financially solvent and able to pay all his just debts and liabilities from resources other than such principal. The son filed a petition in bankruptcy and received his discharge, and under a judgment of the surrogate court the trustee paid over the principal of the trust fund to him. *Held*, that such trust fund did not pass to the trustee in bankruptcy under Bankruptcy Act July 1, 1898, c. 541, § 70a(5), 30 Stat. 565 (Comp. St. 1916, § 9654), providing that the trustee shall be vested with the title of the bankrupt to all property which prior to the filing of the petition he could have transferred, or which might have been levied upon and sold under judicial process against him, as it was manifestly the intention of the testator that the principal should not be paid under circumstances which would result in any part of it being applied to the debts of the son, and the Bankruptcy Act presents no obstacle to the carrying out of such intention.

In Error to the Court of Appeals of the State of New York.

Suit by J. Harry Hull, as trustee in bankruptcy, against the Farmers' Loan & Trust Company, and another. A judgment dismissing the complaint was affirmed by the Appellate Division, of the Supreme Court of New York (Hull v. Palmer, 155 App. Div. 636, 140 N. Y. Supp. 811), and by the Court of Appeals (Id., 213 N. Y. 315, 107 N. E. 653) and plaintiff brings error. Affirmed.

Mr. Walter S. Heilborn, of New York City for plaintiff in error.

Mr. Henry B. Twombly, of New York City, for defendant in error Palmer.

Mr. Frederick Geller, of New York City for defendant in error Farmers' Loan & Trust Co.

*313 *Mr. Justice BRANDEIS delivered the opinion of the Court.

Charles Palmer, of New York City, by will executed shortly before his death, bequeathed to the Farmers' Loan & Trust Company the

sum of $50,000, in trust, to pay the income to his son Francis, during his life, with a remainder over to others, subject to the "wish * * * that my son shall have the principal of said trust fund, whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of the trust fund."

Promptly after probate of the will, Francis filed a voluntary petition in bankruptcy, and in due time received his discharge. Then the trust company instituted proceedings in the Surrogate Court for a judicial settlement of the estate; and, the court adjudging that Francis had become entitled to the principal of the trust fund (65 Misc. Rep. 418, 121 N. Y. Supp. 1099), it was paid over to him. Later the trustee in bankruptcy who had not been a party to proceedings in the Surrogate Court brought suit in the Supreme Court of New York against the trust company and Francis to recover the principal. He claimed that the right to it had passed to him under section 70a (5) of the Bankruptcy Act of 1898 (chapter 541, 30 Stat. 544), and that the whole fund was required to satisfy the balance due
*314 on debts proved against the bankrupt estate and the expenses of *administration. No claim was asserted against the income of the trust fund. A complaint setting forth these facts was dismissed on demurrer; and the judgment entered by the trial court was affirmed both by the Appellate Division (Hull v. Palmer, 155 App. Div. 636, 140 N. Y. Supp. 811) and by the Court of Appeals (213 N. Y. 315, 107 N. E. 653). The case comes here on writ of error.

Plaintiff asserts that the case presents this federal question: Does a contingent interest in the principal of personal property assignable by the bankrupt prior to the filing of the petition necessarily pass to his trustee in bankruptcy? And, to sustain his claim to recovery, he contends that under the law of New York (1) the words used by the testator create a trust; (2) vesting in the beneficiary a contingent interest in personal property; (3) which is an expectant estate; (4) assignable by him; and (5) that, in view of the surrogate's decision and the action thereon, the defendants are estopped from denying that the contingency requiring payment of the principal had arisen. Plaintiff contends also that, under the federal law, (6) this assignable estate in expectancy passed to the trustee when Francis was adjudged bankrupt, and (7) the trustee, as holder of the estate, became entitled to the principal when the discharge rendered Francis solvent.

We need not inquire whether the several propositions of state and federal law which underlie this contention are correct. This is not a case where a testator seeks to bequeath property which shall be free from liability for the beneficiary's debts. Ullman v. Cameron, 186 N. Y. 339, 345, 78 N. E. 1074, 116 Am. St. Rep. 553. Here the testator has merely prescribed the condition on which he will make a gift of the principal. Under the law of New York he had the right to provide, in terms, that such payment of the principal should be made, only if and when Francis should have received in bankruptcy a discharge from his debts and that no part of the fund should go to his trustee in bankruptcy. The *language used by the testator* is broader in scope, but manifests quite as clearly, his intention that the principal shall not be paid over under circumstances which would result in any part of it being applied in satisfying debts previously incurred by Francis. The Bankruptcy Act presents no obstacle to carrying out the testator's intention. Eaton v. Boston Safe Deposit & Trust Co., 240 U. S. 427, 36 Sup. Ct. 391, 60 L. Ed. 723. As the Court of Appeals said: "The nature of the condition itself determines the controversy." The judgment is

Affirmed.

*315

(245 U. S. 198)

ABERCROMBIE & FITCH CO. et al. v. BALDWIN et al.

(Argued Nov. 19 and 20, 1917. Decided Dec. 10, 1917.)

(No. 67.)

1. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—ACETYLENE LAMP.

The Baldwin reissue patent No. 13,542 (original, No. 821,580), for an acetylene gas generating lamp, *held* not invalid as broadening the claims of the original patent, and also *held* valid and infringed.

2. PATENTS ⊂⊃328 — SCOPE OF INVENTION — DOCTRINE OF EQUIVALENTS.

The Baldwin patent, No. 821,580 for an acetylene gas generating lamp, covered an invention of merit, entitling the patentee to invoke the doctrine of equivalents.

3. PATENTS ⊂⊃283(1)—INFRINGEMENT OF REISSUE OF PATENT—INTERVENING RIGHTS.

A manufacturer of a gas lamp entering the field at a time when the validity and scope of a patent covering such a lamp were still unquestioned, and when, after several years of efforts, the patented lamp had created an extensive market, acquired no intervening rights prior to the reissue of such patent relieving it from liability for infringing the reissued patent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Suit by Frederick E. Baldwin and another against the Abercrombie & Fitch Company and another. A decree for complainants (227 Fed. 455) was affirmed by the Circuit Court of Appeals for the Second Circuit (228 Fed. 895), and defendants bring certiorari. Affirmed.

Messrs. James R. Offield and Charles K. Offield, both of Chicago, Ill., for petitioners.

Mr. James Q. Rice, of New York City, for respondents.

*199

*Mr. Justice McKENNA delivered the opinion of the Court.

Suit for infringement of a patent embrac-

ed in letters patent No. 821,580 and a reissue thereof, No. 13,542.

*200 *The suit was originally brought by Frederick E. Baldwin, patentee. John Simmons Company, licensee, having the exclusive right to manufacture and sell the patented device, subsequently intervened and became complainant.

The patents are for a lamp designed to generate and burn acetylene or similar gas "intended for use," to quote the description of the patents, "and adapted to use as a bicycle, automobile, yacht, or miner's lamp, or for any other analogous purpose, it being necessary only to change its form or dimensions to adapt it to any one of the purposes mentioned." Stress in this case, however, is put upon the use of the asserted invention as a miner's lamp, such use conspicuously displaying its commercial utility.

Answer was filed by the Justrite Manufacturing Company, who was made a party defendant to the suit as manufacturer of the asserted infringing lamp, and by stipulation its answer was considered the answer of the Abercrombie & Fitch Company. It denied invention with great detail, set up anticipating patents, denied its utility, attacked the validity of the reissue on the ground that the first and fourth claims of the original patent were held invalid by the United States Circuit Court of Appeals for the Seventh Circuit (199 Fed. 133, 117 C. C. A. 615), and for the further reason that the application for the reissue was not made until seven years after the original letters patent were issued and rights had accrued in the meantime to defendants (petitioners here) and to others. Infringement was denied.

A decree was passed sustaining the validity of the original patent and of the reissue, the originality of the invention and its utility, and adjudging defendants (petitioners) had infringed claim 4 of the reissue, that plaintiffs recover the damages they had incurred by reason of the infringement and the profits defendants had received, an accounting being ordered for this purpose. A perpetual injunction was also adjudged against further infringements. (D. C.) 227 Fed. 455. The decree was affirmed in all respects by the Circuit Court of Appeals (228 Fed. 895, 143 C. C. A. 293) and subsequently this certiorari was granted (239 U. S. 649, 36 Sup. Ct. 284, 60 L. Ed. 485).

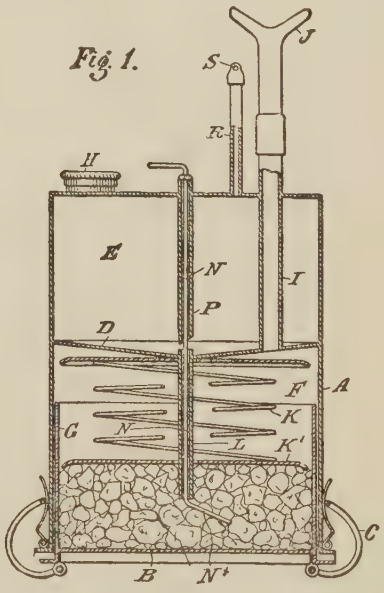
*201 The plaintiffs (we shall so designate respondents) struggled through some years and some litigation to the success of the decrees in the pending case. In a suit brought in the District Court for the Southern District of Illinois a device like that of the defendants herein was held to be an infringement of certain claims of the original patent. The holding was reversed by the Circuit Court of Appeals for the Seventh Circuit. Bleser v. Baldwin, 199 Fed. 133, 117 C. C. A. 615.

Subsequently, the reissue having been granted, suit was brought in the Western District of Pennsylvania against an asserted infringer. Unfair competition was also alleged, and, holding the latter to exist, the court granted a preliminary injunction. (D. C.) 210 Fed. 560. Upon final hearing that holding was repeated, and infringement of a claim of the reissue patent decreed. (D. C.) 215 Fed. 735. The decree was reversed by the Circuit Court of Appeals (Third Circuit) on the ground that the claim of the reissue patent found to have been infringed was broader than a corresponding claim of the original letters patent and therefore void. The holding of the District Court as to unfair competition was sustained. 219 Fed. 735, 135 C. C. A. 433. Aided by the reasoning in the opinions of those cases and the discussion of counsel, we pass to the consideration of the propositions in controversy.

First, as to the original patent. Its contribution to the world's instrumentalities was, as we have said, an acetylene lamp and was represented by the following figure, designated as Figure 1:

*202

Fig. 1.



It will be observed that the device consists of a receptacle divided into two compartments, an upper one for water and a lower one designed to serve as a gas-generating chamber, adapted to contain a receptacle for calcium carbide, which is attached to and forms the detachable bottom. There are means of introducing water into the reservoir and thence to the carbide and means of conducting the gas to the burner.

The device is a means of using the gas (acetylene) formed by the decomposition of water with calcium carbide and necessarily must bring them into contact in an effectual way and use the gas generated in a controlled flow. A tube (*L*) hence leads from the water-reservoir into the carbide receptacle and forms a duct which introduces the water

into the body of the carbide. Various means, the specifications recite, have been employed to regulate or control the flow of water to the carbide, which were found objectionable or not adequate.

*203 *The patentee then says:

That the method which he has invented "for securing the proper feed under all circumstances" without "objectionable features is to make the bore of the duct of comparatively large size and then restrict the duct by means of a wire or rod preferably centrally located therein to leave a channel of the proper size."

It is then said:

"This arrangement is simple; but in a long experience it has been found to be entirely successful. It is possible to secure the correct drop-by-drop feed with a duct of considerable size, since the friction of the water on the large area of the tube-wall and wire reduces its flow. This retarding friction may be regulated by varying the size of wire used. The duct does not become choked, since if foreign particles are deposited therein the water can take a zigzag course around it without the supply being appreciably affected. If it is at any time necessary to clean the tube, the wire is simply reciprocated and rotated a few times from the outside of the lamp without disturbing the position of other parts. This nice regulation of the flow enables me to entirely dispense with the troublesome adjustment of the valve. * * * In some cases, however, there is employed in connection with the means for introducing water into the mass of carbid a device in the nature of a stirrer, which on proper manipulation may be used to break up the mass of carbid surrounding the outlet of the water duct and which by having become slaked and caked by the action of water prevents the proper percolation of the latter to the unslaked carbid in the receptacle *G*. Fig. 1. As such device I employ a stem rod *N*, which extends down through the tube *L* and is bent at substantially right angles to form an arm *N'*."

There is also a figure attached to the patent which shows a valve upon the constricting rod, and it is said:

*204 "This rod may form a prolongation of the valve stem, * * * or in case no valve is used may extend from the top of the* lamp down through the water-reservoir," and this is illustrated by figures.

"As calcium carbid possesses strongly absorptive properties, the introduction of water through the tube *L* will result in the gradual slaking of the material about its outlet; but the lime thus produced becomes gradually less permeable to the water, so that an insufficient quantity of gas is generated to maintain the proper flame. When this becomes noticeable, the rod *N* is turned, so as to cause the arm *N'* to break up to a greater or less extent the mass of lime, and in practice I have found that under ordinary conditions this is amply sufficient to insure a substantially uniform generation of gas until all of the carbid in the receptacle *G* is exhausted."

There are some further descriptive details not necessary to be repeated, and this was said:

"The specific construction of the various parts of my lamp may be, as will be seen from a consideration of the nature of the improvements, very greatly varied without departing from the invention."

The claims of the patent which are pertinent to our inquiry are as follows:

"1. In a lamp of the kind described, the combination with a water-reservoir, and a receptacle for calcium carbid, of a tube extending from the former a considerable distance into the latter so as to be embedded in the mass of carbid contained in said receptacle, and a rod or stem extending through said tube into the carbid-receptacle and having its end formed as a stirrer to break up the slaked carbid around the outlet of the water-tube, as set forth.

"2. In a lamp of the kind described, the combination with a water-reservoir, and a receptacle for calcium carbid, of a tube extending from the former into the latter so as to be embedded in the mass of carbid contained in the receptacle, a rod extending from a point outside of the *205 *lamp through the tube and into the carbid-chamber and having its end bent to form a stirrer for breaking up the slaked carbid around the outlet of the water-tube, as set forth. * * *

"4. In a lamp of the kind described, the combination with a water-reservoir, and a receptacle for calcium carbid, of a water-tube extending from the former a considerable distance into the latter and adapted to be embedded in the mass of carbid in the receptacle, and a rod extending through the water-tube, and constituting a stirrer to break up slaked carbid around the outlet of the water tube, *the rod operating to restrict and thus control the flow of water to the carbid*, as set forth."

The words in italics are the addition of the reissue.

[1] Whether the lamp exhibits invention, when both patents are considered, we shall discuss later. Our attention is more immediately challenged by the stress put upon other defenses, especially upon the contention that the patent is confined to a special form and, so confined, is not infringed, and that the extension of the patent by the reissue is void. The controversy is therefore brought to a consideration of the original patent as added to or developed by the reissue. And their comparison centers in the water-feeding duct or tube and its restriction by means of a wire or rod and the shape and use of the rod to pierce or stir the carbide. In the original patent, as we have seen, it was said that the invented method for securing a proper feed (flow of the water to the carbide) without certain specific objectionable features was "to make the bore of the duct of comparatively large size and then restrict the duct by means of a wire or rod preferably centrally located therein to leave a channel of the proper size." In the reissue, after the words "comparatively large size," it was added, "extend the tube which forms the duct downward so that its *206 end will be always* embedded in the carbid." In other words, the tube is explicitly described as extending to and its end embedded in the carbide, and this, it is contended, was an enlargement of the original patent.

The contention is untenable if there was in the original patent an implication of such length and termination of the tube, and we think there was. To conduct water to the carbide it necessarily had to extend to the carbide receptacle and as necessarily had to penetrate the carbide if the rod located in it, whether straight or bent, was to act "in the nature of a stirrer, which on proper manipulation" might "be used to break up the mass of carbid surrounding the outlet of the water

duct," which is the purpose that the patent ascribes to it. And Fig. 1 shows such ending and embedding. It would be impossible otherwise to perform its function or secure the "proper percolation" of the water "to the unslaked carbid in the receptacle *G*, Fig. 1."

But there was another addition in the reissue which, it is contended, enlarges the invention and assigns a new shape and function to the stirrer of the original. In the latter the rod is described as extending "from the top of the lamp down through the water-reservoir, as shown in Fig. 3." To this the reissue adds:

"It will be understood from what has been said that the function of the stirrer is to break up, pierce or disturb the particles of the slaked carbid mass which, when the lamp is in use, forms at the delivery end of the tube. This slaked carbid mass tends to solidify and either shuts the water off altogether or restricts it so that less water is delivered from the water tube than the lamp demands for efficient operation. As it is sufficient, under the certain circumstances, to insure the requisite water flow by so manipulating the stirrer, as to pierce, break up, or loosen the slaked carbid mass immediately around
*207 or at the mouth of the tube, it is obvious that
* the stirrer need not always be formed with a bent end or so as to extend radially from the mouth of the tube."

There is nothing in this but what was clearly implied in the original, except the shape of the stirrer. In the original it is described and represented as bent. In the reissue it is stated to be obvious that the stirrer need not always be bent "or extend radially from the mouth of the tube."

[2] We are unable to assign to this the extent of alteration that counsel do, nor do we think it necessary to rehearse the details of their argument. We have given it attention and the cases it cites, especially the decision and reasoning of the Circuit Court of Appeals of the Third Circuit in Grier Bros. Co. v. Baldwin et al., 219 Fed. 735, 135 C. C. A. 433, but we are constrained to a different conclusion. Indeed, we are of opinion that the original patent did not need the exposition of the reissue. It exhibited an invention of merit, certainly one entitled to invoke the doctrine of equivalents. Paper Bag Patent Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122. Baldwin, the patentee, complied with the statute (section 4888, R. S. [Comp. St. 1916, § 9432]) by explaining the principle of his invention and the mode of putting it to practical use; there was a clear exposition of the principle and the instruments of its use were defined and their purpose and manner of operation. It left nothing in either for further experiment or contrivance. As we have said, the invention was a means of using the gas formed by the decomposition of water with calcium carbide, and necessarily the water and carbide must be brought into contact and under a controlled flow; hence the tube and its centrally located rod extending downward to the carbide. It was foreseen and stated that the carbide might become torpid or slaked by the action of the water and might have to be disturbed or dispersed in order that there might be percolation of water to unslaked carbide, and this was provided to be performed by a simple *208 manipulation of the rod. Whether the rod was bent or made straight was unimportant. In either form it removed the slake and secured the continuous operation of the water and carbide and through them the formation of the gas and its illuminating purpose. One or the other might be better, according to the extent of the dispersion required, and one naturally suggested the other.

It is, however, contended that plaintiffs were required to give up and did give up in the Patent Office a claim which had the extent which we have indicated. A claim, numbered in the application as 6, described the rod as: "A rod extending from a point outside the lamp through the tube into the carbide receptacle."

Counsel say, "It is to be particularly noted" that, while other claims "mentioned the stirring function of the rod, claim 6 omitted this feature," but that the solicitor who drew the claim "unquestionably had in mind the straight form of rod construction without any stirrer at the end, for the claim specifies 'through the tube into the carbid receptacle.'" It is hence argued that when the claim was given up the straight form of construction was given up, and, having been given up to secure the patent, it cannot be insisted upon to prevent its use by others. But counsel is in error as to the extent of the surrender. The straight construction was not given up, but such construction through the tube into the carbide receptacle, and this was in deference, and only in deference, to other patents that showed such use, that is, showed a penetration into the receptacle, but not its duct ending and embedded in the carbide.

We do not think the case calls for extended discussion. It is best considered in broad outline. The scope and merit of the patents are of instant and assured impression, and to the attempt to defeat or limit their invention by the state of the prior art we adduce the discussion and reasoning of the opinions of the lower courts, which we approve.

*209 The denial of infringement is also easily disposed of. Indeed, it has been in effect disposed of. It is based on the contention that the stirrer is an essential of plaintiff's lamp and that a stirrer is absent from defendants' lamp, which is in all other particulars, as far as this case is concerned, similar to the plaintiff's lamp. To the contention of defendants, therefore, we cannot assent. There is a stirrer in both, and its form, as we have seen, is not of the essence of the invention. There is nothing occult in the act of stirring; it is causing movement or disturbance, and this may be performed by a straight rod as by a bent one. There may be difference in their dispersing power, but no difference in

function, and one or the other would be instantly selected according to the need, under the clear description of the patent. This ready adaptation of the form of stirrer to the work to be performed Baldwin demonstrated even before the grant of the patent. Early in 1906 he put upon the market a lamp with a straight rod, "which, among other things," as the District Court has said, "has characterized the commercial lamp ever since."

[3] To the contention that the Justrite Company, the manufacturing defendant, acquired rights before the reissue, we again may oppose the reasoning and conclusion of District Judge Mayer and their affirmance by the Circuit Court of Appeals. The learned judge said:

"It will be remembered that this company entered the field with its lamp at a time when the validity and scope of the Baldwin patent were still unquestioned and when after some five years of capable effort, the Baldwin lamp had created an extensive market. The Justrite Company took its chances, and, in view of the necessities of the situation, it is relieved of all accountability for the period prior to the granting of the reissue patent; but when the reissue statute was granted the Justrite Company again took its chances.

210 "By the reissuance of the patent, the patentee loses all in the way of an accounting under the original patent, but the dominant purpose of the reissue statute was to save to the inventor the future remaining after the reissue.

"I see nothing in the course of plaintiffs or defendants which would allow a court of equity to conclude that defendants are to be relieved because of intervening rights."

Decree affirmed.

(245 U. S. 315)

BURTON v. NEW YORK CENT. & H. R. R. CO.

HEEREN v. SAME.

(Argued Nov. 21, 1917. Decided Dec. 10, 1917.)

Nos. 71, 72.

1. CONSTITUTIONAL LAW ⊜207(1)—EXTRADITION ⊜37—PRIVILEGES AND IMMUNITIES—ARREST.

Const. art. 4, § 2, subd. 2, and Rev. St. § 5278 (Comp. St. 1916, § 10126), relating to extradition, do not protect a citizen of one state from arrest in New York for a crime committed in another state, without compliance with such statutory provisions, such constitutional and statutory provisions dealing merely with conditions under which one state may demand rendition from another, and not with arrest in advance of requisition, the power of a state to arrest within its borders a citizen of another state for a crime committed elsewhere and the manner of such arrest being left wholly to the individual states.

2. EXTRADITION ⊜39—RESISTANCE BY FUGITIVE.

An alleged fugitive may resist compliance by one state with the demand of another for extradition made under authority of Const. art. 4, § 2, subd. 2, and Rev. St. § 5278 (Comp. St. 1916, § 10126).

In Error to the Supreme Court of the State of New York.

Actions by Lucinda Burton and Cora B. Heeren against the New York Central & Hudson River Railroad Company. Complaints dismissed and exceptions to orders overruled by New York Appellate Division (147 App. Div. 557, 132 N. Y. Supp. 628), judgments entered for defendant affirmed by New York Court of Appeals (210 N. Y. 567, 104 N. E. 1127), and plaintiffs bring error. Affirmed.

Mr. William F. Connell, of Brooklyn, N. Y., for plaintiffs in error.

Mr. Robert Kutschback and Mr. Charles C. Paulding, both of New York City, for defendant in error.

*316 *Mr. Justice BRANDEIS delivered the opinion of the Court.

These actions, which were tried together in the Supreme Court of New York and argued together here, arise out of the same facts and involve the same question of law. The plaintiffs, mother and daughter, both residents of Pennsylvania, occupied the same berth in a Pullman car while traveling from their home to New York City. At Syracuse, N. Y., police officers of that city entered the car, arrested the plaintiffs, and, at the next station, removed them from the train. The officers making the arrest acted without a warrant, upon telegraphic orders from the police department of Rochester, N. Y., in the belief that one of the plaintiffs was the woman implicated in atrocious murders which had recently been committed in Indiana. Investigation soon disclosed that this belief was unfounded; and they were promptly discharged from custody. These suits were then brought against the defendant to recover damages for the annoyance and indignities suffered. Plaintiffs contended that defendant had an affirmative duty to protect them as passengers from a wrongful arrest, and had failed to perform it. The trial court refused to permit plaintiffs to go to the jury and dismissed the complaints. Exceptions to these orders were overruled by the Appellate Division (147 App. Div. 557, 132 N. Y. Supp. 628); the judgments entered for defendant were affirmed by the Court of Appeals (210 N. Y. 567, 568, 104 N. E. 1127); and the cases come here on writs of error.

[1, 2] Plaintiffs duly claimed that they had been denied rights secured by article IV, section 2, subdivision 2, of the federal Constitution.[1] The contention is that by reason of this*clause of the Constitution they could not legally be arrested in New York for a crime committed in another state, except upon compliance with the provisions of sec-

[1] Article IV, Sec. 2, subdivision 2:

"A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

tion 5278 of the Revised Statutes[2] of the United States (Comp. St. 1916, § 10126); that such being the law defendant's representatives were bound to know it and to protect them, its passengers, from arrest, unless all steps had been taken which would have justified their rendition upon application of another state. But these provisions of the Constitution and statutes have no application here. They deal merely with the conditions under which one state may demand rendition from another and the alleged fugitive may resist the latter's complying with the demand.[3] Here no demand had been made upon the executive of New York. Proceedings for rendition had not even been initiated. And there was no attempt at removal from the state. The arrest, so far as appears, was made by the New York police department of its own initiative.

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These provisions of the Constitution and federal statutes do not deal with arrest in advance of a requisition. They do not limit the power of a state to arrest, within its borders, a citizen of another state for a crime committed elsewhere; nor do they prescribe the manner in which such arrest may be made. These are matters left wholly to the individual states. Whether the asylum state shall make an arrest in advance of requisition, and, if so, whether it may be made without a warrant, are matters which each state decides for itself. Such has been the uniform practice, sanctioned by a long line of decisions and regulated by legislation in many of the states.[4] The alleged federal right which plaintiffs assert is not immunity from arrest without a warrant; it is immunity from arrest until after requisition granted. The Constitution grants no such immunity. To restrict the right of arrest as claimed would rob interstate rendition of much of its efficacy. As no federal right of plaintiffs was denied, the judgments must be

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Affirmed.

(245 U. S. 170)

PETERSEN et al. v. STATE OF IOWA ex rel. STATE TREASURER et al.

(Argued Nov. 21, 1917. Decided Dec. 10, 1917.)

No. 74.

TREATIES ⊂⊃8 — COLLATERAL INHERITANCE TAX—CONFLICT WITH TREATY.

Code Supp. Iowa 1907, § 1467, imposing a greater collateral inheritance tax when beneficiaries are nonresident aliens than in other cases, does not conflict with article 7, Treaty with Denmark (Treaty of April 26, 1826, 8 Stat. 342, renewed April 11, 1857, 11 Stat. 720), providing that "no higher or other duties, charges, or taxes of any kind, shall be levied in the territories or dominions of either party, upon any personal property, money, or effects or their respective citizens or subjects, on the removal * * * either upon the inheritance of such property, money, or effects, or otherwise, than are or shall be payable in each state, upon the same, and removed by a citizen or a subject of such state respectively," such treaty merely contracting against departure by discrimination by either of such countries against the citizens of the other and their property therein from legislation governing their own citizens, and does not impose a burden upon such legatees' rights to remove their property, such right of property being dependent on the payment, and not arising until payment was made.

In Error to the Supreme Court of the State of Iowa.

In the matter of the estate of Anna Margrethe Anderson, deceased. Whelmina Elizabeth Petersen and others, legatees, bring error to review the decision of the Supreme Court of Iowa in Re Anderson's Estate, 166

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[2] Rev. Stats. Sec. 5278 (Act of Feb. 12, 1793, Sec. 1, 1 Stat. 302):

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or [any] other crime, certified as authentic by the Governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority * * * to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

[3] The provisions are so narrow in scope, that if the removal is actually effected without the interposition of the state's executives—though it be by kidnapping and breach of the peace—the federal law affords no redress, and interposes no obstacle to the prosecution of the alleged fugitive by the state which has by wrongful act acquired jurisdiction over him. Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283. See, also, Cook v. Hart, 146 U. S. 183, 13 Sup. Ct. 40, 36 L. Ed. 934; Pettibone v. Nichols, 203 U. S. 192, 27 Sup. Ct. 111, 51 L. Ed. 148, 7 Ann. Cas. 1047; Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421.

[4] The decisions appear to be uniform that at common law arrest in advance of requisition is legal. People v. Schenck, 2 Johns. (N. Y.) 479 (1807); Simmons v. Com., 5 Bin. (Pa.) 617 (1813); People v. Goodhue, 2 John. Ch. (N. Y.) 198 (1816); Com. v. Deacon, 2 Wheeler Cr. Cas. (N. Y.) 1, 17 (1823); State v. Anderson, 1 Hill (S. C.) 327, 350-8 (1833); State v. Loper, Ga. Dec. 33, pt. 2 (1842); State v. Buzine, 4 Har. (Del.) 572 (1846); In the Matter of Fetter, 23 N. J. Law, 311, 57 Am. Dec. 382 (1852); Morrell v. Quarles, 35 Ala. 544 (1860); Ex parte Romanes, 1 Utah, 23 (1876); Simmons v. Van Dyke, 138 Ind. 380, 37 N. E. 973, 26 L. R. A. 33, 46 Am. St. Rep. 411 (1894); State v. Taylor, 70 Vt. 1, 4, 39 Atl. 447, 42 L. R. A. 673, 67 Am. St. Rep. 648 (1896). But some deny that it can be made without a warrant even in case of a felony. Botts v. Williams, 17 B. Mon. (Ky.) 687 (1857). The right of arrest and detention in advance of requisition is in many states regulated by statute. Ex parte Rosenblat, 51 Cal. 285; Wells v. Johnston, 52 La. Ann. 713, 27 South. 185; Ex parte Lorraine, 16 Nev. 63; State v. Shelton, 79 N. C. 605, 608; Ex parte Ammons, 34 Ohio St. 518; State v. Whittle, 59 S. C. 297, 37 S. E. 923. See Moore on Extraditions and Interstate Rendition, Appendix II. And under the statutes of some states, arrest cannot be made until after proceedings charging the person have been had in the state where the crime is alleged to have been committed. State v. Hufford, 28 Iowa, 391, 395.

Iowa, 617, 147 N. W. 1098, 52 L. R. A. (N. S.) 686, affirming an order approving the final report crediting the administrator with the will annexed with payment of collateral inheritance tax on application of the State of Iowa on the relation of W. C. Brown, State Treasurer. Affirmed.

Mr. Hugh O'Neill, of Chicago, Ill., for plaintiffs in error.

Mr. Freeman C. Davidson, of Emmetsburg, Iowa, for defendants in error.

*171 *Mr. Chief Justice WHITE delivered the opinion of the Court.

Anna M. Anderson, a native of Denmark, but a naturalized citizen of the United States, died in the state of Iowa where she resided and owned property. By her will she gave money legacies to her nephews and nieces who were subjects of the Kingdom of Denmark and resided therein. By the death duties imposed by the law of the state of Iowa a higher rate was imposed on legacies made to nonresident aliens than was payable on those given under similar conditions to residents of Iowa whether made by a citizen or by resident or nonresident aliens. Section 1467, 1907 Supplement to the Code of Iowa. The representative of the estate of Anderson in filing his accounts having credited himself with the sum due to the state on the legacies, which he had paid, the foreign legatees opposed the allowance of *172 such *credit on the ground that the charge of a greater sum to them because they were aliens and nonresidents than would have been charged against them had they been residents was illegal because in conflict with a treaty between the United States and Denmark. The case is here to review the action of the court below rejecting such contention and upholding the validity of the charge. In re Anderson's Estate, 166 Iowa, 617, 147 N. W. 1098, 52 L. R. A. (N. S.) 686.

The court, conceding that if the treaty were applicable it would be controlling, based its conclusion solely on the ground that the treaty when rightly considered did not apply, and in the argument at bar the error of this conclusion is the sole ground relied upon.

The treaty is that of April 26, 1826 (8 Stat. 340) renewed in 1857 (11 Stat. 719), and the particular clauses invoked are article 1, the favored nation clause, and article 7, dealing more directly with the subject under consideration. We postpone momentarily the first to come at once to the latter. The article is as follows:

"The United States and his Danish Majesty mutually agree, that no higher or other duties, charges or taxes of any kind, shall be levied in the territories or dominions of either party, upon any personal property, money, or effects, of their respective citizens or subjects, on the removal of the same from their territories or dominions reciprocally, either upon the inheritance of such property, money, or effects, or otherwise, than are or shall be payable in each state, upon the same, when removed by a citizen or subject of such state respectively."

It is obvious that the article places restrictions upon the authority of the respective countries to impose taxes, duties or charges under the circumstances and conditions for which it provides. Conceding that it requires construction to determine whether the prohibitions embrace taxes generically considered, or death duties, or excises, on the right to transfer and remove property, singly or *collectively, we are of *173 the opinion that the duty of interpretation does not arise since in no event would any of the prohibitions be applicable to the case before us. We are constrained to this conclusion because the case here presented concerns only the power of the state of Iowa to deal with a citizen of that state and her property there situated, while the prohibitions of the treaty, giving to them their widest significance, apply only to a citizen of Denmark and his right to dispose of his property situated in the state of Iowa. This is undoubted because there is no controversy as to the first, the citizenship in Iowa, and there is not room for substantial doubt as to the latter, since on the face of the treaty the contractual limitations which it provides are manifestly intended not to control or limit the right of either of the governments to deal with its own citizens and their property within its borders, but were solely intended to restrict the power of both of the governments to deal with citizens of the other and their property within its dominions. But if the mere letter of portions of the article when separately considered would leave room for any doubt on the subject, it would be dispelled by the context and by the consideration that the foundation of the provision is the recognition of the plenary power of each country to legislate according to its conceptions of public welfare as to its own citizens and their property within its jurisdiction. Indeed that which is contracted against is merely a departure by discrimination by either one of the countries against the citizens of the other and their property therein from the legislation governing their own citizens. In other words, the right of the citizens of each of the contracting countries reciprocally to own, dispose of or transmit their property situated in the other country, free from provisions or restrictions discriminating because of alienage, is in the largest possible sense that which is protected by the treaty. And conversely this being true *174 it follows also that the *treaty did not protect the right of the citizens of either country to acquire by transfer or inheritance property situated in the other belonging to its own citizens free from the restraints imposed by the law of such country on its own citizens even although such restraints would not have been applicable in case the property had been disposed of or transmitted to a citizen.

The ruling in Frederickson v. Louisiana, 23 How. 445, 16 L. Ed. 577, while it concerned a treaty with a different country, is here aptly illustrative and persuasively controlling. In that case the contention was that limitations contained in a treaty between the United States and the King of Wurtemburg forbidding discrimination as to the disposal or transmission of their property by subjects of the King of Wurtemburg were applicable to property in the state of Louisiana of a citizen of that state because of the accidental circumstance that the property had passed by the death of such citizen to subjects of the King of Wurtemburg, nonresidents in the United States. In holding the contention to be unfounded it was said (23 How. 447, 16 L. Ed. 577):

"But we concur with the Supreme Court of Louisiana in the opinion that the treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting powers, in reference to property within the country of their origin or citizenship. The cause of the treaty was, that the citizens and subjects of each of the contracting powers were or might be subject to onerous taxes upon property possessed by them within the states of the other, by reason of their alienage, and its purpose was to enable such persons to dispose of their property, paying such duties only as the inhabitants of the country where the property lies pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in the contemplation of the contracting powers, and is not embraced in this article of the treaty."

And this view disposes of the elaborate argument concerning the right of the foreign legatees to remove the property as there is here no question of a burden placed by the state of Iowa on the right to remove other than that which the argument assumes may have indirectly resulted from the payment of the lawful duty imposed by the state of Iowa upon its own citizens and as to their property within its own borders. The duty to pay on such property which preceded and accompanied the right of such foreign legatees was not a burden upon their right to remove their property, as such right of property on their part was dependent on the payment and could not and did not arise until the payment was made. United States v. Perkins, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287.

This leaves only the contention as to the favored nation clause contained in the first article of the treaty. But as to that it suffices to say that the argument does not take into view, but disregards the words by which the clause is limited and which expressly make it applicable only "in respect of commerce and navigation," a limitation which it has been settled does not embrace the subject we are now dealing with. Mager v. Grima, 8 How. 490, 494, 12 L. Ed. 1168.

Affirmed.

(245 U. S. 176)

DUUS v. BROWN, Treasurer of State of Iowa.

(Argued Nov. 23, 1917. Decided Dec. 10, 1917.)

No. 85.

1. TREATIES ⊂⊃8 — COLLATERAL INHERITANCE TAX—CONFLICT WITH TREATY.

Code Supp. Iowa 1907, § 1467, imposing a greater collateral inheritance tax when beneficiaries are nonresident aliens than in other cases, does not conflict with articles 2 and 6, Treaty with Sweden (Treaty of April 3, 1783, 8 Stat. 62, 64, renewed by Treaty of September 4, 1816, article 12, 8 Stat. 240, and revived by article 17 of Treaty of July 4, 1827, 8 Stat. 354) which by its text embraces and protects from discrimination only citizens or subjects of Sweden and their property in Iowa, and does not relate to the right of the state to deal by death duties with its own citizens and their property within the state.

2. TREATIES ⊂⊃8 — COLLATERAL INHERITANCE TAX—CONFLICT WITH TREATY.

Code Supp. Iowa 1907, § 1467, imposing a greater collateral inheritance tax when beneficiaries are nonresident aliens than in other cases, does not conflict with article 2, the favored nation clause of Treaty with Sweden (Treaty of April 3, 1783, 8 Stat. 62, renewed by Treaty of September 4, 1816, article 12, 8 Stat. 240, and revived by article 17 of Treaty of July 4, 1827, 8 Stat. 354).

In Error to the Supreme Court of the State of Iowa.

A. M. Duus, administrator of the estate of John Peterson, deceased, brings error to review judgment of Supreme Court of Iowa (In re Peterson's Estate, 168 Iowa, 511, 151 N. W. 66, L. R. A. 1916A, 469), affirming order subjecting property to payment of inheritance tax on application of W. C. Brown, treasurer of the State of Iowa. Affirmed.

Mr. Nelson Miller, of Le Mars, Iowa, for plaintiff in error.

Mr. Freeman C. Davidson, of Emmetsburg, Iowa, for defendant in error.

Mr. Chief Justice WHITE delivered the opinion of the Court.

[1] John Peterson, a native of Sweden, but a naturalized citizen of the United States and a resident of Iowa, there died unmarried and intestate. His property in the state passed under the laws of Iowa to his heirs who were his nephews and nieces or their representatives, some of whom were naturalized citizens of the United States residing in states other than Iowa and the remainder were natives and citizens of the Kingdom of Sweden and there resided. The property in Iowa was administered under the laws of that state and the administrator paid upon the portion of the estate accruing to the nonresident alien heirs the death duties provided by the law of Iowa which were higher than those provided by that law upon the portion accruing to the resident heirs. Section 1467, 1907 Supplement to the Code of Iowa. This controversy arose from a contest over the right of the state to make that charge and the duty of the administrator to pay it, the contention being that the duties

in so far as they discriminated against the nonresident alien heirs were void because in conflict with a treaty between the United States and the King of Sweden. Treaty of April 3, 1783, 8 Stat. 60, renewed by article 12 of the Treaty of September 4, 1816, 8 Stat. 240, and revived by article 17 of the Treaty of July 4, 1827, 8 Stat. 354. The case is here to review the judgment of the court below holding that contention to be unsound. In re Peterson's Estate, 168 Iowa, 511, 151 N. W. 66, L. R. A. 1916A, 469.

[2] Two clauses of the treaty are relied upon: Article 6, which it is asserted directly prohibited the discriminating charge, and article 2, which by the favored nation clause accomplished a like result. Article 6 is in *178 the margin[1] and from its text it plainly appears that it embraces only citizens or subjects of Sweden and their property in Iowa and therefore as we have just pointed out in Petersen v. Iowa, 245 U. S. 170, 38 Sup. Ct. 109, 62 L. Ed. ——, has no relation whatever to the right of the state to deal by death duties with its own citizens and their property within the state. And from the same case it also appears that the favored nation clause has also no application, since that clause in the treaty relied upon, as was the case in the Treaty of Denmark which came under consideration in the previous case is applicable only "in respect to commerce and navigation."

For the reasons stated in the Petersen Case and in this, it follows that the judgment must be and it is

Affirmed.

(245 U. S. 217)

JONES et al. v. CITY OF PORTLAND.

(Argued Nov. 22, 1917. Decided Dec. 10, 1917.)

No. 77.

1. COURTS ⟸366(6) — FEDERAL COURTS — STATE LAWS AS RULES OF DECISION.

While the ultimate authority to determine the validity of state legislation under the Fourteenth Amendment rests in the federal Supreme Court, local conditions are of such varying character that what is or is not a public use in a particular state, for which money may be raised by taxation, is a matter respecting which local authorities have peculiar facilities for securing accurate information, and a judgment of the highest court of the state as to what should be deemed a public use is entitled to the highest respect.

2. CONSTITUTIONAL LAW ⟸70(1) — JUDICIAL FUNCTIONS — ENCROACHMENT ON LEGISLATIVE DEPARTMENT.

It is not the function of the federal Supreme Court, under the authority of the Fourteenth Amendment, to supervise state legislation in the exercise of the police power beyond protecting against exertions of such authority in the enactment and enforcement of laws of an arbitrary character, having no reasonable relation to the execution of lawful purposes.

3. CONSTITUTIONAL LAW ⟸283—MUNICIPAL CORPORATIONS ⟸961—TAXATION—PURPOSES—DUE PROCESS.

Rev. St. Me. 1903, c. 4, § 87, authorizing any city or town to establish and maintain a permanent wood, coal and fuel yard for the purpose of selling wood, coal, and fuel to its inhabitants at cost, does not take the property of taxpayers for private uses in violation of the Fourteenth Amendment, especially where the highest court of the state has declared such purpose to be a public one.

In Error to the Supreme Judicial Court of the State of Maine.

Suit by Henry M. Jones and others against the City of Portland. A demurrer to the bill was sustained and the bill dismissed by the Supreme Judicial Court of Maine (113 Me. 123, 93 Atl. 41), and plaintiffs bring error. Affirmed.

Mr. Eben Winthrop Freeman, of Portland, Me., for plaintiffs in error.

Messrs. Carroll S. Chaplin, Guy H. Sturgis, and Henry P. Frank, all of Portland, Me., for defendant in error.

*Mr. Justice DAY delivered the opinion of *220 the Court.

By an act of the Legislature of the state of Maine approved March 19, 1903, P. L. 1903, c. 122; section 87, chapter 4, Revised Statutes of Maine, 1903, it was provided:

"Any city or town may establish and maintain, within its limits, a permanent wood, coal, and fuel yard, for the purpose of selling, at cost, wood, coal and fuel to its inhabitants. The term 'at cost' as used herein, shall be construed as meaning without financial profit."

The city of Portland, Me., voted to establish and maintain within its limits a permanent coal and fuel yard for the purposes of selling at cost wood, coal, and fuel to its inhabitants, and that the money necessary for such purposes be raised by taxation, and that the term 'at cost' as used in said vote should be construed as meaning without financial profit. On February 3, 1913, the common council of the city at a legal meeting passed the vote, and on the same date it was passed by the board of aldermen of the city, and on February 4, 1913, the mayor of the city approved it, whereupon it became the vote of the city of Portland. The city voted to appropriate the

[1] "Article 6. The subjects of the contracting parties in the respective states, may freely dispose of their goods and effects either by testament, donation or otherwise, in favour of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession even ab intestato, either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects, which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from all duty called 'droit de detraction,' on the part of the government of the two states respectively. But it is at the same time agreed, that nothing contained in this article shall in any manner derogate from the ordinances published in Sweden against emigrations, or which may hereafter be published, which shall remain in full force and vigour. The United States on their part, or any of them, shall be at liberty to make respecting this matter, such laws as they think proper."

sum of $1,000 to be devoted to carrying out the purposes of the vote, and the appropriation was passed by the common council, the board of aldermen, and approved by the mayor of the city.

This suit was brought by citizens and taxpayers of Portland in the Supreme Judicial Court of Maine in equity to enjoin the establishment of the yard. The Supreme Judicial Court sustained a demurrer to the bill, and dismissed it. 113 Me. 123, 93 Atl. 41. A writ of error brings the case here because of alleged violation of rights secured to the plaintiffs in error by the Fourteenth Amendment. The contention is that the establishment of the municipal wood yard is not a public purpose; that taxation to accomplish that end amounts to the taking of the property of the plaintiffs in error without due process of law.

The decision of the case turns upon the answer to the question whether the taxation is for a public purpose. It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the State. Citizens' Saving & Loan Ass'n v. Topeka, 20 Wall. 655, 22 L. Ed. 455.

The act in question has the sanction of the legislative branch of the state government, the body primarily invested with authority to determine what laws are required in the public interest. That the purpose is a public one has been determined upon full consideration by the Supreme Judicial Court of the state upon the authority of a previous decision of that court. Laughlin v. City of Portland, 111 Me. 486, 90 Atl. 318, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916C, 734.

[1] The attitude of this court towards state legislation purporting to be passed in the public interest, and so declared to be by the decision of the court of last resort of the state passing the act, has often been declared. While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information. In that view the judgment of the highest court of the state upon what should be deemed a public use in a particular state is entitled to the highest respect. Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 607, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008. In Union Lime Co. v. Chicago & N. W. Ry. Co., 233 U. S. 211, 34 Sup. Ct. 522, 58 L. Ed. 924, this court declared that a decision of the highest court of the state declaring a use to be public in its nature would be accepted unless clearly not well founded, citing Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 160, 17 Sup. Ct. 56, 41 L. Ed. 369; Clark v. Nash, 198 U. S. 361, 369, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; Strickley v. Highland Boy Mining Co., 200 U. S. 527, 531, 26 Sup. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174; Offield v. N. Y., N. H. & H. R. R. Co., 203 U. S. 372, 377, 27 Sup. Ct. 72, 51 L. Ed. 231; Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 607, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008. This doctrine was reiterated in O'Neill v. Leamer, 239 U. S. 244, 253, 36 Sup. Ct. 54, 60 L. Ed. 249.

In the case of Laughlin v. City of Portland, 111 Me., supra, the matter was fully considered by the Supreme Judicial Court of that state. After reviewing the cases which establish the general authority of municipalities in the interest of the public health, convenience, and welfare to make provisions for supplying the inhabitants of such communities with water, light, and heat by means adequate for that purpose, the court came to consider the distinction sought to be made between the cases which sustain the authority of the state to authorize municipal action for the purposes stated, and the one under consideration, because of the fact that in the instances in which municipal authority had been sustained the use of the public streets and highways for mains, poles, and wires in the distribution of water, light, and heat had been required under public authority, whereas in supplying fuel to consumers, under the terms of the law in question, no such permission was essential, the court said (111 Me. 486, 496, 90 Atl. 318, 322 [51 L. R. A. (N. S.) 1143, Ann. Cas. 1916C, 734]):

"Let us look at the question from a practical and concrete standpoint. Can it make any real and vital difference and convert a public into a private use if, instead of burning the fuel at the power station to produce the electricity, or at the central heating plant to produce the heat and then conducting it in the one case by wires and in the other by pipes to the user's home, the coal itself is hauled over the same highway to the same point of distribution? We fail to see it. It is only a different and simpler mode of distribution and, if the Legislature has the power to authorize municipalities to furnish heat to its inhabitants 'it can do this by any appropriate means which it may think expedient.' The vital and essential element is the character of the service rendered and not the means by which it is rendered. It seems illogical to hold that a municipality may relieve its citizens from the rigor of cold if it can reach them by pipes or wires placed under or above the highways but not if it can reach them by teams traveling along the identically same highway. It will be something of a task to convince the ordinarily intelligent citizen that an act of the Legislature authorizing the former is constitutional, but one authorizing the latter is unconstitutional beyond all rational doubt. For we must remember that we are considering the existence of the power in the Legislature which is the only question before the court, and not the wisdom of its exercise which is for the Legislature alone."

Answering the objection that sustaining the act in question opens the door to the exercise of municipal authority to conduct other lines of business and commercial activity

to the destruction of private business, the court said (111 Me. 500, 90 Atl. 324, 51 L. R. A. [N. S.] 1143, Ann. Cas. 1916C, 734):

"But it is urged, why, if a city can establish a municipal fuel yard, can it not enter upon any kind of commercial business, and carry on a grocery store, or a meat market, or a bakery. The answer has been already indicated. Such kinds of business do not measure up to either of the accepted tests. When we speak of fuel, we are dealing not with ordinary articles of merchandise for which there may be many substitutes, but with an indispensible necessity of life, and more than this, the commodities mentioned are admittedly under present economic conditions regulated by competition in the ordinary channels of private business enterprise. The principle that municipalities can neither invade private liberty nor encroach upon the field of private enterprise should be strictly maintained as it is one of the main foundations of our prosperity and success. If the case at bar clearly violated that principle it would be our duty to pronounce the act unconstitutional, but in our opinion it does not. The element of commercial enterprise is entirely lacking. The purpose of the act is neither to embark in business for the sake of direct profits (the act provides that fuel shall be furnished at cost) nor for the sake of the indirect gains that may result to purchasers through reduction in price by governmental competition. It is simply to enable the citizens to be supplied with something which is a necessity in its absolute sense to the enjoyment of life and health, which could otherwise be obtained with great difficulty and at times perhaps not at all, and whose absence would endanger the community as a whole."

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[2, 3] Bearing in mind that it is not the function of this court under the authority of the Fourteenth Amendment to supervise the legislation of the states in the exercise of the police power beyond protecting against exertions of such authority in the enactment and enforcement of laws of an arbitrary character, having no reasonable relation to the execution of lawful purposes, we are unable to say that the statute now under consideration violates rights of the taxpayer by taking his property for uses which are private.

The authority to furnish light and water by means of municipally owned plants has long been sanctioned as the accomplishment of a public purpose justifying taxation with a view to making provision for their establishment and operation. The right of a municipality to promote the health, comfort, and convenience of its inhabitants by the establishment of a plant for the distribution of natural gas for heating purposes was sustained, and we think properly so, in State of Ohio v. Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729. We see no reason why the state may not, if it sees fit to do so, authorize a municipality to furnish heat by such means as are necessary and such systems as are proper for its distribution. Heat is as indispensable to the health and comfort of the people as is light or water. In any event we are not prepared to say that when a state authorizes a municipality to tax with a view to providing heat at cost to the inhabitants of the city, and that purpose is declared by the highest court of the state to be a public one, that the property of a citizen who is taxed to effect such purpose is taken in violation of rights secured by the Constitution of the United States. As this view decides the questions open to consideration, it follows that the judgment of the Supreme Judicial Court of Maine must be affirmed.

*225

Affirmed.

(245 U. S. 225)

KIRK et al. v. OLSON.

(Argued and Submitted Nov. 23, 1917. Decided Dec. 10, 1917.)

No. 81.

1. MINES AND MINERALS ⇐40—MINING ENTRY — CONCLUSIVENESS OF FINDINGS OF LAND DEPARTMENT.
Where, on ex parte proofs in support of a claim under the placer mining law, the officers of the Land Department found a tract to be valuable for placer mining, and permitted it to be included in a placer entry, such finding was not final or conclusive, but interlocutory and open to reconsideration and reversal, prior to the issuance of a patent.

2. MINES AND MINERALS ⇐40—CANCELLATION OF MINING ENTRY—CONCLUSIVENESS.
Where a placer entry was made by two brothers, both claimants were entitled to notice of the Land Department's intended reconsideration of the question, as to the character of the land, and one who was not notified, was not concluded by the finding that the land was not mineral in character upon which a homestead patent was based, and was entitled in a suit by the patentee to quiet title to show, if such was the fact, that the tract was valuable for placer mining.

3. MINES AND MINERALS ⇐40—CANCELLATION OF MINING ENTRY—NOTICE.
The irregularity in failing to give such claimant notice of the department's intended reconsideration of the matter was not prejudicial, where, in a suit by the homestead patentee, to which he was a party, the evidence established that the tract was strictly agricultural, and not subject to entry under the placer mining law.

In Error to the Supreme Court of the State of South Dakota.

Suit by Hans Olson against Frank L. Kirk and others. A decree for plaintiff was affirmed by the Supreme Court of South Dakota (35 S. D. 620, 153 N. W. 893), and defendants bring error. Affirmed.

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Mr. William G. Porter, of Aberdeen, S. D., for plaintiffs in error.

Messrs. Samuel Herrick, of Washington, D. C., and Clifford A. Wilson, of Hot Springs, S. D., for defendant in error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This was a suit to quiet the title to a small tract of land in South Dakota which had been the subject of conflicting claims under the public land laws. One claim was made under the placer mining law and the

other under the homestead law. Both claims embraced other lands, the tract in question being all that was common to both. It was subject to disposal under the placer mining law if valuable for placer mining, and under the homestead law[1] if valuable only for agriculture. Whether it was valuable for the one purpose or the other was a question of fact to be determined by the officers of the Land Department. The claim under the placer mining law was first brought to the attention of those officers and, upon ex parte proofs presented in support of that claim, they found the tract to be valuable for placer mining and permitted it to be included in a placer entry. The homestead claim was next brought to their attention and, upon ex parte proofs presented in support of that claim, they found the tract to be valuable only for agriculture and permitted it to be included in a homestead entry. Thus the findings upon the ex parte proofs were inconsistent and the tract was included in conflicting entries. This was discovered before either entry was passed to patent, and so a hearing was ordered to determine the true character of the land. The placer entry had been made by two brothers and through some inadvertence one of these was not notified of the hearing. The other brother and the homestead entryman appeared and the hearing proceeded as if all parties in interest were present; that is to say, there was no reference to the absence of the placer claimant not notified. Upon the proofs produced at this hearing the land officers found the tract to have no value for placer mining and to be valuable only for agriculture, and as a result of the finding the tract was eliminated from the placer entry and the homestead entry was passed to patent. The patentee afterward sold and transferred the tract to the plaintiff, who knew that a right to it was still being asserted under the placer entry.

By their answer, which was in the nature of a cross-bill, the defendants, who were the placer claimants, asserted that they had located and were entitled to the mining claim before mentioned, that the tract in question was lawfully included in that claim and was valuable for placer mining, that the entry of the claim at the land office was lawful and entitled them to a patent, and that the subsequent elimination of the tract from that entry was unlawful and violative of their rights, because the earlier finding that the tract was valuable for placer mining was conclusive upon that point, and, if not conclusive, could not be recalled or disturbed except upon due notice to both placer claimants and after giving them a reasonable opportunity to sustain their entry by evidence and otherwise. The right of the homestead claimant to have the tract patented to him was questioned on other grounds, but these need not be noticed, for they plainly were such as could not be urged by the defendants. The answer concluded with a prayer that the plaintiff be decreed to hold the title to the tract in trust for the defendants and compelled to convey the same to them.

At the trial the evidence bearing upon the character of the tract disclosed, without any contradiction, that it had no value for placer mining, but was strictly agricultural land, and that its only use by the placer claimants had been for farming purposes.

The plaintiff was given a decree, which was affirmed, 35 S. D. 620, 153 N. W. 893, and the defendants seek a review here.

A statement of the case leaves little to be said, for the pertinent rules of decision are well settled and easily applied.

[1] The original finding respecting the character of the tract was not in itself final or conclusive, but essentially interlocutory. It was only a step in the proceedings looking to the ultimate disposal of the title, and, until the issue of a patent, was as much open to reconsideration and reversal as are the interlocutory orders or decrees of a court of equity until the entry of a final decree. New Orleans v. Paine, 147 U. S. 261, 266, 13 Sup. Ct. 303, 37 L. Ed. 162; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592, 18 Sup. Ct. 208, 42 L. Ed. 591 et seq.; Hawley v. Diller, 178 U. S. 476, 488, 20 Sup. Ct. 986, 990 (44 L. Ed. 1157). In the last case this court said:

"The Land Department has authority, at any time before a patent is issued, to inquire whether the original entry was in conformity with the act of Congress."

[2, 3] Without any doubt both placer claimants were entitled to notice of the intended reconsideration of the character of the tract and to an opportunity to sustain the original finding by evidence and otherwise. Parsons v. Venzke, 164 U. S. 89, 91, 17 Sup. Ct. 27, 41 L. Ed. 360, and cases supra. One was not notified and so was not accorded the opportunity to which he was entitled. This irregularity prevented the ultimate finding, upon which the homestead patent rested, from being conclusive of the character of the tract, as against him. Thayer v. Spratt, 189 U. S. 346, 351, 23 Sup. Ct. 576, 47 L. Ed. 845. He, therefore, was entitled in this suit to assert and show if such was the fact, that the tract was valuable for placer mining, as originally found by the land officers; and had he shown that this was its real character, he would have been entitled to a decree charging the title with an appropriate trust for his benefit. Guaranty Savings Bank v. Bladow, 176 U. S. 448, 453, 454, 20 Sup. Ct. 425, 44 L. Ed. 540; Thayer v. Spratt, supra. But no such showing was made at the trial. On the contrary, the evidence established that the tract was strictly agricultural, and therefore not subject to

[1] The tract was in the Black Hills Forest Reserve and, if agricultural land, was brought within the operation of the homestead law by the Acts of March 3, 1899, c. 424, 30 Stat. 1095, and April 15, 1902, c. 507, 32 Stat. 106.

entry or acquisition under the placer mining law. Thus it appears that the irregularity complained of was not prejudicial and did not result in the issue of a patent to one when it should have gone to another. See Bohall v. Dilla, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. Ed. 61; Sparks v. Pierce, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed. 428; Johnson v. Riddle, 240 U. S. 467, 481, 36 Sup. Ct. 393, 60 L. Ed. 752.

Judgment affirmed.

(245 U. S. 210)

STEVIRMAC OIL & GAS CO. v. DITTMAN et al.

(Submitted Oct. 22, 1917. Decided Dec. 10, 1917.)

No. 131.

1. CORPORATIONS ⊕507(13)—ACTION AGAINST —SUFFICIENCY OF RETURN OF SERVICE.

Under Oklahoma laws allowing service of process upon a corporation's treasurer only when certain other officers cannot be found in the jurisdiction, where service is made upon the treasurer, such other facts must be stated in the return.

2. APPEAL AND ERROR ⊕23—UNITED STATES SUPREME COURT—APPELLATE JURISDICTION.

The United States Supreme Court looks after its own jurisdiction whether the point is raised by counsel or not.

3. COURTS ⊕385(4) — UNITED STATES SUPREME COURT—REVIEW OF JURISDICTION OF DISTRICT COURT—QUESTION PRESENTED.

Under section 5 of Court of Appeals Act of March 3, 1891, c. 517, 26 Stat. 827, now section 238 of Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. 1916, § 1215]), providing for direct appeals to and writs of error from Supreme Court, where jurisdiction of District Court is in issue, in which case the question of jurisdiction only must be certified, the merits of the controversy are not brought up for decision, but merely the question of jurisdiction.

4. COURTS ⊕385(4)—UNITED STATES SUPREME COURT — REVIEW OF JURISDICTION OF DISTRICT COURT.

A case cannot be brought to the United States Supreme Court on writ of error to a District Court under section 5 of Court of Appeals Act of 1891 as one involving jurisdiction, where jurisdiction challenged is not that of the court rendering the judgment, from which appeal is taken, which was a refusal to set aside a former default judgment, claimed to be void on account of defective service on a corporation, but is that of the court rendering the former judgment.

5. COURTS ⊕405(12) — UNITED STATES CIRCUIT COURT — REVIEW OF JURISDICTION OF DISTRICT COURT—FINALITY OF DECISION.

A proceeding to set aside an original default judgment on the theory that no jurisdiction was acquired over defendant by service of process as amended by the court's order is in effect an independent action, and the judgment final and reviewable in the Court of Appeals.

In Error to the United States District Court for the Eastern District of Oklahoma.

Suit by C. E. Dittman and others against the Stevirmac Oil & Gas Company and another. Default judgment for plaintiffs against defendant named, entered in United States District Court for Eastern District of Oklahoma, application to set aside such judgment overruled, and defendant named brings error. Dismissed.

Messrs. George S. Ramsey, Edgar A. de Meules, and Malcolm E. Rosser, all of Muskogee, Okl., for plaintiff in error.

Mr. Jesse H. Wise, for defendant in error.

*211 *Mr. Justice DAY delivered the opinion of the Court.

On October 4, 1913, the defendants in error brought suit in the United States District Court for the Eastern District of Oklahoma against the Stevirmac Oil & Gas Company and Virgil Hicks to recover a money judgment. Process was issued naming November 3, 1913, as answer date. On October 15, 1913, the marshal made return certifying that he had delivered a copy of the summons to Virgil Hicks, treasurer, in person, and that the other defendant named was not served. On November 25, 1913, the court ordered the marshal to amend the return to conform to the facts, and thereupon the marshal amended his return so as to certify that he had served the Stevirmac Oil & Gas Company by leaving a copy of the summons with Virgil Hicks personally and as treasurer of the company at Sapulpa, Oklahoma, in said district, on October 13, 1913, the president, chairman of the board of directors, or other chief officer not being found in the district, and Virgil Hicks being in charge of the place of business of the corporation.

[1] On December 1, 1913, the court rendered judgment by default against the Stevirmac Oil & Gas Company. Under the laws of Oklahoma service can be made upon a corporation's treasurer only when the president, chairman of the board of directors, or other chief officer cannot be found in the jurisdiction, and this fact must be stated in the return. Cunningham Commission Co. v. Rorer Mill & Elevator Co., 25 Okl. 133, 105 Pac. 676.

*212 *About eighteen months after the default judgment the Stevirmac Oil & Gas Company filed an application to set aside the default judgment; it was averred that the Stevirmac Oil & Gas Company, a corporation, was named in the summons issued with Virgil Hicks; that on October 13, 1913, the United States Marshall delivered to said Virgil Hicks at Sapulpa, Oklahoma, a copy of the summons; that at that time H. H. McFann was the president of the corporation and was in the town of Sapulpa, was well known therein and had a regular place of business and residence in said town; that Virgil Hicks was not in charge of the place of business of the defendant corporation; that at the time of the delivery of the copy of the summons to him the marshal did not tell or inform him in any way that the copy was for the defendant, the Stevirmac Oil & Gas Company, or that said delivery was intended for service upon said defendant corporation,

and that Virgil Hicks understood and believed that the service was upon him individually; that the United States Marshal inquired of Virgil Hicks for the name of the president of the defendant corporation and where he could be found, and was told that H. H. McFann was the president of the corporation, was then in Sapulpa, Oklahoma, wherein he could be found; that this constituted all the service of summons made in the case; that no service was ever made on McFann or upon the Stevirmac Oil & Gas Company; that on October 15, 1913, the marshal made return certifying that he had delivered a copy of the return to Virgil Hicks, treasurer, in person at Sapulpa, Oklahoma, the other defendant named "not served"; that on November 25, 1913, without notice to the Stevirmac Oil & Gas Comapny the court made an order requiring or directing the marshal to amend the return to conform with the facts; that thereafter the return was amended so as to certify that the summons had been served upon the Stevirmac Oil & Gas Company by handing to and leaving a true and attested copy with Virgil Hicks personally, treasurer of said corporation, at Sapulpa, Oklahoma, on October 13, 1913, the president, chairman of the board of directors, or other chief officers not being found in the district; that the said Virgil Hicks was the person in charge of the place of business of the defendant corporation; that the said marshal had not at any time served the said summons on the Stevirmac Oil & Gas Company; that plaintiff in the original suit caused and procured said false amended return to be made by the said marshal; that the Stevirmac Oil & Gas Company had no notice nor knowledge of the said order of the court amending said return until long after the judgment was rendered; that the record does not show that the marshal asked leave of court, or that the court granted leave to make such amended return; that it is true that the court ordered the marshal to amend the original return; that said return was complete upon its face, and that the court had no power to order the marshal to make another or different return; that, therefore, said judgment was obtained without service of process upon the Stevirmac Oil & Gas Company as required by law, and is void. The Stevirmac Oil & Gas Company filed certain affidavits in support of this application.

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Upon hearing the application, with accompanying affidavits, the court refused to set aside the former judgment and overruled the application of the Stevirmac Oil & Gas Company. The court made a certificate setting forth that the order refusing to set aside and vacate the judgment rendered December 1, 1913, involved and determined the question whether the court had jurisdiction over the person of the Stevirmac Oil & Gas Company; it being contended that the court had no jurisdiction to render said judgment on account of lack of jurisdiction of the person of the defendant, and that the order entered was a denial of that contention.

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[2-4] The case is brought here solely upon the question of the jurisdiction of the District Court. It was submitted upon briefs which argue the question of the authority of the court to order the amendment of the return and thereby acquire jurisdiction over the Stevirmac Oil & Gas Company. The plaintiff in error contends that the proceeding to vacate the judgment was in effect a separate proceeding, and as it resulted in a judgment refusing to vacate the former judgment, the latter is final and reviewable here. We agree that it is a final judgment, reviewable in the proper court. The question now presented is whether it can be reviewed by direct writ of error from this court to the District Court. This court looks after its own jurisdiction, whether the point is raised by counsel or not. Mansfield, Cold Water & Lake Michigan R. R. Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462. Section 5 of the Court of Appeals Act of 1891, now Judicial Code, § 238, 36 Stats. 1157, provides for direct appeals to and writs of error from this court in cases in which the jurisdiction of the District Court is in issue, in which case the question of jurisdiction only must be certified here for decision. Such appeals or writs of error do not bring here the merits of the controversy, and impose upon this court the single duty of determining whether the District Court had jurisdiction of the case. In the present case while it is certified that the jurisdiction of the court rendering the original judgment was presented and decided against the contention of the plaintiff in error, it is apparent that no question is made concerning the jurisdiction of the court to entertain the proceeding to set aside the former judgment, and that the real controversy arises from the attack upon the authority of the court to order an amendment of the marshal's return, and to render the original judgment. In such cases we are of opinion that former decisions of this court have settled the construction of the statute to be against the right to entertain direct appeals or writs of error upon the question of jurisdiction.

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*Carey v. Houston & Texas Central R. R. Co., 150 U. S. 170, 14 Sup. Ct. 63, 37 L. Ed. 1041, presents an action upon a bill in equity to impeach and set aside a decree of foreclosure in the Circuit Court on the ground of fraud. It was held that no question of jurisdiction over that suit could be availed of to sustain a direct appeal to this court under section 5 of the Court of Appeals Act. In that case Mr. Chief Justice Fuller, speaking for the court, expounding the fifth section of the act of March 3, 1891, said:

"But the fifth section of the act of March 3, 1891, does not authorize a direct appeal to this court in a suit upon a question involving the jurisdiction of the Circuit Court over another

suit previously determined in the same court. It is the jurisdiction of the court below over the particular case in which the appeal from the decree therein is prosecuted, that, being in issue and decided against the party raising it and duly certified, justifies such appeal directly to this court. This suit to impeach the decree of May 4, 1888, and to prevent the consummation of the alleged plan of reorganization, was a separate and distinct case, so far as this inquiry is concerned, from the suit to foreclose the mortgages on the railroad property; and no question of jurisdiction over the foreclosure suit or the rendition of the decree passed therein can be availed of to sustain the present appeal from the decree in this proceeding.

"The collusion and fraud charged in the institution and conduct of the prior litigation, and in the procurement of the decree against the railroad company, and in the other transactions in respect of which relief was sought against the defendants, seem to form the gravamen of the case; but whether the bill be treated as a bill of review, an original bill of the same nature, or an original bill on the ground of fraud, it was a distinct proceeding in which the moving parties were shifted, and the fact that it put in issue the jurisdiction in the proceedings it assailed would not change the appeal from this, into an appeal from the prior decree."

That case was followed and approved in Re Lennon, 150 U. S. 393, 14 Sup. Ct. 123, 37 L. Ed. 1120, wherein Lennon filed a petition in habeas corpus in the Circuit Court of the United States for the Northern District of Ohio seeking to be relieved from punishment for contempt because of violation of an injunction issued in the same court, upon the ground that the court had no jurisdiction in the original case in which the order had been issued, and had no jurisdiction over the person of Lennon because he was not a party to the original suit, not having been served with process. This court held that while the proceeding in habeas corpus undertook to attack the jurisdiction of the court to make the order, the right to entertain the petition for habeas corpus was not in issue, but on the contrary, jurisdiction had been entertained, and conceding that the jurisdiction to discharge the prisoner would depend upon want of jurisdiction to commit in the original case, still that would not present a question reviewable by direct appeal in the habeas corpus suit. See, also, Empire State-Idaho Mining & Developing Co. v. Hanley, 205 U. S. 225, 232, 27 Sup. Ct. 476, 51 L. Ed. 779.

[5] The plaintiff in error correctly contends that the proceeding to set aside the original judgment is in effect an independent action, and the judgment therein final and reviewable. The proceeding to set aside the original judgment is based upon the theory that no jurisdiction was acquired over the Stevirmac Oil & Gas Company by the service of the process as amended by the court's order, and hence the company was never properly subject to the jurisdiction of the court in the original suit. No contention is made that the court could not entertain the proceeding to set aside that judgment, indeed it did entertain jurisdiction and decided against the contention of the plaintiff in error. In such case we have no doubt that in view of the nature of the attack made upon the original judgment, the judgment in the present proceeding was final, and reviewable in the Court of Appeals. Rust v. United Waterworks Co., 70 Fed. 129, 17 C. C. A. 16. But the attempt now made is to convert the writ of error into a means of reviewing the question of the jurisdiction of the court to render the original judgment. For the reasons stated, and following the construction of the statute already given, the writ of error must be dismissed, and it is so ordered.

Dismissed.

(245 U. S. 319)

UNITED STATES v. NESS.

(Argued Nov. 5, 1917. Decided Dec. 10, 1917.)

No. 284.

1. ALIENS ⟸68—NATURALIZATION—PROCEEDINGS—FILING IMMIGRATION CERTIFICATE.

Naturalization Act June 29, 1906, c. 3592, § 1, 34 Stat. 596 (Comp. St. 1916, § 963), requires that a registry be made of certain facts concerning each alien arriving in the United States, and that a certificate of such registry be granted the alien. Section 4 (section 4352) requires applicants for naturalization to file a certificate of the Department of Labor, stating the date, place, and manner of his arrival in the United States, and provides that an alien may be admitted to citizenship in the manner therein prescribed and not otherwise. Section 5 (section 4353) requires public notice of each petition for naturalization, and section 6 (section 4354) prohibits final action until 90 days after such notice has been given. Section 27 (section 4382) provides that substantially the forms therein contained shall be used, and prescribes a form of petition, reciting that the certificate from the Department of Labor is attached and made a part thereof. *Held*, that the filing of the certificate of the Department of Labor is not merely a form of proof, but is a matter of substance, and cannot be dispensed with by the naturalization court.

2. ALIENS ⟸71½ — NATURALIZATION—CANCELLATION OF CERTIFICATE—GROUNDS—"ILLEGALLY PROCURED."

Naturalization granted without the filing of the certificate from the Department of Labor required by Naturalization Act June 29, 1906, § 4, is illegally procured within section 15, authorizing the canceling of certificates of citizenship on the ground that they were illegally procured.

3. ALIENS ⟸70 — NATURALIZATION—OPERATION AND EFFECT.

Naturalization Act, § 11 (Comp. St. 1916, § 4370) provides that the United States shall have the right to appear before any court exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses, and may produce evidence and be heard in opposition to the petition. Section 15 (section 4374) authorizes a suit to cancel a certificate of citizenship for fraud or on the ground that it was illegally procured. *Held*, that where the United States appeared and opposed a petition for naturalization on the ground that the certificate of the Department of Labor required by section 4 was not filed, the order of naturalization was not conclusive against the government so as to preclude it from maintaining a suit to cancel the certificate, as the interest of all concerned requires objections to be presented at the earliest possible stage, and it

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

would defeat this purpose to compel the government to refrain from presenting any objection unless willing to accept the decision of the naturalization court as final.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States against Iver Ingebretsen Ness to cancel a certificate of naturalization. A decree dismissing the bill (217 Fed. 169) was affirmed by the Circuit Court of Appeals for the Eighth Circuit (230 Fed. 950, 145 C. C. A. 144, Ann. Cas. 1917C, 41), and the government brings certiorari. Reversed.

Mr. Solicitor General Davis, of Washington, D. C., for the United States.

Mr. Denis M. Kelleher, of Ft. Dodge, Iowa, for respondent.

*320 *Mr. Justice BRANDEIS delivered the opinion of the Court.

This suit was brought under Section 15[1] of the Naturalization Act (June 29, 1906; 34 Stat. 596) in the District Court of the United States for the Northern District of Iowa, to cancel a certificate of naturalization issued to Ness by a state court of Iowa on May 21, 1912. The naturalization is alleged to have been "illegally procured," because the petitioner failed to file with the clerk the certificate from the Department of Commerce and Labor "stating the time, place and manner" of arrival as provided in Section 4, subdivision Second.[2] Ness admitted this failure; but contended that on the facts hereinafter stated he was nevertheless entitled to naturalization, and that, in any event, his right thereto had become res judicata for the following reason: The United States entered its appearance under Section 11[3] (by the chief naturalization examiner of the Department of Commerce and Labor) "in opposition to the granting" of naturalization and submitted a motion that the petition be dismissed on the ground that the certificate of arrival was not attached. The motion was duly considered by the court and denied. Then, after hearing the petitioner and his witnesses, the order of naturalization was granted. This bill was filed within six months thereafter. *321

The facts relied upon by Ness as entitling him to naturalization, although he had not filed the certificate of arrival, were as follows:

He emigrated from Norway and arrived at the port of Buffalo by rail via Canada in August, 1906. Ignorant of the requirements of the immigration and naturalization laws of the United States and unobserved by officials of the government and of the railroad, he entered this country without submitting himself to physical examination, without paying the alien head tax, and without having his entry registered. After filing his petition for naturalization he learned that it was defective for failure to file the certificate of arrival and immediately applied to the Bureau of Immigration and Naturalization for such certificate, but found it could not be furnished, because no registry of his entry had been made. After receiving his certificate of naturalization, he offered to pay the head tax and to submit himself to medical examination; but his offer was refused. He possessed the personal qualifications which entitle aliens to admission and to citizenship.

The District Court dismissed the bill (D. C.) 217 Fed. 169. Its decree was affirmed by the Circuit Court of Appeals, 230 Fed. 950, 145 C. C. A. 144, Ann. Cas. 1917C, 41, and this court granted a writ of certiorari, 242 U. S. 634, 37 Sup. Ct. 18, 61 L. Ed. 538. The case presents questions of importance in the administration of the Naturalization Act. *322

*[1, 2] First: Whether filing the certificate of arrival as provided in Section 4, subdivision Second is an essential prerequisite to a valid order of naturalization.

It is urged that the certificate of arrival is merely a form of proof which the naturalization court has power to dispense with for cause. The uses served by the certificate, the history of the provision and its relation to other parts of the act show that this contention is unsound.

Section 1 requires that a registry be made of certain facts concerning each alien arriving in the United States; and that "a certificate of such registry with the particulars thereof be granted" to each alien.[4] Section

[1] Sec. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavits showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the alien may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured.

[2] Sec. 4. Second: * * * At the time of filing his petition there shall be filed with the clerk of court a certificate from the Department of [Commerce and] Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

[3] Sec. 11. That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings.

[4] The requirement of such registry was first introduced by the Act of June 26, 1906, but its importance in connection with naturalization had long been recognized and had been pressed upon Congress. The Commissioner General of Immigration recommended, in his report for 1898, p. 36: "Each arriving immigrant, when admitted into the United States, should be provided with a landing certificate

323 5 (Comp. St. 1916, § 4353) requires clerks of court to give public notice of each petition for naturalization filed. Section 6 prohibits courts from taking final action upon any petition until 90 days after such notice has been given. That period is provided so that the examiners of the Bureau of Naturalization and others may have opportunity for adequately investigating whether reasons exist for denial of the petition. The certificate of arrival is the natural starting point for this investigation. It aids in ascertaining (a) whether the petitioner was within any of the classes of aliens who are excluded from admission by Sections 2 and 38 of the Immigration Act of February 20, 1907 (c. 1134, 34 Stat. 898, Comp. St. 1916, §§ 4244, 4287); (b) whether he is among those who are excluded from naturalization under Section 7 of the Naturalization Act (Comp. St. 1916, § 4363)—for political beliefs or practices; (c) whether he is the same person whose declaration of intention to become a citizen is also attached to the petition under Section 4, subdivision Second; (d) whether the minimum period of five years' continuous residence prescribed by Section 4, subdivision Fourth, has been complied with. The certificate of arrival is in practice deemed so important that in the regulations issued by the Secretary of Labor under Section 28 (Comp. St. 1916, § 4383) "for properly carrying into execution the various provisions" of the act, the clerk of court is advised that he "should not commence the execution of the petition until he has received the certificate of arrival." [5]

*Filing the certificate of arrival being a matter of substance, it is clear that no power is vested in the naturalization court to dispense with it. Section 4 declares: *324

"That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise."

Section 27 declares: "That substantially the following forms shall be used in the proceedings to which they relate"; and the form of petition therein prescribed recites: "Attached hereto and made a part of this petition" is "the certificate from the Department of Labor required by law." Experience and investigation had taught that the widespread frauds in naturalization, which led to the passage of the Act of June 29, 1906, were, in large measure, due to the great diversities in local practice, the carelessness of those charged with duties in this connection, and the prevalence of perjured testimony in cases of this character. A "uniform rule of naturalization," embodied in a simple and comprehensive code under federal supervision, was believed to be the only effective remedy for then existing abuses. And in view of the large number of courts to which naturalization of aliens was intrusted and the multitude of applicants[6]—uniformity and strict enforcement of the law could not be attained unless the Code prescribed also the exact character of proof to be adduced. The value of contemporary documentary evidence was recognized; and the certificate of arrival was, therefore, specifically included among the prerequisites to naturalization.[7] Naturalization granted* without the certificate having been filed, is, therefore, "illegally pro- *325

setting forth the name, age, sex, birth place of the immigrant, government to which allegiance is due, the port from which the vessel sailed, the name of the vessel, the line which it belongs to, the port it arrives at, and the date of landing. The immigrant should be instructed, by means of a circular, to retain the certificate for presentation when applying for naturalization papers. A record of the facts stated in the said circular [certificate] as to each immigrant, to be known as an Immigration Directory should be kept for each fiscal year by the Bureau of Immigration. An act of Congress authorizing such a course of procedure and requiring of the alien presenting himself for naturalization to produce such a certificate or a duplicate from the Immigration Directory would facilitate the work of the courts and go far toward preventing the issuance of fraudulent naturalization papers in the future." Without express authority from Congress the Bureau of Immigration undertook, in 1900, to make such a registry and issue certificates of arrival (McBonynge, 40 Cong. Record, p. 3644) and in 1902-03 a card system was introduced "by means of which such an accurate and accessible record is kept at every port of arrival, that at any subsequent time the name, date of arrival and other particulars in regard to every alien entering the United States, can be readily ascertained." Report of Commissioner General, 1903, p. 120. For this reason, while other provisions of the Act of June 29, 1906, did not take effect until 90 days after its passage (see Sec. 31), it was possible to make Section 1 effective immediately; and under Section 4, subdivision Second, the certificate of arrival is required "if the petitioner arrives in the United States after the passage of this Act."

[5] Beginning with regulations issued May 22, 1911, and including those issued February 15, 1917. See Section 5 of the Regulations. For a description of the practice pursued see Report of the Commissioner of Naturalization for 1914, pp. 22, 23. Until Act of March 4, 1913, c. 141, 37 Stat. 736, creating the Department of Labor, the Bureau of Naturalization was in the Department of Commerce and Labor.

[6] The average number of aliens naturalized for several years preceding 1906 was estimated at 100,000. Report of Special Commission on Immigration appointed by the President March 1, 1905 (59th Cong. 1st Session, Doc. 46, p. 26). In the year ending June 30, 1916, 93,911 certificates of naturalization were granted and 11,927 petitions were denied. Of these, 399 were denied for failure to file certificate of arrival. Report of Commissioner of Naturalization, pp. 4, 6.

[7] The Act of June 29, 1906, embodies in the main the legislation recommended in the Report of the Special Commission. The requirement therein proposed (p. 98) concerning the certificate of arrival was adopted in terms except that the Commission had proposed it should apply to all aliens arriving after Jan. 1, 1900. The Report of Special Examiner Van Deusen, thereto annexed, states (p. 80): "The Code should also specifically set forth the exact proof to be adduced by the alien and his witnesses as a precedent to the admission of the alien. Such proof should include documentary or other evidence of the date and place of birth and a certificate of immigration showing the date of arrival and the port or place of entry of the alien into the United States." See Mr. Hayes, 40 Congressional Record, pp. 7043-44. Report of Commissioner General of Immigration for 1909, p. 209.

cured";[8] United States v. Ginsberg, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853; and it may, at least where the proceedings were ex parte, be set aside under Section 15.

[3] Second: Whether an order entered in a proceeding to which the United States became a party under Section 11 is res judicata as to matters actually litigated therein, so that the certificate of naturalization cannot be set aside under Section 15, as having been "illegally procured."

This question, discussed and left undecided, in Johannessen v. United States, 225 U. S. 227, 238, 32 Sup. Ct. 613, 56 L. Ed. 1066, is, in effect: Do Section 11 and Section 15 afford the United States alternative or cumulative means of protection against illegal or fraudulent naturalization under the Act of June 29, 1906?

The remedy afforded by Section 15 for setting aside certificates of naturalization is broader than that afforded in equity, independently of statute, to set aside judgments, United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Kibbe v. Benson, 17 Wall. 624, 21 L. Ed. 741; but it is narrower in scope than the protection offered under Section 11. Opposition to the granting of a petition for
*328 naturalization may prevail, because of objections to the competency or weight of evi-
* dence or the credibility* of witnesses, or mere irregularities in procedure. A decision on such minor questions, at least of a state court of naturalization, is, though clearly erroneous, conclusive even as against the United States if it entered an appearance under Section 11. For Congress did not see fit to provide for a direct review by writ of error or appeal.[9] But where fraud or illegality is charged, the act affords, under Section 15, a remedy by an independent suit "in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit." If this suit is brought in the federal District Court, its decision will also be subject, under the general law, to review by the Circuit Court of Appeals, and, on certiorari, by this court. Such an independent suit necessarily involves considerable delay and expense; and it may subject the individual to great hardship. On the other hand, a contest in the court of naturalization is usually disposed of expeditiously and with little expense. The interest of all concerned is advanced by encouraging the presentation of known objections to naturalization at the earliest possible stage of the proceedings; so that the petitioner may, if the defects are remediable, remove them, and if not, may adopt, without delay, such course, if any, as will ultimately entitle him to citizenship. It would have defeated this purpose to compel the United States to refrain from presenting any objection, or the objection of illegality, in the court of naturalization, unless it is willing to accept the decision of that court as final.

*It was the purpose of Congress, by provid- *327
ing for appearances under Section 11, to aid the court of naturalization in arriving at a correct decision and so to minimize the necessity for independent suits under Section 15. In most cases this assistance could be given best by an experienced examiner of the Bureau of Naturalization familiar with the sources of information. Section 11, unlike Section 15, does not specifically provide that action thereunder shall be taken by the United States district attorneys; and if appearance under Section 11 on behalf of the government should be held to create an estoppel, no good reason appears why it should not arise equally whether the appearance is by the duly authorized examiner or by the United States attorney.[10] But in our opinion Section 11 and Section 15 were designed to afford cumulative protection against fraudulent or illegal naturalization. The decision of the Circuit Court of Appeals is therefore

Reversed.

(245 U. S. 328)

JONES et al. v. BUFFALO CREEK COAL & COKE CO.

(Argued Nov. 5, 1917. Decided Dec. 10, 1917.)

(No. 293.)

1. CONSTITUTIONAL LAW ⊂⊃251—DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS—FOURTEENTH AMENDMENT.

The Fourteenth Amendment to the federal Constitution, relating to deprivation of property without due process, has no application where the action complained of is not the action of a state.

2. CONSTITUTIONAL LAW ⊂⊃278(1)—DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS—"DUE PROCESS OF LAW."

Error of the trial judge in admitting evidence or entering judgment after full hearing does not constitute a denial of due process of law within meaning of the Fifth and Fourteenth

[8] In In re Liberman (D. C.) 193 Fed. 301, and In re Hollo (D. C.) 206 Fed. 852, where naturalization was refused on this ground, the petitions were dismissed without prejudice. Compare Report of Commissioner General of Immigration for 1908, p. 191.

[9] The bill submitted by the Commission on Naturalization provided for such appellate proceedings and its proposal was recommended to the House by the Committee on Immigration and Naturalization as Section 13 (Report of Feb. 6, 1906, p. 5); but after debate in the Committee of the Whole (40 Cong. Rec., pp. 7784-7787) was stricken from the bill. The bill proposed by the Commission and recommended by the House Committee contained in addition (as section 17) the provision for cancellation proceeding enacted as Section 15.

[10] In United States v. Mulvey, 232 Fed. 513, 146 C. C. A. 471, where an order for naturalization was canceled under Section 15, on grounds which the Examiner of the Bureau of Naturalization had presented in opposition to the granting of naturalization, stress was laid upon the fact that the representative of the Bureau was not a law officer of the government and that he appeared as amicus curiæ; but in view of the language of Section 11, the distinction does not seem of importance. See, also, Report of Commissioner of Naturalization for 1915, pp. 20-21.

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Amendments to the federal Constitution; hence in action of ejectment where plaintiff set up title from the state through mesne conveyances by virtue of sales made for benefit of school fund under valid statutes, and thereupon recovered, defendant was not deprived of property without due process, justifying review in United States Supreme Court upon direct writ of error to United States District Court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

In Error to the District Court of the United States for the Southern District of West Virginia.

Ejectment by the Buffalo Creek Coal & Coke Company against H. S. Jones and others. Directed verdict for plaintiff in the District Court of the United States for the Southern District of West Virginia, and plaintiff brings error. Dismissed.

Mr. Maynard F. Stiles, of Charleston, W. Va., for plaintiff in error.

Mr. William R. Lilly, of Logan, W. Va., and Mr. R. C. Alston, of Atlanta, Ga., for defendants in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

This is an action of ejectment brought by the Buffalo Creek Coal & Coke Company in the District Court of the United States for the Southern District of West Virginia. Jurisdiction of that court was invoked solely on the ground of diversity of citizenship. A verdict was directed for the plaintiff below; and the case was brought here by direct writ of error, defendants below claiming that, by the action of the lower court they have been deprived of their property without due process of law in violation of the Fifth and Fourteenth Amendments of the federal Constitution.

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*[1, 2] Plaintiff below set up title from the state derived through mesne conveyances, by virtue of sales made for the benefit of the school fund under statutes which have repeatedly been held valid by this court.[1] The action of which defendants complain as depriving them of due process of law, is the admission in evidence herein of the records and papers in three proceedings brought in the state courts of West Virginia under these statutes, and the rendering of judgment herein against them. As the action now complained of is not the action of a state, the Fourteenth Amendment can have no application. And the claim that the action of the court violates the Fifth Amendment is likewise unfounded.

[1] King v. Mullins, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214; King v. Panther Lumber Co., 171 U. S. 437, 18 Sup. Ct. 573, 43 L. Ed. 227; Swann v. Treasurer of West Virginia, 188 U. S. 739, 23 Sup. Ct. 848, 47 L. Ed. 677; King v. State of West Virginia, 216 U. S. 92, 30 Sup. Ct. 225, 54 L. Ed. 396; Fay v. Crozer, 217 U. S. 455, 30 Sup. Ct. 568, 54 L. Ed. 837; King v. Buskirk, 231 U. S. 735, 34 Sup. Ct. 316, 58 L. Ed. 460.

It was the contention of the plaintiff below that the records and papers in the three suits established title in those under whom it claims; and also that the decrees in those suits created res judicata as against the defendant, because their predecessors in title had been parties or privies to those suits. The defendants below contended among other things, that the premises in question were not within the tracts affected by one or more of the decrees in those suits and that they were not bound by any of them. It is conceivable that the defendants below were right in whole or in part, and that the trial judge erred in admitting some or all of the evidence objected to and in rendering judgment for the plaintiff. But error of a trial judge in admitting evidence or entering judgment after full hearing does not constitute a denial of due process of law. Central Land Co. v. Laidley, 159 U. S. 103, 112, 16 Sup. Ct. 80, 40 L. Ed. 91. The writ of error must be Dismissed.

(245 U. S. 345)

PEOPLE OF STATE OF NEW YORK ex rel. NEW YORK & QUEENS GAS CO. v. McCALL et al., Public Service Commission of New York for First District.

(Argued Nov. 6 and 7, 1917. Decided Dec. 10, 1917.)

No. 407.

1. COURTS ⊜399(1)—REVIEW OF DECISIONS OF STATE COURTS—SCOPE OF REVIEW.

On a writ of error to a state court to review a judgment upholding an order of the Public Service Commission of the state, requiring a gas company to extend its mains and service pipes, the Supreme Court may not substitute its judgment for that of the Commission as to the wisdom or policy of the order, and will not analyze or balance the evidence, but will make such examination of the record as may be necessary to determine whether there was such a want of a hearing, or such arbitrary or capricious action on the part of the Commission, as to violate the due process clause of the Constitution.

2. CONSTITUTIONAL LAW ⊜318—DUE PROCESS OF LAW — ADMINISTRATIVE PROCEEDINGS.

Where a gas company appeared before a public service commission at the hearing on the question of ordering an extension of its mains and service pipes, cross-examined witnesses, introduced testimony and argued the case, and the case was re-examined by the Appellate Division of the Supreme Court on certiorari, and reviewed by the Court of Appeals, there was no want of due process of law in the matter of procedure.

3. CONSTITUTIONAL LAW ⊜296(1)—DUE PROCESS OF LAW — ADMINISTRATIVE PROCEEDINGS.

A gas company, which was the only company having a franchise covering a rapidly growing settlement about 1½ miles from its mains, was ordered by a public service commission to extend its pipes and serve such settlement. The settlement had 330 houses, of an average cost of $7,500, occupied the entire year and served by other franchise holding companies, with water, electric lights, and telephone. On the cost as estimated by the gas company, the return would be about 2¼ per centum per annum, and on the cost as estimated by the Commission

about 4 per centum, but it was not claimed that the comparatively small loss, which the company claimed would result would render its business as a whole unprofitable. *Held*, that the order of the Commission was not arbitrary or capricious, so as to constitute a denial of due process of law.

In Error to the Court of Appeals of the State of New York.

Certiorari by the People of the State of New York, on relation of the New York & Queens Gas Company, against Edward E. McCall and others, Commissioners, constituting the Public Service Commission of the State of New York for the First District. A judgment of the Appellate Division of the Supreme Court of New York (171 App. Div. 580, 157 N. Y. Supp. 707) was reversed by the Court of Appeals (219 N. Y. 84, 113 N. E. 795, Ann. Cas. 1916E, 1042), and the relator brings error. Affirmed.

Mr. John A. Garver, of New York City, for plaintiff in error.

Messrs. Godfrey Goldmark and George S. Coleman, both of New York City, for defendants in error.

*346 *Mr. Justice CLARKE delivered the opinion of the Court.

It sufficiently appearing that the Court of Appeals retained practical control over the record and judgment in this case, while the motion for reargument in that court was pending, the motion to dismiss the writ of error on the ground that the application for it came too late, will be denied, and the case will be disposed of upon its merits.

The Public Service Commission of the State of New York for the First District ordered the New York & Queens Gas Company to extend its gas mains and service pipes in such a manner as would be "required reasonably to serve with gas" the community known as Douglaston, including Douglas Manor, which was located about a mile and a half beyond the then terminus of the company's gas mains, but within the Third ward of the borough of Queens, city of New York.

When this order of the Public Service Commission was reviewed by the Supreme Court at the Appellate Division, that court assumed that it had authority to review generally the reasonableness of the order of the Public Service Commission, and upon such review found the order unreasonable and annulled it. 171 App. Div. 580, 157 N. Y. Supp. 707.

*347 *From the decision of the Appellate Division an appeal was taken to the Court of Appeals, which reversed that decision (219 N. Y. 84, 113 N. E. 795, Ann. Cas. 1916E, 1042), and held that the Appellate Division had no power under the New York law to substitute its own judgment for the determination of the Public Service Commission as to what was reasonable, under the circumstances of the case. The case is now in this court for review of the judgment entered upon the decision of the Court of Appeals and it is presented upon a single assignment of error, viz.:

"That the order of the Public Service Commission * * * was illegal and void in that it deprived the Gas Company of its property without due process of law and denied to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in requiring the company to extend its distributing system under great physical difficulties and at enormous expense to an independent and remote community which the company was under no present duty to supply with gas when it appeared that the Gas Company would not obtain an adequate return from the expenditure required to make such extension."

More compactly stated, this assignment of error is, that the order deprived the gas company of its property without due process of law, because obedience to it would require an expenditure of money upon which the prospective earnings would not provide an adequate return.

The Court of Appeals of New York decided that the Public Service Commission was created to perform the important function of supervising and regulating the business of public service corporations; that the state law assumes that the experience of the members of the Commission especially fits them for dealing with the problems presented by the duties and activities of such corporations; that the courts in reviewing the action *348 of the Commission have no authority to substitute their judgment as to what is reasonable in a given case for that of the Commission, but are limited to determining whether the action complained of was capricious or arbitrary and for this reason unlawful; and that it was clearly within the power of the Commission to make the order which is here assailed.

This interpretation of the statutes of New York is conclusive, and the definition, thus announced, of the power of the courts of that state to review the decision of the Public Service Commission, based as it is in part on the decision in Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 470, 30 Sup. Ct. 155, 54 L. Ed. 280, differs but slightly, if at all, from the definition by this court of its own power to review the decisions of similar administrative bodies, arrived at in many cases in which such decisions have been under examination. Typical cases are: Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co., 215 U. S. 481–494, 30 Sup. Ct. 164, 54 L. Ed. 292; Kansas City Southern Co. v. United States, 231 U. S. 423, 443, 444, 34 Sup. Ct. 125, 58 L. Ed. 296, 52 L. R. A. (N. S.) 1; Louisiana R. R. Commission v. Cumberland Tel. & Tel. Co., 212 U. S. 414, 420–422, 29 Sup. Ct. 357, 53 L. Ed. 577; Interstate Commerce Commission v. Union Pac. Railroad Co., 222 U. S. 541–547, 32 Sup. Ct. 108, 56 L. Ed. 308; and Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655, 668, 32 Sup. Ct. 389, 56 L. Ed. 594.

[1] It is the result of these and similar decisions that, while in such cases as we have

here this court is confined to the federal question involved and therefore has not the authority to substitute its judgment for that of an administrative commission as to the wisdom or policy of an order complained of, and will not analyze or balance the evidence which was before the Commission for the purpose of determining whether it preponderates for or against the conclusion arrived at, yet it will, nevertheless, enter upon such an examination of the record as may be necessary to determine whether the federal constitutional right claimed has been denied, as, in this case, whether there was such a want of hearing or such arbitrary or capricious action on the part of the Commission as to violate the due process clause of the Constitution.

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[2] The result of the application of this rule to the record before us cannot be doubtful. The Gas Company appeared at the hearing before the Commission, cross-examined witnesses, introduced testimony and argued the case. On writ of certiorari the case was re-examined by the Appellate Division of the Supreme Court, and it was again reviewed on appeal, by the Court of Appeals. In the matter of procedure plainly the company cannot complain of want of due process of law.

[3] The record shows that the company at the time of the hearing had franchises authorizing it to manufacture and sell gas throughout the Third ward of the borough of Queens, in the city of New York, and that, it being the only company which had franchises for any part of that area, the community to which it was ordered to extend its distributing system must continue without gas if the order does not become effective.

The community of Douglaston, including Douglas Manor, was a rapidly growing settlement of three hundred and thirty houses, of an average cost of $7,500, thus giving assurance that the occupiers of them would be probable users of gas, and which, with very few exceptions, were occupied by families the entire year. While the community is described in the assignment of error as "independent and remote" the record shows that it was served at the time by franchise holding companies, which supplied water, electric light and telephone to its inhabitants, and that the number of houses had doubled within a few years.

The length of the extension ordered was about one and one-half miles but the mains of the company, which extended to the point nearest to Douglaston, were being used to almost their full capacity, and for this reason the estimated cost of making the improvement included new mains of some eight miles in length. The engineer of the Gas Company testified that the cost of the ordered extension would be approximately $86,000, while the engineer for the Commission estimated the cost at $61,000. The Commission found that only $45,000 of the new investment required would be properly chargeable against the extension ordered, since the newer and larger mains would be available in part for other business.

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On the basis of the company's estimate of the cost of the extension the income would be about 2¼% per annum, and, on the basis of the estimate by the Commission of the part of the cost properly chargeable to the Douglaston community the income would be 4%. There is no showing in the record as to the fair value of the entire property of the Gas Company used in the public service, nor of the rate of return which it was earning thereon, and therefore even if the return on the cost of complying with the order be conceded to be inadequate, this would not suffice to render the order legally unreasonable. Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission, 206 U. S. 1, 24–26, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398; Mo. Pac. Ry. Co. v. Kansas, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472; Puget Sound Traction Co. v. Reynolds, 244 U. S. 574, 580, 37 Sup. Ct. 705, 61 L. Ed. 1325.

It is significant also that within a year preceding the hearing by the Commission the Gas Company proposed in writing to the residents of Douglaston that it would extend its mains to the settlement if they would advance $10,000, to be returned in semi-annual credits upon the amount of gas consumed.

These references to the evidence will suffice. They show this Public Service Commission ordering a public service corporation to render an important public service, under conditions such that in the aspect least favorable to the Gas Company the initial return upon the investment involved would be low but with every prospect of its soon becoming ample, and also that no claim was made by the company that the comparatively small loss which the company claims would result would render its business as a whole unprofitable.

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Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render. To correct this disposition to serve where it is profitable and to neglect where it is not, is one of the important purposes for which these administrative commissions, with large powers, were called into existence, with an organization and with duties which peculiarly fit them for dealing with problems such as this case presents, and we agree with the Court of Appeals of New York in concluding that the action of the Commission complained of was not arbitrary or capricious, but was based on very substantial evidence, and therefore that, even

if the courts differed with the Commission as to the expediency or wisdom of the order, they are without authority to substitute for its judgment their views of what may be reasonable or wise. Since no constitutional right of the plaintiff in error is invaded by the order complained of, the judgment under review must be

Affirmed.

(245 U. S. 288)

SCHNEIDER GRANITE CO. v. GAST REALTY & INVESTMENT CO. et al.

GAST REALTY & INVESTMENT CO. et al. v. SCHNEIDER GRANITE CO.

(Argued Oct. 11 and 12, 1917. Decided Dec. 10, 1917.)

Nos. 461, 473.

1. COURTS ⟸400 — UNITED STATES SUPREME COURT — APPEAL FROM STATE COURT — COMPLIANCE WITH MANDATE.

Where special paving assessments based on front-foot rule and also on area rule were, on error to the United States Supreme Court, declared void as to the area rule, the state Supreme Court, on remand, could order reversal, and direct judgment sustaining assessment as to the other rule; such mandate leaving the state tribunals at liberty to exercise their proper jurisdiction between the parties so long as they avoid a conflict with landowners' rights under Const. Amend. 14, and the question of whether the two elements of assessment were inseparable, and hence that the tax, being void in part, was entirely void, being a question of state law. Such mandate did not require a new assessment in lieu of the former area assessment, although such new assessment would not be inconsistent with the mandate, if not infringing landowners' constitutional rights; the questions whether such new assessment should be made, and, if made, whether by a court or by an assessing board or other appropriate instrumentality, and whether further legislation was needed for that purpose, also being matters of state law.

2. MUNICIPAL CORPORATIONS ⟸514(3)—PUBLIC IMPROVEMENTS — REASSESSMENT AFTER DETERMINATION OF INVALIDITY OF PRIOR ASSESSMENT.

Where a special assessment to pay for a particular improvement has been held to be illegal, the United States Constitution does not prevent the making of the new and just assessment to pay for the completed work.

In Error to the Supreme Court of the State of Missouri.

Actions by the Schneider Granite Company against the Gast Realty & Investment Company and another. Judgments for plaintiff, and defendants appealed. In division two cases affirmed, by judgments reversed as to defendant Independent Breweries Company (259 Mo. 172, 168 S. W. 692; 258 Mo. 378, 168 S. W. 693; 258 Mo. 382, 168 S. W. 694). On error to the United States Supreme Court first two judgments reversed (240 U. S. 55, 36 Sup. Ct. 254, 60 L. Ed. 523; 240 U. S. 55, 36 Sup. Ct. 255, 60 L. Ed. 523; 240 U. S. 55, 36 Sup. Ct. 400, 60 L. Ed. 523). Cases transferred to State Supreme Court in Banc. Cross writs of error bringing up for review judgment of Supreme Court of Missouri (269 Mo. 561, 191 S. W. 689), reversing and remanding cause, with directions. Affirmed.

Messrs. Hickman P. Rodgers and William K. Koerner, both of St. Louis, Mo., for Schneider Granite Co.

Messrs. Thomas P. Rutledge, David Goldsmith, and Robert A. Holland, Jr., all of St. Louis, Mo., for Gast Realty & Investment Co. and another.

Mr. Justice PITNEY delivered the opinion of the Court.

These are cross writs of error, bringing under review a judgment rendered by the Supreme Court of Missouri after the reversal by this court of a previous judgment in the same action. 288

The action was brought to collect a tax bill for paving one of the streets of St. Louis, levied upon land fronting upon the street, under an ordinance that imposed one-fourth of the cost of the improvement upon all the abutting property according to its frontage, and three-fourths according to area upon all the property in an improvement district whose boundaries were to be fixed in a manner specified in the ordinance, the effect of which, as applied to the property in question, was to extend the area assessment upon defendants' land to a depth of between 400 and 500 feet, while other lands similarly benefited by the improvement were subjected to the area assessment to a much less depth. A judgment of the Supreme Court, which had affirmed a judgment of the circuit court of the city of St. Louis sustaining the tax (259 Mo. 153, 168 S. W. 687), was reversed, and the cause remanded for further proceedings not inconsistent with the opinion of this court. 240 U. S. 55, 36 Sup. Ct. 254, 255, 60 L. Ed. 523.

Upon the going down of the mandate, the case was transferred to the Supreme Court in banc, whereupon the plaintiff prayed that the cause be remanded to the circuit court (the trial court) with directions, first, to render judgment for the amount of the frontage assessment in the original tax bill, with interest, and second, to charge against the land a proper area assessment, in some mode to be prescribed by the Supreme Court in its mandate; it being plaintiff's contention that the decision of this court did not condemn the entire area assessment, but only so much of it as was in excess of benefits received. On the other hand, the landowners moved for a reversal of the judgment of the circuit court in toto, with directions for the entry of a general judgment in their favor. The Supreme Court, interpreting our decision as limited to holding the ordinance invalid only so far as concerned the area assessment, reversed the judgment of the trial court, and remanded the cause with directions to enter judgment for the amount of the frontage assessment, with interest. 290

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Both parties sued out writs of error from this court, plaintiff on the ground that the state court refused its application for an area assessment, the landowners upon the ground that there was error in directing judgment for any part of the tax bill sued on.

[1] These contentions must be tested by the true intent and meaning of the mandate of this court, and, so tested, both must be overruled. The mandate, while reversing the judgment that was under review on the former writ of error, permitted further proceedings of any kind to be had in the state courts, provided they were not inconsistent with the opinion of this court. It left the tribunals of the state at liberty to exercise their proper jurisdiction in the cause between the parties, so long as they avoided a conflict with the rights of the landowners under the Fourteenth Amendment as established by our decision. As our former opinion shows, the conflict with federal rights was due solely to the mode in which that portion of the tax which was levied according to area was distributed. The subsequent judgment of the state court sustaining the tax to the extent of the frontage assessment was not inconsistent with it.

The landowners insist that the two elements were inseparable, and that the tax, being void in part, was entirely void. But the Supreme Court of the state held in this case, following Collier Estate v. Western Paving & Supply Co., 180 Mo. 362, 375, 79 S. W. 947, that the tax was severable. This, like the kindred question of the severability of a statute of the state, is a question of state law. See Guinn v. United States, 238 U. S. 347, 366, 35 Sup. Ct. 926, 59 L. Ed. 1340, L. R. A. 1916A, 1124; Myers v. Anderson, 238 U. S. 368, 380, 35 Sup. Ct. 932, 59 L. Ed. 1349. In those cases we passed upon the question of severability, in the absence *291 of controlling state rulings; but we were there reviewing the proceedings of federal courts, and were called upon to consider questions of state as well as of federal law, while in reviewing the judgments of state courts we are confined to the federal questions.

[2] Plaintiff's contention that our mandate required a new assessment in lieu of the former area assessment is likewise unfounded. It is true that there would be nothing inconsistent with our former judgment and mandate in imposing a new area assessment, so long as it did not infringe the landowners' rights under the Constitution of the United States. But whether such new assessment should be made, and, if made, whether it should be done by a court or by an assessing board or other appropriate instrumentality, and whether further legislation was needed for the purpose, were and are matters of state law, it being well settled that where a special assessment to pay for a particular improvement has been held to be illegal, the Constitution of the United States does not prevent the making of a new and just assessment to pay for the completed work. Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; Bellingham Bay, etc., Co. v. New Whatcom, 172 U. S. 314, 19 Sup. Ct. 205, 43 L. Ed. 460; Lombard v. West Chicago Park Com., 181 U. S. 33, 42, 21 Sup. Ct. 507, 45 L. Ed. 731. Our former decision left the Supreme Court of Missouri, and the other agencies of the state, entirely unhampered in this regard.

No. 461, affirmed.

No. 473, affirmed.

(245 U. S. 292)

CREW LEVICK CO. v. COMMONWEALTH OF PENNSYLVANIA.

(Argued Oct. 17, 1917. Decided Dec. 10, 1917.)

No. 499.

1. COURTS ⟸366(6) — FEDERAL COURTS — STATE LAWS AS RULES OF DECISION.

In determining the validity of a tax imposed by a state law and challenged as a burden on foreign commerce, and an impost or duty on exports, the federal Supreme Court accepts the decision of the state court of last resort, respecting the proper construction of the statute, but must determine the questions raised under the federal Constitution on its own judgment of the actual operation and effect of the tax, irrespective of the form it bears, or how it is characterized by the state courts.

2. COMMERCE ⟸64, 77—LICENSES ⟸7(1) — REGULATION OF FOREIGN COMMERCE—IMPOSING TAX ON EXPORTS—"IMPOST."

The tax imposed by Act Pa. May 2, 1899 (P. L. 184), on wholesale and retail dealers in merchandise, the amount of which is based upon the volume of business transacted, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, on orders taken there or sent direct to the dealer, constitutes a direct burden on foreign commerce, and an "impost" on exports, in violation of Const. art. 1, §§ 8, 10.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Imposts.]

In Error to the Supreme Court of the State of Pennsylvania.

Proceedings by the Commonwealth of Pennsylvania against the Crew Levick Company. A judgment of the court of common pleas in favor of the Commonwealth was affirmed by the Supreme Court of Pennsylvania (256 Pa. 508, 100 Atl. 952), and defendant brings error. Reversed.

Mr. David Wallerstein, of Philadelphia, Pa., for plaintiff in error.

Mr. Joseph L. Kun, of Philadelphia, Pa., for the Commonwealth of Pennsylvania.

Mr. Justice PITNEY delivered the opinion of the Court.

The state of Pennsylvania, by an act of May 2, 1899 (P. L., p. 184)[1] imposes an an-

[1] "Section 1. Be it enacted, etc., That from and after the passage of this act, each retail vender of or retail dealer in goods, wares and merchandise shall pay an annual mercantile license tax of two

*293 nual mercantile license tax of $3 upon each wholesale vender of or dealer in goods, wares, and merchandise, and "one-half mill additional on each dollar of the whole volume, gross, of business transacted annually," and like taxes at another rate upon retail venders, and at still another upon venders at an exchange or board of trade. In the year 1913 plaintiff in error sold and delivered at wholesale, from a warehouse located in that state, merchandise to the value of about $47,000 to purchasers within the state, and merchandise to the value of about $430,000 to customers in foreign countries; the latter sales usually having been negotiated by agents abroad who took orders and transmitted them to plaintiff in error at its office in the state of Pennsylvania, subject to its approval, while in some cases orders were sent direct by the customers in foreign countries to plaintiff in error; and the goods thus ordered, upon the acceptance of the orders, having been shipped direct by plaintiff in error from its warehouse in Pennsylvania to its customers in the foreign countries. Under the act of 1899 a mercantile license tax was imposed upon plaintiff in error, based upon the amount of its gross annual receipts. Plaintiff in error protested *294 against the assessment of so much of the tax as was based upon the gross receipts from merchandise shipped to foreign countries. The court of common pleas of Philadelphia and, upon appeal, the Supreme Court of the state (256 Pa. 508, 100 Atl. 952) sustained the tax, overruling the contention that it amounted to a regulation of foreign commerce and also was an impost or duty on exports levied without the consent of Congress, contrary to sections 8 and 10 of article 1 of the Constitution of the United States.[2]

Whether there was error in the disposition of the federal question is the only subject with which we have to deal.

[1] As in other cases of this character, we accept the decision of the state court of last resort respecting the proper construction of the statute, but are in duty bound to determine the questions raised under the federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts. Galveston, Harrisburg, etc., Ry. Co. v. Texas, 210 U. S. 217, 227, 28 Sup. Ct. 638, 52 L. Ed. 1031; St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 362, 35 Sup. Ct. 99, 59 L. Ed. 265; Kansas City Ry. v. Kansas, 240 U. S. 227, 231, 36 Sup. Ct. 261, 60 L. Ed. 617.

[2] In this case, however, the characterization of the tax by the state court of last resort is a fair index of its actual operation and effect upon commerce. Soon after the passage of the act, in Knisely v. Cotterel, 196 Pa. 614, 630, 46 Atl. 861, 863 (50 L. R. A. 86) that court was called upon to construe it and to answer objections raised under the Constitution of the state and the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States, and in the course of an elaborate opinion declared: *295

"An examination of the details of the provisions of the present act makes it clear that the tax, as held by the learned judge below, is upon the business of vending merchandise, and that the classification is based on the manner of sale, and within each class the tax is graduated according to the gross annual volume of business transacted. This is apparent from the fact that the amount of the tax over the small fixed license fee is determined in every case by the volume of business, measured in dollars, and the rate at which it is to be levied is according to the manner of sale."

The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms. And there is no suggestion that the tax is limited to the necessities of inspection, or that the consent of Congress has been given.

We are constrained to hold that the answer must be in the affirmative. No question is made as to the validity of the small fixed tax of $3 imposed upon wholesale ven-

dollars, and all persons so engaged shall pay one mill additional on each dollar of the whole volume, gross, of business transacted annually. Each wholesale vender of or wholesale dealer in goods, wares and merchandise shall pay an annual mercantile license tax of three dollars, and all persons so engaged shall pay one-half mill additional on each dollar of the whole volume, gross, of business transacted annually. Each dealer in or vender of goods, wares or merchandise at any exchange or board of trade shall pay a mercantile license tax of twenty-five cents on each thousand dollars worth, gross, of goods so sold.

"Section 2. And it is provided that all persons who shall sell to dealers in or venders of goods, wares and merchandise, and to no other person or persons, shall be taken under the provisions of this act [to] be wholesalers; and all other venders of or dealers in goods, wares and merchandise shall be retailers, and shall pay an annual license tax as provided in this act for retailers."

[2] Literally, the objection was that a tax based upon the gross receipts for merchandise shipped to foreign countries would be "a tax levied by the United States of America upon commerce with foreign nations, in violation of article 1, section 8, of the Constitution of the United States, and would also be an impost or duty on exports levied by the state of Pennsylvania without the authority of an act of Congress in violation of aricle 1, section 10, of the Constitution of the United States." The description of the tax as "levied by the United States of America" evidently was a slip, and so understood by both courts, as appears from the opinion of the court of common pleas (unreported), of which only the conclusion is quoted in the opinion of the Supreme Court.

ders doing business within the state in both internal and foreign commerce; but the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and *296 therefore a regulation of *it, and, for the same reason, to be in effect an impost or duty upon exports. This view is so clearly supported by numerous previous decisions of this court that it is necessary to do little more than refer to a few of the most pertinent. Case of the State Freight Tax, 15 Wall. 232, 276, 277, 21 L. Ed. 146; Robbins v. Shelby County Taxing District, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; Fargo v. Michigan, 121 U. S. 230, 244, 7 Sup. Ct. 857, 30 L. Ed. 888; Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U. S. 326, 336, 7 Sup. Ct. 1118, 30 L. Ed. 1200; Leloup v. Port of Mobile, 127 U. S. 640, 648, 8 Sup. Ct. 1383, 32 L. Ed. 311; McCall v. California, 136 U. S. 104, 109, 10 Sup. Ct. 881, 34 L. Ed. 391; Galveston, Harrisburg, etc., Ry. Co. v. Texas, 210 U. S. 217, 227, 28 Sup. Ct. 638, 52 L. Ed. 1031.

Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned.

The principal reliance of the Commonwealth is upon Ficklen v. Shelby County Taxing District, 145 U. S. 1, 12 Sup. Ct. 810, 36 L. Ed. 601. Undoubtedly that case is near the border line; but we think its authority would have to be stretched in order to sustain such a tax as is here in question. Consistently with due regard for the constitutional provisions, we are unable thus to extend it. In that case the complaining parties were established in business within the taxing district as general merchandise brokers, and had taken out general and unrestricted licenses to do business of all kinds, both internal and interstate. As it happened, one of them (Ficklen), during the year in question, did an interstate business exclusively, and the other (Cooper & Co.) did a business nine-tenths of which was interstate. And the court, by Mr. Chief Justice Fuller, said (145 U. S. 21, 12 Sup. Ct. 812, 36 L. Ed. 601):

"Where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and nonresident merchants, of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution."

And again (145 U. S. 24, 12 Sup. Ct. 813, 36 *297 L. Ed. 601):

"What position *they [the plaintiffs in error] would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for nonresident principals, is an entirely different question, which does not arise upon this record."

Besides, the tax imposed in the Ficklen Case was not directly upon the business itself or upon the volume thereof, but upon the amount of commissions earned by the brokers, which, although probably corresponding with the volume of the transactions, was not necessarily proportionate thereto. For these and other reasons the case has been deemed exceptional.

In Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 695, 15 Sup. Ct. 268, 269 (39 L. Ed. 311), the court, again speaking by Mr. Chief Justice Fuller, said:

"It is settled that where, by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained."

The tax now under consideration, so far as it is challenged, fully responds to these tests. It bears no semblance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax, except as it is imposed upon the very carrying on of the business of exporting merchandise. It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the state, a part of every dollar received in such transactions. That it applies to internal as well as to foreign commerce cannot save it; for, as was said in Case of the State Freight Tax, 15 Wall. 232, 277 (21 L. Ed. 146):

"The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state."

That portion of the tax which is measured by the receipts from foreign commerce nec- *298 essarily varies in proportion to the *volume of that commerce, and hence is a direct burden upon it.

So obvious is the distinction between this tax and those that were sustained in Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994, U. S. Express Co. v. Minnesota, 223 U. S. 335, 347, 32 Sup. Ct. 211, 56 L. Ed. 459, Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 87, 34 Sup. Ct. 15, 58 L. Ed. 127, Kansas City Ry. v. Kansas, 240 U. S. 227, 232, 235, 36 Sup. Ct. 261, 60 L. Ed. 617, and some other cases of the same class, that no time need be spent upon it.

The judgment under review must be Reversed.

(245 U. S. 352)

McGOWAN et al. v. COLUMBIA RIVER PACKERS' ASS'N et al.

(Argued Nov. 22, 23, 1917. Decided Dec. 17, 1917.)

(No. 78.)

1. States ⇐12(3) — Jurisdiction — Waters Forming Boundaries.

Assuming that under Act Feb. 14, 1859, c. 33, § 2, 11 Stat. 383, admitting Oregon into the Union, concurrent jurisdiction over a particular part of the Columbia River is given to the State of Washington, such jurisdiction did not extend to the bed of the stream or to the removal of a nuisance consisting of set nets anchored to the bottom of the stream between the line of extreme low tide and the channel of the river.

2. Injunction ⇐129(1)—Dismissal Before Hearing—Right to Dismiss.

Where, pending a suit in the Western District of Washington to compel the removal of certain obstructions placed by defendants on the bottom of the channel of the Columbia River in front of fishing sites on Sand Island leased by complainant from the government, the Supreme Court decided that Sand Island was in the State of Oregon, whereupon complainant sought to dismiss the suit, the court erred in retaining the case against plaintiff's will.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by the Columbia River Packers' Association and another against H. S. McGowan and others. From a decree of the Circuit Court of Appeals for the Ninth Circuit (219 Fed. 365, 134 C. C. A. 461), reversing a judgment for defendants, and dismissing the bill, defendants appeal. Affirmed.

Messrs. Bert W. Henry and Franklin T. Griffith, both of Portland, Or., for appellants.

Mr. G. C. Fulton, of Astoria, Or., for appellees.

*356 *Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit brought by the appellee, the Columbia River Packers' Association, as lessee from the United States of fishing sites and riparian rights on Sand Island in the Columbia River, to compel the appellants to remove certain obstructions placed by them upon the bottom of the channel of the river in front of the plaintiff's premises, and to refrain from longer maintaining them there. Upon a bond being given a restraining order was issued on July 7, 1908; answers and a cross-bill were filed in the following August, and a demurrer to the cross-bill was overruled on October 21 of the same year. The suit had been brought in the Western District of Washington upon the belief that Sand Island was in Washington and subject to the jurisdiction that that State exercised in fact. But on November 16, 1908, it was decided by this Court that the boundary between Oregon and Washington was the ship channel north *357 of Sand Island, and that Sand Island belonged to the former State. Washington v. Oregon, 211 U. S. 127, 29 Sup. Ct. 47, 53 L. Ed. 118; Id., 214 U. S. 205, 29 Sup. Ct. 631, 53 L. Ed. 969. Thereupon, in June, 1909, the plaintiff filed a petition that the suit be dismissed without prejudice for want of jurisdiction, since it turned out that the land concerned was not within the district for which the Court sat.

The District Court dismissed the petition and retained jurisdiction of the cause on the ground that by the Act of Congress of March 2, 1853, c. 90, § 21, 10 Stat. 172, 179, organizing the Territory of Washington, and by the Act of February 14, 1859, c. 33, § 2, 11 Stat. 383, admitting Oregon into the Union, concurrent jurisdiction on this part of the river was reserved to Washington, when it subsequently became a State. The plaintiff then filed a supplemental bill in which again it prayed that the suit might be dismissed without prejudice if the court had no jurisdiction; the case proceeded to the taking of evidence and final hearing, the temporary injunction was dissolved, an injunction was issued against the plaintiff's interfering with the defendants' appliances, and a final decree for damages caused by the temporary injunction was entered in favor of the defendants. The plaintiff appealed to the Circuit Court of Appeals, and that court, being of opinion that the bill should have been dismissed on the plaintiff's petition, reversed the decree and ordered the bill to be dismissed. 219 Fed. 365, 134 C. C. A. 461.

[1] The nuisance complained of consisted of set nets, each anchored by a stone weighing about three hundred pounds to which was attached a short cable which was clamped to a wire rope about twenty-five feet long, to which in its turn was attached a buoy of large timbers. The nets were placed between the line of extreme low tide and the channel of the river; they were alleged to interfere with the exercise of the plaintiffs' rights, and an abatement of the obstruction was prayed for in the bill. We agree with the Circuit Court of Appeals that, assuming for the *356 purposes of decision that the State of Washington had concurrent jurisdiction "on the Columbia," in the words of the statute (Act 1859, c. 33, § 2), Nielsen v. Oregon, 212 U. S. 315, 319, 29 Sup. Ct. 383, 53 L. Ed. 528, the jurisdiction did not extend to the removal of such a nuisance as this. It did not reach the bed of the stream, and the officers of the State would have had no authority to intermeddle with the defendants' nets anchored to the bottom. See Wedding v. Meyler, 192 U. S. 573, 585, 24 Sup. Ct. 322, 48 L. Ed. 570, 66 L. R. A. 833. This was an important part of the relief that the plaintiff sought and when it found that it could not have it, it naturally endeavored to dismiss the bill.

[2] It ordinarily is the undisputed right of a plaintiff to dismiss a bill before the final hearing. Carrington v. Holly, 1 Dickens, 280. Cummins v. Bennett, 8 Paige, 79. Kempton v. Burgess, 136 Mass. 192. The dis-

cussions have been directed more to the question of costs. When a bill was filed under a mistake common to both parties and in other like cases the plaintiff was allowed to dismiss his bill without costs. Lister v. Leather, 1 DeG. & J. 361, 368 (1859). Broughton v. Lashmar, 5 My. & Cr. 136, 144 (1840). Here the decision of this Court put the plaintiff in an unexpected position. The question before the District Court was not whether the bill ought to be retained for a decree in personam if the plaintiff so desired, or even one of costs, but whether it should be retained against the plaintiff's will for a trial that could not, or at least very possibly might be held unable to, give it what it asked. Upon this point also we are of opinion that the Circuit Court of Appeals was right. Its decree of course meant that the bill was dismissed without prejudice, as prayed, but it is better that it should express the fact and with that modification it is affirmed.

Decree affirmed.

(245 U. S. 359)

SOUTHERN PAC. CO. v. STEWART.

(Submitted Nov. 5, 1917. Decided Dec. 17, 1917.)

(No. 348.)

1. COURTS ⟸382(2)—CIRCUIT COURT OF APPEALS—FINALITY OF DETERMINATION.

Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094, as amended by Act Jan. 20, 1914, c. 11, 38 Stat. 278 (Comp. St. 1916, § 1010), specifies the suits which may be removed from a state court to the United States District Court. Section 29 (Comp. St. 1916, § 1011) requires the application for removal to be made by a petition filed in the state court. Section 128 (section 1120) makes judgments of the Circuit Court of Appeals final in cases in which the jurisdiction depends entirely upon diverse citizenship, and section 241 (section 1218) authorizes a review by the Supreme Court in cases not made final. *Held* that, though an action to recover damages to an interstate shipment of live stock might have been removed from the state court on the ground that it arose under the laws of the United States, where the petition for removal specified diversity of citizenship as the sole ground for removal, the judgment of the Circuit Court of Appeals was final.

2. EVIDENCE ⟸69 — PRESUMPTIONS — REGULARITY OF COURSE OF BUSINESS.

Under the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [Comp. St. 1916, §§ 8604a, 8604aa]), to Interstate Commerce Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, requiring carriers receiving property for interstate transportation to issue a receipt or bill of lading, and making the carrier liable to the lawful holder thereof for any loss, damage, or injury to the property, the presumption is that such bill of lading or receipt was issued, though there is no specific allegation to this effect.

3. REMOVAL OF CAUSES ⟸81—TIME FOR FILING PETITION.

It is essential to the removal of a cause that the petition provided for by the statute be filed with the state court within the time fixed by statute, unless the time be in some manner waived.

The Chief Justice dissenting.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Action by Frank R. Stewart against the Southern Pacific Company. A judgment for plaintiff was affirmed by the Circuit Court of Appeals for the Ninth Circuit (233 Fed. 956, 147 C. C. A. 630), and defendant brings error. On motion to dismiss. Writ of error dismissed.

Messrs. Henley C. Booth and William F. Herrin, both of San Francisco, Cal., for plaintiff in error.

Mr. Thomas Armstrong, Jr., of Phœnix, Ariz., for defendant in error.

*360 *Mr. Justice DAY delivered the opinion of the Court.

Frank R. Stewart began this action against the Southern Pacific Company, a common carrier, in the superior court of Arizona for the county of Maricopa. In his complaint he set out that he delivered certain cattle to the Southern Pacific Company to be carried from San Luis Obispo, California, to Phœnix, Arizona, in consideration of the freight to be paid to the company as measured by the rate applicable to the shipment and carriage of live stock in carload lots from the point of shipment to the point of destination as the same was published and on file with the Interstate Commerce Commission. The complaint alleged that in consideration of the freight charges the company undertook to deliver the cattle in good condition at Phœnix, Arizona, and set forth that the cattle were handled and transported in such a negligent and careless manner that five of them died in Yuma, Arizona, a station on the line of the company; that the remainder were delivered to the plaintiff at Phœnix, Arizona, in such injured condition that six more of them died, and eighty-seven of them were seriously injured, and depreciated in value as a result of negligent handling and transportation of the cattle as set forth in the complaint.

The company upon petition and bond duly filed removed the case to the United States District Court for the District of Arizona, the same was tried in the District Court, and resulted in a verdict and judgment against the company, which was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit; a writ of error brings the case here.

The case is before us on motion to dismiss on the ground that the judgment of the Circuit Court of Appeals is final. The judgment of the Circuit Court of Appeals is final, among other cases, in those in which the jurisdiction, *361 meaning that of the District Court, is dependent entirely upon the opposite parties to the suit or controversy being citizens of different states. Judicial Code, § 128, 36 Stat. 1157.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The removal to the District Court of the United States was made upon a petition which set forth as a ground for removal the diversity of citizenship of the parties; no other ground for removal was in any manner alleged in the petition.

[1] A suit is removable from a state court to the United States District Court when it arises under the Constitution or laws of the United States, or treaties made under their authority, of which the District Courts of the United States are given original jurisdiction; any other suit of a civil nature at law or in equity, of which the District Courts of the United States are given jurisdiction may be removed into the District Court of the United States by the defendant, or defendants, being nonresidents of the state. Judicial Code, § 28.

By the amendment of January 20, 1914, 38 Stat. 278, it is provided that no suit brought in any state court of competent jurisdiction against a railroad company, or other common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier, under section 20 (which includes the Carmack Amendment) of the act to regulate interstate commerce as amended, shall be removed to any court of the United States where the amount in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000. In this case the plaintiff sought to recover more than $3,000, and in view of the allegations of the complaint it may be conceded that the action being for loss or injury to cattle shipped in interstate commerce for transportation by a common carrier this suit is one which arose under a law of the United States, and might have been removed to a federal court on that *ground. See Northern Pacific R. Co. v. Wall, 241 U. S. 87, 36 Sup. Ct. 493, 60 L. Ed. 905; Georgia, F. & A. R. Co. v. Blish Mill Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948; Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265; St. Louis Iron Mt. & Southern R. R. Co. v. Starbird, Adm'r, 243 U. S. 592, 595, 596, 597, 37 Sup. Ct. 462, 61 L. Ed. 917.

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[2] The Carmack Amendment requires the carrier receiving property for transportation between points in different states to issue a receipt or bill of lading therefor and makes the carrier liable to the lawful holder thereof for any loss, damage or injury to such property. While there is no specific allegation in the complaint that such bill of lading or receipt was issued, as the law makes it the duty of the carrier to issue the same the presumption is that such duty was complied with. Cincinnati, N. O. & T. P. R. Co. v. Rankin, supra, 241 U. S. 319, 327, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265; N. Y. Central, etc., R. R. v. Beaham, 242 U. S. 148, 151, 37 Sup. Ct. 43, 61 L. Ed. 210.

While it thus appears that the suit might have been removed to the federal court because of the federal nature of the cause of action upon which it was brought, it was nevertheless within the jurisdiction of the state court, and that court might have proceeded to final judgment had not the defendant seen fit to remove the suit to the federal court.

Congress has not only provided for classes of cases wherein removal may be effected from the state to the federal courts, but has provided process by which such removals may be effected. Section 29 of the Judicial Code provides that the party desiring to remove the suit from the state court to the United States District Court may apply for removal by petition duly verified in the suit in the state court, at the time, or at any time before the defendant is required by the laws of the state or the rules of the court to answer or plead to the declaration of the plaintiff. Provision is also made for the filing of a *bond requiring that the defendant shall enter in the District Court of the United States within thirty days of filing such petition a certified copy of the record in the suit, and for paying costs in the event that the United States District Court holds that such suit was improperly removed; it is then made the duty of the state court to accept the petition and bond and proceed no further in the suit.

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[3] It is essential to the removal of a cause that the petition, provided for by the statute, be filed with the state court within the time fixed by statute, unless the time be in some manner waived. Martin's Adm'r v. B. & O. Railroad Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311. True, there are cases in which it has been held that a removal may be accomplished after the time to answer or appear has expired, when the complainant changes the cause of action by amendment so as to make a case removable, which was not so before, as in Powers v. Chesapeake & Ohio R. R. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. Amendments have been permitted so as to make the allegations of the removal petition more accurate and certain when the amendment is intended to set forth in proper form the ground of removal already imperfectly stated. See Kinney v. Columbia Savings, etc., Ass'n, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103, and the review of previous cases in this court contained in the opinion in that case.

The petition for removal in this instance made no reference to any ground of removal because of a cause of action arising upon a federal statute. The petition which required the state court to give up its own jurisdiction, and transfer the cause to the federal court, was based solely upon the allegation of diversity of citizenship.

We are thus presented with the question whether a case removed solely upon the ground of diversity of citizenship, although the complaint contained a cause of action

*364 arising under a federal statute, after judgment in the Circuit Court of Appeals, may be brought by a writ of *error to this court. Cases not made final in the United States Circuit Court of Appeals may be brought to this court when the matter in controversy exceeds $1,000 besides costs. Judicial Code, § 241. As the amount in controversy herein exceeds $1,000 the jurisdiction of this court depends upon whether the jurisdiction of the District Court, to which the cause was removed, depended entirely upon the opposite parties being citizens of different states. The jurisdiction referred to, it has come to be settled, means the jurisdiction of the United States District Court as originally invoked. Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 22 Sup. Ct. 452, 46 L. Ed. 546, and previous cases in this court cited in the opinion of Mr. Chief Justice Fuller, who spoke for the court in that case.

In McFadden v. United States, 213 U. S. 288, 29 Sup. Ct. 490, 53 L. Ed. 801, the subject was examined under sections 5 and 6 of the Court of Appeals Act now incorporated into the Judicial Code in sections 128 and 241. Mr. Justice Moody, who spoke for the court in that case, pointed out that finality of cases in the Circuit Court of Appeals as governed by section 6, was determined, not by the nature of the case nor by the questions of law raised, but by the sources of jurisdiction of the trial court; whether its jurisdiction rested upon the character of the parties or the nature of the case, and he quoted with approval the language of Mr. Chief Justice Fuller in Huguley Mfg. Co. v. Galeton Cotton Mills, supra, wherein it was said the jurisdiction referred to is the jurisdiction of the Circuit Court "as originally invoked." This principle was applied in Spencer v. Duplan Silk Company, 191 U. S. 526, 24 Sup. Ct. 174, 48 L. Ed. 287, in which a suit was brought by a trustee in bankruptcy in a state court against the Silk Company to recover in trover for certain lumber the property of the bankrupt wrongfully converted, it was alleged, to the use of the defendant. The case was removed from the state court upon a petition alleging that the controversy in the suit was wholly between citizens of different states. A trial *was had resulting in a verdict* 365 in favor of the plaintiff, this judgment was reversed by the Circuit Court of Appeals for the Third Circuit, and a writ of error was allowed to this court. The writ of error was dismissed as being within the rule which made the judgments of the Circuit Courts of Appeal final when the jurisdiction of the trial court depended entirely upon diversity of citizenship. Mr. Chief Justice Fuller, speaking for the court, in the course of the opinion reached the conclusion that the case was not to be treated as one commenced in the federal court by consent of the defendant under section 23 of the Bankruptcy Act (Comp. St. 1916, § 9607). In concluding the discussion of the subject, the Chief Justice said:

"Plaintiff brought his action in the state court, and its removal on the ground of diverse citizenship placed it in the Circuit Court as if it had been commenced there on that ground of jurisdiction, and not as if it had been commenced there by consent of defendant under section 23 of the Bankruptcy Act. The right to removal is absolute, and cannot be trammeled by such a consequence."

It may be conceded, for the sake of the argument, that the grounds of removal might have been amended by including in the petition the federal ground of action set up in the complaint, but no attempt at amendment was made, and the removal to the District Court of the United States was upon a petition resting solely on the ground of diverse citizenship. We are of opinion that it follows that the jurisdiction of the federal court was invoked solely on that ground and that fact determines the right to a review in this court of the judgment of the United States Circuit Court of Appeals against the contention of the plaintiff in error. It follows that the writ of error must be dismissed.

Dismissed.

The CHIEF JUSTICE dissents.

MEMORANDUM DECISIONS

Disposed of at October Term, 1917

No. 83. MENASHA WOODEN WARE COMPANY, plaintiff in error, v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY. Dec. 10, 1917. In error to the Circuit Court of Winnebago County, State of Wisconsin. For opinion below, see 159 Wis. 130, 150 N. W. 411, L. R. A. 1915F, 732. Messrs. A. E. Thompson and J. C. Thompson, both of Oshkosh, Wis., for plaintiff in error. Messrs. William A. Hayes, of Milwaukee, Wis., and Alfred H. Bright, of Minneapolis, Minn., for defendant in error.

PER CURIAM. Judgment affirmed with costs upon the authority of Armour Packing Company v. United States, 209 U. S. 56, 80, et seq., 28 Sup. Ct. 428, 52 L. Ed. 681; L. & N. R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; Portland Railway, etc., Co. v. Railroad Commission of Oregon, 229 U. S. 397, 412, 413, 33 Sup. Ct. 820, 57 L. Ed. 1248; New York Central & Hudson River R. Co. v. Gray, 239 U. S. 583, 36 Sup. Ct. 176, 60 L. Ed. 451.

No. 88. George W. EGAN, plaintiff in error, v. Charles S. McDONALD. Dec. 10, 1917. See, also, 36 S. D. 92, 153 N. W. 915. Mr. George W. Egan, of Sioux Falls, S. D., in pro. per. Messrs. Charles O. Bailey and John H. Voorhees, both of Sioux Falls, S. D., for defendant in error. The provisions of rule 10 having been now complied with by the plaintiff in error, the motion to dismiss for failure to print the record is denied. The motion to continue to the next term is also denied, and the case assigned for hearing on Monday, January 28th next.

No. 163. John E. ROLLER, plaintiff in error, v. Charles CATLETT, trustee. Dec. 10, 1917. In error to the Supreme Court of Appeals of the State of Virginia. For opinion below, see 118 Va. 185, 86 S. E. 909. Mr. John E. Roller, of Harrisonburg, Va., for plaintiff in error. Mr. Rudolph Bumgardner, of Staunton, Va., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Deming v. Carlisle Packing Co., 226 U. S. 102, 105, 33 Sup. Ct. 80, 57 L. Ed. 140; Consolidated Turnpike v. Norfolk, etc., Railway Co., 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; Stewart v. Kansas City, Kansas, 239 U. S. 14, 36 Sup. Ct. 15, 60 L. Ed. 120.

No. 507. Elina SKARDERUD, plaintiff in error, v. The TAX COMMISSION OF STATE OF NORTH DAKOTA. Dec. 10, 1917. In error to the Supreme Court of the State of North Dakota. For opinion below, see Moody v. Hagen, 36 N. D. 471, 162 N. W. 704. Mr. Edward Engerud, of Fargo, N. D., for plaintiff in error.

PER CURIAM. Judgment affirmed with costs upon the authority of Duus v. Brown, 245 U. S. 176, 38 Sup. Ct. 111, 62 L. Ed. —, this day decided.

No. 753. John A. JESSON et al., petitioners, v. F. G. NOYES, as Receiver of the Washington-Alaska Bank. Dec. 10, 1917. For opinion below, see 245 Fed. 46. Messrs. W. H. Metson, Curtis Hillyer, and Metson, Drew & Mackenzie, all of San Francisco, Cal., for petitioners. Mr. Orion L. Rider, of Vinita, Okl., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 762. James B. SIMPSON, indicted as James B. Miller, petitioner, v. The UNITED STATES of America. Dec. 10, 1917. For opinion below, see 245 Fed. 278. Mr. George H. Eichelberger, of Cleveland, Ohio (Messrs. Mathews, Orgill & Maschke, of Cleveland, Ohio, of counsel), for petitioner. Mr. John W. Davis, Sol. Gen., of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

Nos. 121 and 122. George M. GLENN, plaintiff in error, v. SOUTHERN EXPRESS COMPANY. Dec. 17, 1917. In error to the Supreme Court of the State of North Carolina. For opinion below, see 170 N. C. 286, 87 S. E. 136. Messrs. Lawrence Maxwell and Joseph S. Graydon, both of Cincinnati, Ohio, for plaintiff in error. Mr. Alexander B. Andres, Jr., for defendant in error. Dismissed with costs per stipulation.

No. 601. MIDLAND VALLEY RAILROAD COMPANY, plaintiff in error, v. Mrs. Maude GRIFFITH, administratrix, etc. Dec. 17, 1917. In error to the Supreme Court of the State of Kansas. For opinion below, see 166 Pac. 467. Mr. L. T. Michener, of Washington, D. C., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction with 5 per cent. damages upon the authority of section 237, Judicial Code, as amended by the act of Congress of September 6, 1916, ch. 448, 39 Stat. 726 (Comp. St. 1916, § 1214); Prairie Oil & Gas Co. v. Carter, 244 U. S. 646, 37 Sup. Ct. 402, 652, 61 L. Ed. 1378, 1369. Petition for a writ of certiorari denied October 15, 1917, 245 U. S. 653, 38 Sup. Ct. 12, 62 L. Ed. —.

No. 661. John B. TURNER, petitioner, v. BOARD OF TRADE OF THE CITY OF CHICAGO. Dec. 17, 1917. For opinion below, see 244 Fed. 108. Mr. Joseph E. Johnson, of Atlanta, Ga., for petitioner. Mr. Henry S. Robbins, of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 697. Sidney J. BROOKS, receiver, etc., appellant, v. EMPIRE TRUST COMPANY et al. Dec. 17, 1917. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. For opinion below, see 232 Fed. 641, 146 C. C. A. 567. Messrs. Chester H. Terrell,

of San Antonio, Tex., and Joseph W. Bailey, of Dallas, Tex. (Messrs. F. C. Davis and Terrell & Terrell, all of San Antonio, Tex., of counsel), for appellant. Messrs. Thomas H. Franklin, of San Antonio, Tex., and Stephen H. Olin, of New York City, for appellees.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of: 1. Rouse v. Letcher, 156 U. S. 47, 15 Sup. Ct. 266, 39 L. Ed. 341; Gregory v. Van Ee, 160 U. S. 643, 16 Sup. Ct. 431, 40 L. Ed. 566; St. Louis, K. C. & C. R. Co. v. Wabash R. Co., 217 U. S. 247, 250, 30 Sup. Ct. 510, 54 L. Ed. 752; Shulthis v. McDougal, 225 U. S. 561, 32 Sup. Ct. 704, 56 L. Ed. 1205; 2. Gumbel v. Pitkin, 113 U. S. 545, 5 Sup. Ct. 616, 28 L. Ed. 1128; Rouse v. Letcher, 156 U. S. 47, 60, 15 Sup. Ct. 266, 39 L. Ed. 341; Carey v. Houston & Texas Central R. Co., 161 U. S. 115, 16 Sup. Ct. 537, 40 L. Ed. 638.

No. 754. H. H. RIDDELL, petitioner, v. The UNITED STATES of America. Dec. 17, 1917. For opinion below, see 244 Fed. 695. Messrs. E. B. Dufur and W. Y. Masters, both of Portland, Or., for petitioner. Mr. John W. Davis, Sol. Gen., of Washington, D. C., and Mr. William C. Fitts, Asst. Atty. Gen., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 757. A. W. LOHMAN, petitioner, v. STOCK YARDS LOAN COMPANY. Dec. 17, 1917. For opinion below, see 243 Fed. 517. Mr. H. P. White, of Pawhuska, Okl., for petitioner. Messrs. B. F. Deatherage, of Kansas City, Mo., and Robert F. Blair, of Wagoner, Okl., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 777. CENTRAL CALIFORNIA CANNERIES COMPANY et al., petitioners, v. DUNKLEY COMPANY. Dec. 17, 1917. For opinion below, see 247 Fed. 790. Mr. William K. White, of San Francisco, Cal., for petitioners. Mr. Fred. L. Chappell, of Kalamazoo, Mich., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(245 U. S. 427)

STATE OF WISCONSIN v. LANE, Secretary of Interior.

(Argued Dec. 11, 1917. Decided Jan. 7, 1918.)

No. 7, Original.

1. PUBLIC LANDS ⇐51—SCHOOL LANDS—EFFECT OF GRANT TO STATE.

Wisconsin Enabling Act Aug. 6, 1846, c. 89, § 7, 9 Stat. 58, providing that section numbered 16 in every township of public lands in the state, and, when such section has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to the state for the use of schools, did not make an unconditional present grant to the state of such sections, and the state's right to the lands was subordinate to the right of Congress to make other disposition thereof; the state in such case being entitled to indemnity in other lands.

2. PUBLIC LANDS ⇐52 — SCHOOL LANDS — LANDS INCLUDED IN GRANT — "OTHERWISE DISPOSED OF."

The Menominee Indians, who by Treaty Oct. 18, 1848 (9 Stat. 952), had given up their lands in Wisconsin for lands farther west, became dissatisfied, and were permitted to remain on their former lands until 1852, when they were removed to a tract of land between the Wolf and Oconto rivers with the assent of the state of Wisconsin, and pursuant to Act Cong. Aug. 30, 1852, c. 103, 10 Stat. 41, appropriating money for such removal. By Treaty May 12, 1854 (10 Stat. 1064), they ceded to the United States the lands assigned to them under the prior treaty in consideration of a cession by the United States to them of twelve townships embracing six of those to which they were moved to in 1852, and six other townships to the west thereof. At that time the final approval of the surveys of such lands identifying the sections numbered 16 had not been made. *Held*, that thereby Congress "otherwise disposed of" such lands within the meaning of Wisconsin Enabling Act, § 7, and the state of Wisconsin did not acquire title to the sixteenth sections in such townships.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Otherwise.]

Original suit in equity by the State of Wisconsin against Franklin K. Lane, Secretary of the Interior. Decree for defendant.

Messrs. J. C. Thompson and R. A. Hollister, both of Oshkosh, Wis., for State of Wisconsin.

Mr. C. Edward Wright, Asst. Atty. Gen., for defendant.

*428 *Mr. Justice DAY delivered the opinion of the court.

This is an original suit brought by the state of Wisconsin claiming title under the school land grant to the state to sections 16 in certain townships in the Menominee Indian Reservation, which lands are alleged to belong to the state or its grantees.[1] The bill seeks to enjoin the defendant, the Secretary of the Interior, and through him
*429 the Indian occupants of the land, from cutting timber *or committing waste thereon. The townships in controversy are Nos. 29 and 30 in ranges 13, 14, and 15; township 29 in range 16; township 28 in ranges 15 and 16. These townships are all included in the treaty reservation of 1854, and those in ranges 15 and 16 also in the reservation of 1852, which treaty and reservations are hereinafter considered.

The question to be decided is whether the school land grant shall prevail over the rights of the Indian occupants.

The Enabling Act of Wisconsin was approved August 6, 1846 (9 Stat. 56). The state was admitted to the Union on May 29, 1848. The Enabling Act (section 7) provides:

"That section numbered 16, in every township of the public lands in said state, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools."

As to the rights of the Indians, it appears that they had occupied a large territory in the state of Wisconsin, and by various treaties, not necessary now to be dwelt upon, had made cessions to the United States. In 1848 the Indians made a treaty ceding the remainder of their lands in Wisconsin to the United States, for which they received lands farther west and the sum of $350,000. This treaty was ratified January 23, 1849. By its terms the Indians were permitted to remain on the ceded lands for two years from October 18, 1848, and until notified by the President that the same were wanted. The Indians did not remove to the West, and in August, 1850, petitioned the President for leave to remain on some of the ceded lands. In their petition the Indians set forth the unsatisfactory character of the lands granted to them in the West, and their desire to remain in Wisconsin. On September 5, 1850, the President gave the Indians permission to remain upon the ceded lands until June 1, 1851; this time was *subsequently extended *430 by the President to October 1, 1852. On September 30, 1851, the local Superintendent of Indian Affairs reported to the Commissioner of Indian Affairs that in pursuance of instructions he had explored the country on the Wolf and Oconto rivers in Wisconsin for a location for the Menominee Indians, and for that purpose recommended a rectangular tract of land; this tract of land was to commence at the southeast corner of township 28 on the range line between 19 and 20 and run west 30 miles, north 18 miles, and thence back east and south to the place of beginning. The tract embraced 18 townships, 6 of which on the west are included within the limits of the lands described in the treaty of 1854, hereinafter referred to.

On August 30, 1852, Congress appropriated money for the removal of the Indians to the lands designated by the Superintendent. 10 Stat. 41, 47. On November 30, 1852, the Commissioner of Indian Affairs reported to the Secretary of the Interior that the removal of the Menominee Indians, as contemplated

[1] NOTE.—The jurisdiction in this case is founded upon the statute set forth in Minnesota v. Hitchcock, 185 U. S. 373, 387, 22 Sup. Ct. 650, 46 L. Ed. 954.

by the act of Congress passed the preceding session, had been satisfactorily effected, and that the whole tribe had been concentrated on the designated territory between the Wolf and Oconto rivers, a location with which they were well pleased, and on which they were anxious to be permitted to remain permanently.

On February 1, 1853, the state of Wisconsin by joint resolution of its Legislature gave its assent to this removal, in the following terms:

"That the assent of the state of Wisconsin is hereby given to the Menominee Nation of Indians to remain on the tract of land set apart for them by the President of the United States, on the Wolf and Oconto rivers, and upon which they now reside, the same being within the state of Wisconsin aforesaid, and described as follows, to wit:

*431 "Commencing at the southeast corner of town-[ship] 28 north, range 19, running thence west thirty miles, thence north eighteen miles, thence east thirty miles, thence south 18 miles, to the place of beginning."

Laws Wis. 1853 (Joint Resolutions) p. 110, c. 1.

On November 26, 1853, the Commissioner of Indian Affairs made a report in which he said that by the treaty of 1848 the removal of the Menominee Indians to a place west of the Mississippi River was contemplated, but that it was thought preferable to concentrate them on the Upper Wolf and Oconto rivers in the state of Wisconsin, and suggested, among other things, that the Indians could properly remain where they were for many years, without interference with the white population, suggesting, however, that if such arrangement were to be of a permanent character, a new convention should be made with them, which would be necessary for their relinquishment of the country given to them by the treaty of 1848. This recommendation probably gave rise to the treaty of 1854, by which the Indians, for the recited purpose of acquiring the new lands for a permanent home, agreed to relinquish to the United States all lands assigned to them by the treaty of October 18, 1848; in consideration of which cession the United States agreed to give to the Indians for a home, to be held as Indian lands are held, "that tract of country lying upon the Wolf river, in the state of Wisconsin, commencing at the southeast corner of township 28 north of range 16 east of the fourth principal meridian, running west 24 miles, thence north eighteen miles, thence east twenty-four miles, thence south eighteen miles, to the place of beginning, the same being townships 28, 29 and 30, of ranges 13, 14, 15 and 16, according to the public surveys." This tract embraced six of the townships included in the Indian reservation of 1852, and six townships to the west thereof. The sixteenth sections in five of the former and four of the latter are here in controversy.

*432 *It appears that as to three of these townships the surveys were not approved until February 20, 1854, and as to the other townships the surveys of two were approved October 11, 1854, and of the others on dates ranging from February 6, 1855, to October 9, 1891.

[1] It is evident from a consideration of the terms of the Enabling Act (section 7), that Congress did not make an unconditional grant in præsenti to the state of the school sections; the terms of the grant are that the sections "shall be" granted. Moreover, the grant contemplated that Congress might make other disposition of the lands. The state of Wisconsin's right to the lands in controversy was to be subordinate to such disposition; in which event the state should seek indemnity in other lands for the loss of school sections.

[2] The Menominee Indians by the treaty of 1848 gave up their holdings in Wisconsin, but were not removed to the lands provided for them in the West. They had the privilege of remaining in Wisconsin for two years, and until notified by the President that the lands were wanted; this permission was extended, ultimately until October, 1852; in the meantime the Indians were located by the action of the Superintendent of Indian Affairs, and by the act of Congress, with the approval of the President, upon the reservation created in 1852. True, the act of Congress appropriating money for the removal referred to the temporary character of the location, but they were thus located subject to the control of Congress, and, as we have seen, with the consent of the state, if that were needed.

We think this recited action was a disposition, prior to survey, of the school sections, which was clearly within the authority of Congress to make and sanctioned by the terms of section 7 of the Enabling Act. This action being before survey took these lands out of the scope of the grant for school purposes, *433 and made them subject to ultimate disposition by Congress for the benefit of the Indians. This was accomplished by the treaty of 1854, which adds to the reserved lands six townships on the west and includes the six westerly townships of the reservation of 1852. That treaty is comprehensive in its terms, it recites the unwillingness of the Indians to remove to the lands provided for them to the west of the Mississippi River, and sets forth the purpose to exchange those lands for the lands desired by the tribe for a permanent home. To that end the Menominee Indians agreed to cede, and did cede, to the United States all lands assigned to them under the treaty of October 18, 1848, and in consideration of this cession the United States gave to the Indians, for a home to be held as Indian lands are held, the lands described in the treaty, in the 12 townships to which we have referred. The occupancy and rights of the Indians so established have never been terminated, but still continue.

In view of these statements of fact, and the purposes of the government and the Indians in the transactions referred to, we regard

the case as controlled by the decision of this court in United States v. Morrison, 240 U. S. 192, 36 Sup. Ct. 326, 60 L. Ed. 599, which deals with a similar grant of lands for school purposes to the state of Oregon. In that case the previous decisions of this court were reviewed, and in concluding the discussion of the effect of such school land grants this court said:

"The designation of these sections was a convenient method of devoting a fixed proportion of public lands to school uses, but Congress in making its compacts with the states did not undertake to warrant that the designated sections would exist in every township, or that, if existing, the state should at all events take title to the particular lands found to be therein. Congress did undertake, however, that these sections should be granted unless they had been sold or otherwise disposed of; that is, that on the survey, defining the sections, the title to the lands should pass to the state provided sale or other disposition had not previously been made, and, if it had been made, that the state should be entitled to select equivalent lands for the described purpose." 240 U. S. 201, 36 Sup. Ct. 329 (60 L. Ed. 599).

The principles, thus stated, are applicable here. In our view the lands were otherwise disposed of by the Indian reservation of 1852 and the treaty of 1854. As we have seen, these dispositions were made before final approval of the surveys identifying sections 16.

It is insisted that this conclusion is inconsistent with the decision of this court in Beecher v. Wetherby, 95 U. S. 517, 24 L. Ed. 440. The same contention as to the effect of that decision was made in the Morrison Case, supra, and of it this court said:

"In opposition to this definition of the effect of the donation for school purposes, the appellees rely upon what was said in Beecher v. Wetherby, 95 U. S. 517 [24 L. Ed. 440]. That was an action of replevin to recover logs cut on a section 16 in Wisconsin which had been granted by the Enabling Act of August 6, 1846 (chapter 89, 9 Stat. 56, 58). The exterior lines of the township in which the land was situated were run in October, 1852, and the section lines in May and June, 1854; and the defendant claimed under patents from the state issued in 1865 and 1870. The land had been occupied by the Menominee Indians, but their right was only that of occupancy. 'The fee was in the United States, subject to that right, and could be transferred by them whenever they chose.' By the treaty of 1848 (9 Stat. 952) these Indians agreed to cede to the United States all their lands in Wisconsin, it being stipulated that they should be entitled to remain on the lands for two years. In view of their unwillingness to withdraw, a further act was passed (10 Stat. 1064) by which a tract was assigned to them embracing the land in controversy. Subsequently a portion of this reservation was assigned by another treaty to the Stockbridge and Munsee Tribes, and for the benefit of the latter Congress passed the act of February 6, 1871 (16 Stat. 404, c. 38), providing for the sale of certain townships. The plaintiff asserted title under patents issued by the United States in 1872 pursuant to this act. It appeared, however, that the Indian occupation of the land had ceased before the logs were cut. The court held that the title had vested in the state, and hence that the plaintiff had acquired no title by his patents from the United States. It was said in the opinion that by the contract with the state (the school grant) the lands were 'withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing the sale of it could be construed to embrace them, although they were not specially excepted,' and that after this compact 'no subsequent sale or other disposition * * * could defeat the appropriation.' But it was also stated that 'when the logs in suit were cut, those tribes (Stockbridge and Munsee) had removed from the land in controversy, and other sections had been set apart for their occupation.' That is, the lands had been surveyed in 1854; prior to that time there had been no other disposition of the fee by the United States; the title had vested in the state subject at most to the Indian occupancy, and this had terminated. There was abundant reason for the decision that these lands were not embraced, and were not intended to be embraced, in the provisions for sale made by the act of 1871. What was said in the opinion must be considered in the light of the facts. Weyerhauser v. Hoyt, 219 U. S. 380, 394 [31 Sup. Ct. 300, 55 L. Ed. 258]. The Heydenfeldt Case [93 U. S. 634, 23 L. Ed. 995], was not cited and cannot be regarded as overruled. See New York Indians v. United States, 170 U. S. 1, 18 [18 Sup. Ct. 531, 42 L. Ed. 927]; Minnesota v. Hitchcock, 185 U. S. 375, 399–401 [22 Sup. Ct. 650, 46 L. Ed. 954]."

See Heydenfeldt v. Daney Gold & Silver Mining Co., 93 U. S. 634, 23 L. Ed. 995; United States v. Thomas, 151 U. S. 577, 14 Sup. Ct. 426, 38 L. Ed. 276; Minnesota v. Hitchcock, 185 U. S. 375, 22 Sup. Ct. 650, 46 L. Ed. 954; Wisconsin v. Hitchcock, 201 U. S. 202, 26 Sup. Ct. 498, 50 L. Ed. 727.

We reach the conclusion that the lands in controversy did not pass under the school lands grant to the state of Wisconsin, and that there should be a decree for the defendant.

It is so ordered.

Mr. Justice McREYNOLDS took no part in the consideration or disposition of this case.

(245 U. S. 436)

UNITED STATES v. J. S. STEARNS LUMBER CO.

(Argued Dec. 18, 1917. Decided Jan. 7, 1918.)

No. 94.

PUBLIC LANDS ⟸52—SCHOOL LANDS—LANDS INCLUDED IN GRANT.

Wisconsin Enabling Act Aug. 6, 1846, c. 89, § 7, 9 Stat. 58, provided that the section numbered 16 in every township, and, when that section had been sold or otherwise disposed of, other equivalent lands, should be granted to the state for the use of schools. Treaty Sept. 30, 1854 (10 Stat. 1109), with the Lake Superior Chippewa Indians, set apart the La Pointe Reservation for such Indians, and provided for surveys and allotments in severalty of such lands in the discretion of the President. At that time the land so reserved had not been surveyed and the sections identified. *Held*, that this disposition of the lands by treaty before the survey was but an exercise of the right of the United States under the Enabling Act to make disposition of the lands, and the state did not acquire the sixteenth sections within such reservation, though after the lands were surveyed allotments were made in severalty to the Indians, as this was merely to provide a home for them in furtherance of the purpose with which the reservation was made.

Appeal from the District Court of the United States for the Western District of Wisconsin.

Suit by the United States against the J. S. Stearns Lumber Company. From a decree dismissing the bill, the Government appeals. Reversed and remanded.

Mr. Assistant Attorney General Kearful, for the United States.

Messrs. Arthur Dyrenforth and W. W. Gurley, both of Chicago, Ill., for appellee.

*437 *Mr. Justice DAY delivered the opinion of the court.

The United States brought its bill to cancel patents from the state of Wisconsin held by the J. S. Stearns Lumber Company and covering certain lands in the Bad River or La Pointe Indian Reservation in the state of Wisconsin. The District Court dismissed the bill for want of equity. There is no controversy as to the facts, and it appears that the Lake Superior Chippewas by treaty of October 4, 1842, proclaimed March 23, 1843 (7 Stat. 591), ceded large tracts of land in Wisconsin and Michigan to the United States, reserving the right of hunting on the ceded territory, and other usual privileges of occupancy until removed by the President. Within the Wisconsin territory were included the sections 16 in question, lying in township 46 north, ranges 2 and 3 west, and township 47 north, in range 2 west.

Wisconsin was admitted to the Union in 1848. The Enabling Act contained the provision as to the school sections recited in Wisconsin v. Lane, 245 U. S. 427, 38 Sup. Ct. 135, 62 L. Ed. ——, just decided. The President did not remove the Indians, and on September 30, 1854, a treaty was made with them, proclaimed January 29, 1855 (10 Stat. 1109), whereby the *United States set apart the La Pointe Reservation in Wisconsin, and provided for surveys and allotments in severalty from time to time of such reserved lands in the discretion of the President.

*438 This reservation embraces the land in controversy; nothing was said in the treaty about sections numbered 16. The sectional survey identifying sections 16 as to one of the townships was made in 1864; as to the other two in 1873. From 1881 to 1887 the state of Wisconsin, claiming to own these lands under its school land grant, patented them to various persons, under whom the lumber company claims title.

In 1907 allotment patents were issued by the President of the United States to the Indians in severalty under article 3 of the treaty of 1854, the allottees have since resided on the reservation, and claim the lands allotted and patented to them. The patents in each case contained a provision that the allottee and his heirs shall not sell, lease, or in any manner alienate the lands except with the consent of the President. From 1909 to 1912 timber on the lands in dispute, which had been damaged by fire, was cut for sale by the lumber company under stipulation made with approval of the United States, and the value of the lumber so realized was deposited in banks for the benefit of the parties entitled thereto, the amount so deposited was $66,833.56.

This case does not need extended discussion, as in our opinion it is controlled by the decision of this court just rendered in Wisconsin v. Lane. The treaty of 1854 authorized the ultimate allotment in severalty to the Indians of the lands reserved by it. Afterwards such allotment of the sections in question was made by the President of the United States in carrying out the purposes of the treaty. Considering the obligations of the United States in favor of its Indian wards imposed by this treaty, and the purpose for which these lands were* reserved, *439 we are of opinion that the treaty with these provisions in favor of the Indians amounts to a disposition of the lands within the authority of Congress, and is not inconsistent with the Enabling Act, under which the school lands were provided for the state.

Considering that the lands were reserved by the treaty long before they were surveyed and the sections identified, the fact that they were after survey allotted in severalty to the Indians does not in our view enable the state to claim the sixteenth sections under the school lands grant. What was ultimately done in the process of allotment was merely to provide a home for these Indians in furtherance of the purpose with which the reservation was made. See, M., K. & T. R. R. Co. v. United States, 235 U. S. 37, 40, 35 Sup. Ct. 6, 59 L. Ed. 116.

We are of opinion that the disposition of the lands by treaty in favor of the Indians, before the survey identifying the school sections, was but an exercise of the right of the United States to make other disposition of the lands, and the state of Wisconsin must seek indemnity elsewhere, as provided by law. It follows that the judgment of the United States District Court for the Western District of Wisconsin must be reversed, and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice McREYNOLDS took no part in the consideration or disposition of this case.

(245 U. S. 441)

BOLDT v. PENNSYLVANIA R. CO.

(Argued Nov. 16 and 19, 1917. Decided Jan. 7, 1918.)

No. 62.,

1. MASTER AND SERVANT ⟸203(3), 217(1), 219(1)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

At common law a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him.

2. MASTER AND SERVANT ⟸295(4, 6) — ACTION FOR INJURIES—INSTRUCTIONS—ASSUMPTION OF RISK.

Where in railway yards cars under control of a brakeman were permitted to descend an incline by gravity, and it was claimed that the death of an experienced yard conductor attempting to adjust a faulty coupler and between the cars for that purpose was due to the negligence of the brakeman in permitting moving cars to strike standing cars with too great violence, and to the negligence of the company in failing to promulgate and enforce adequate rules to safeguard deceased, an instruction that deceased assumed the ordinary risks of his employment was more favorable to plaintiff than he could properly demand.

3. MASTER AND SERVANT ⟸204(3)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

Under Employers' Liability Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (Comp. St. 1916, § 8657), making carriers liable for injuries to employés resulting from the negligence of officers, agents, or employés of the carrier, and section 4 (section 8660), providing that employés shall not be held to have assumed the risk in any case, where a violation by the carrier of any statute enacted for the safety of employés contributed to the injury or death, risks arising from the negligence of officers, agents, or employés are not excluded from those assumed in the absence of any violation of a statute enacted for the safety of employés.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Action by Caroline Boldt, administratrix of Edward J. Boldt, deceased, against the Pennsylvania Railroad Company. A judgment on a verdict for defendant was affirmed by the Circuit Court of Appeals for the Second Circuit (218 Fed. 367, 134 C. C. A. 175), and plaintiff brings error. Affirmed.

Messrs. Henry W. Brush, of Buffalo, N. Y., Rufus S. Day, of Washington, D. C., Frank Gibbons, of Buffalo, N. Y., and Charles W. Dille, of Cleveland, Ohio, for plaintiff in error.

Messrs. Frederic D. McKenney and J. S. Flannery, both of Washington, D. C., for defendant in error.

*442 *Mr. Justice McREYNOLDS delivered the opinion of the court.

At Buffalo, N. Y., defendant has a yard where freight trains are made up. Cars under control of a brakeman descend by gravity to desired positions on connecting tracks which lie southward of the "hump" or high point. A rule forbade employés from going between cars without first taking precautions not observed in the present case. Some evidence tended to show that under long-continued practice, considered good railroading, cars (in "strings" or "cuts") were constantly sent down and purposely allowed to strike others with sufficient force to secure coupling, but not hard enough to injure the equipment, "regardless of the position the men are in, putting them under obligation to take care of themselves."

*443 *While between cars, contrary to instructions, and assisting in an effort to adjust a faulty coupler, Edward J. Boldt, an experienced yard conductor, was killed. The coupler was at the south end of a "string" standing on an inclined switch. Another "string" moving down from the north hit the standing one violently and drove it against deceased and across a space of 20 feet.

Suing under the federal Employers' Liability Act, plaintiff maintained that the brakeman in control negligently permitted the moving cars to strike with too great violence; also that the company negligently failed to promulgate and enforce adequate rules to safeguard deceased while occupied about his task; and some evidence tended to support both claims. The Circuit Court of Appeals affirmed a judgment upon verdict for defendant after the trial court had denied motion for new trial based solely upon its refusal to give the charge specially requested by plaintiff and copied below. 218 Fed. 367, 134 C. C. A. 175.

To the general charge plaintiff made no objection whatever. In the first paragraph it declared:

"The foundation for the action is the Employers' Liability Act, which was passed by Congress in the year 1908, and which substantially provides that, if the employés of interstate railway carriers are injured while at work, on account of the negligence of the employer, or on account of the negligence of an officer or agent, or, indeed, even on account of the negligence of a fellow servant, that a recovery can be had."

Continuing, it explained nature of the accident, relationship, responsibilities, and obligations of parties, definition and effect of contributory negligence, etc.

Concerning assumption of risk, the court said:

"Evidence has been given by other witnesses that customarily cars are sent over this 'leader' into the yard of the defendant, and into the railroad yards of other railroad companies, ad libitum; that is, they are sent freely, one after another, to classify them and to make up trains when already classified; they are defined as 'live tracks,' a dangerous place to work, gentlemen, and workmen who take upon themselves occupations of that character assume the ordinary risks of the employment; they assume the risks that are incident to the particular avocation." "The decedent, as I have already stated, was bound to take care, and exercise diligence, and avoid any accidents from the movements of the cars in the yards and while at work. A railroad company, gentlemen, does not guarantee or insure the safety of its employés; it is merely obliged to use ordinary care to prevent unusual risks by the decedent, which, under *444

the circumstances, and the manner in which the work was ordinarily done, could not be reasonably anticipated." "You must be satisfied, gentlemen, in order to give her an award, that it is due to her because of the negligence of the defendant railroad company, and, if you also believe that it was due to the negligence of the decedent himself, who was engaged in a risky occupation, he, as I said before, assumed the ordinary risks of his employment, then you may apportion the damages."

At defendant's request and without objection, the jury were told:

"That the decedent assumed the obvious necessary risks of the employment in which he was engaged."

Plaintiff then asked a charge that:

"The risk the employé now assumes, since the passage of the federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of defendant's officers, agents, or employés."

Denying the request the court said:

"Under the Employers' Liability Act the employé simply assumes the risk of his employment. Section 4 [Comp. St. 1916, § 8660] reads, 'Such employé shall not be held to have assumed the risk of his employment in any case where a violation by such common carrier of any statute enacted for the safety of employés contributed to the injury, or death of such employé.' I decline to charge as requested, because this is not an action of the kind specified in section 4."

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This denial is the only error properly assigned here; and the circumstances afford no reason for departing from the general rule which limits our consideration to it.

Section 1, Employers' Liability Act, 35 Stat. 65 (Comp. St. 1916, § 8657), declares:

That carriers "shall be liable in damages to any person suffering injury while he is employed," etc., "resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

In cases within the purview of the statute the carrier is no longer shielded by the fellow-servant rule, but must answer for an employé's negligence as well as for that of an officer or agent.

In Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 503, 34 Sup. Ct. 635, 639 (58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475), we said:

"It seems to us that section 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action." Jacobs v. Southern R. R. Co., 241 U. S. 229, 235, 36 Sup. Ct. 588, 60 L. Ed. 970.

[1] At common law the rule is well settled that a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him. Shearman & Redfield on Negligence (6th Ed.) § 208; Bailey, Personal Injuries (2d Ed.) § 385. This general doctrine was clearly recognized in Gila Valley Ry. Co. v. Hall, 232 U. S. 94, 101, 34 Sup. Ct. 229, 58 L. Ed. 521; Jacobs v. Southern R. R. Co., supra; Chesapeake & Ohio Ry. v. De Atley, 241 U. S. 310, 313, 36 Sup. Ct. 564, 60 L. Ed. 1016; and Erie R. R. Co. v. Purucker, 244 U. S. 320, 324, 37 Sup. Ct. 629, 61 L. Ed. 1166.

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[2, 3] *The request in question did not accurately state any applicable rule of law and was properly refused. Already the jury had been told that deceased assumed the ordinary risks of his employment—a statement more favorable than plaintiff could properly demand. The risk held to have been assumed in the Horton Case certainly arose from negligence of some officer, agent, or employé; and if the negligence of all these should be excluded in actions under the Employers' Liability Act, it is difficult to see what practical application could ever be given in them to the established doctrine concerning assumption of risk.

The judgment below is

Affirmed.

Mr. Justice DAY took no part in the consideration or decision of this cause.

(245 U. S. 440)

HOUSTON OIL CO. OF TEXAS et al. v. GOODRICH et al.

(Argued Nov. 21 and 22, 1917. Decided Jan. 7, 1918.)

No. 76.

COURTS ⇐383(1)—SUPREME COURT—REVIEW OF DECISIONS OF CIRCUIT COURT OF APPEALS.

The refusal of the District Court to submit certain questions to the jury, on the ground that there was not evidence enough to warrant a finding thereon in favor of the parties asking such submission, when approved by the Circuit Court of Appeals, will not be reviewed by the Supreme Court on certiorari, in the absence of some sufficient reason.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Action by Cornelia G. Goodrich and others against the Houston Oil Company of Texas and others. A judgment for plaintiffs was affirmed by the Circuit Court of Appeals for the Fifth Circuit (226 Fed. 434, 141 C. C. A. 264), and defendants bring certiorari. Writ dismissed.

Mr. William L. Marbury, of Baltimore, Md., and Mr. H. O. Head, of Sherman, Tex., for petitioners.

Mr. William D. Gordon, of Beaumont, Tex., for respondents.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

After hearing arguments upon the issues involved in this cause it seems clear that the writ of certiorari was improvidently grant-

ed and must be dismissed. Furness, Withy & Co. v. Yang-Tsze Ins. Ass'n, 242 U. S. 430, 37 Sup. Ct. 141, 61 L. Ed. 409.

The controversy (presented in an action at law) is over title to a tract of land in Texas. Both parties claim under one Felder—petitioners through a deed said to have been executed June 10, 1839, and respondents through one dated June 18, 1839.

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As grounds for granting the writ petitioners alleged that the trial court erred in refusing to submit to the jury (1) whether the deed first dated was in fact executed; (2) whether it was presented for record before execution of the later one; (3) whether vendee in the junior deed was a bona fide purchaser for value; (4) whether the junior deed was forged; and (5) whether the action was barred by the three years statute of limitations. The propriety of submitting these matters depended essentially upon an appreciation of the evidence. Having heard it all, the trial court concluded there was not enough in support of any one of petitioners' above-stated claims to warrant a finding in their favor, and the Circuit Court of Appeals reached the same result. 226 Fed. 434, 141 C. C. A. 264.

The record discloses no sufficient reason within the rule long observed why we should review the judgment below. Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095.

Dismissed.

(245 U. S. 463)

LOUISVILLE & N. R. CO. v. UNITED STATES et al.

(Submitted Nov. 23, 1917. Decided Jan. 7, 1918.)

(No. 91.)

1. Commerce ⇐95 — Interstate Commerce Commission—Findings—Conclusiveness.

In a suit to set aside an order of the Interstate Commerce Commission, where the evidence before the Commission was conflicting and ample to sustain the findings, they are conclusive.

2. Commerce ⇐88 — Constitutional Law ⇐298(2)—Interstate Commerce Commission—Due Process of Law.

Where a railroad company applied to the Interstate Commerce Commission for authority to continue higher rates to and from Bowling Green, Kentucky, than for longer distances over the same route in the same direction to and from Louisville and Nashville, and the Commission after a full hearing entered an order denying authority to continue on certain traffic through Bowling Green to Louisville and Nashville lower rates than were contemporaneously in effect to Bowling Green, the contentions that the order deprived the railroad company of its property without due process of law because it was broader than the hearing held in connection therewith, or that it was invalid because the Commission failed to act on other phases of the application, were unsound.

3. Commerce ⇐85 — Interstate Commerce Commission—Authority and Functions.

The Interstate Commerce Commission had power to make such order under Interstate Commerce Act Feb. 4, 1887, § 4, 24 Stat. 380, as amended by Act June 18, 1910, c. 309, § 8, 36 Stat. 547 (Comp. St. 1916, § 8566), prohibiting higher charges for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, provided that upon application to the Interstate Commerce Commission the carrier may in special cases after investigation be authorized by the Commission to charge less for longer than for shorter distances.

Appeal from the District Court of the United States for the Western District of Kentucky.

Suit by the Louisville & Nashville Railroad Company against the United States and the Interstate Commerce Commission. From a decree denying a temporary injunction and dismissing the bill (225 Fed. 571) complainant appeals. Affirmed.

Mr. Henry L. Stone, of Corsicana, Tex., and Mr. William A. Colston, of Louisville, Ky., for appellant.

Mr. Asst. Atty. Gen. Frierson, for the United States.

Mr. Joseph W. Folk, of Washington, D. C., for the Interstate Commerce Commission.

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*Mr. Justice BRANDEIS delivered the opinion of the Court.

Bowling Green, Kentucky, is located on the main line of the Louisville & Nashville Railroad, 114 miles south of Louisville and 73 miles north of Nashville. Prior to the year 1910 the railroad had established many rates to and from Bowling Green which were higher than those charged by it for longer distances over the same route in the same direction to and from Louisville and Nashville. The amendment to section 4, of the Act to Regulate Commerce, made June 18, 1910 (c. 309, 36 Stat. 539, 547), prohibits any such higher charges for shorter distances unless previously authorized by the Interstate Commerce*Commission; but it provided that carriers might, within six months thereafter, apply to the Commission for authority to continue in effect charges of that nature then lawfully existing. Within the period so fixed the railroad filed such an application covering many hundred different places scattered over its extended system, and including both Louisville and Nashville. That part of the application which sought to continue in effect lower rates to and from Louisville and Nashville than those in effect to and from Bowling Green, was heard separately.[1] The railroad sought to justify the lower charges for the longer distances by showing that it had to meet, particularly as to Nashville traffic, competition both by water and by rail. This contention was opposed by evidence to the effect that at Bowling Green, also, there was water competition, actual or potential and

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[1] Rates to Clarksville, a city 64 miles southwest of Bowling Green on a branch line of the railroad were considered at the same time, but the order here assailed did not deal with Clarksville rates.

that at Nashville there was no real rail competition. After full hearing an order was entered which (after several revisions) merely denied to the railroad authority to continue on certain traffic through Bowling Green to Louisville and to Nashville lower rates "than are contemporaneously in effect to Bowling Green." Bowling Green Business Men's Association v. Louisville & Nashville Railroad Co., 24 Interst. Com. Com'n R. 228.

The railroad then brought this suit in the Commerce Court to set aside the order of the Commission and asked for a temporary injunction.[2] Upon the abolition of that court by Act of October 22, 1913, c. 32, 38 Stat. 208, 219, the case was heard in the District Court of the United States for the Western District of Kentucky before three judges. The railroad assailed the validity of the order on many grounds; but its main contentions were, that the order complained of was not such a negative order as was contemplated by the fourth section of the Act to Regulate Commerce, was not responsive to the application and hence, was not such an order as the Commission had power to make; and also that its decision was "contrary to the indisputable nature of the evidence" and not supported by any evidence. The District Court refused to grant a temporary injunction and dismissed the bill. 225 Fed. 571.

[1-3] The case comes here by direct appeal; and thirty-eight errors are assigned. Eleven relate to the weight or sufficiency of the evidence before the Commission. The evidence was conflicting. And, as there was ample to sustain the findings, they are conclusive. United States v. Louisville & Nashville Railroad, 235 U. S. 314, 320, 35 Sup. Ct. 113, 59 L. Ed. 245. Other assignments present, in substance, either criticism of the reasoning of the Commission or of the form of the order, or assert unsubstantial or unsubstantiated irregularities in practice before the Commission; such as that the order deprived plaintiff of its property without due process of law, because the "order was broader than the hearing held in connection therewith," or that it was invalid because the Commission failed to act on "other phases" of the application. United States v. Merchants' & Manufacturers' Traffic Association, 242 U. S. 178, 37 Sup. Ct. 24, 61 L. Ed. 233. Other errors assigned relate to the exclusion by the court of evidence which was clearly inadmissible, both because of the character of the evidence and because, on the issues presented, the validity of the order must be determined upon the evidence introduced before the Commission. Still other assignments allege, in varying language but without statement of reasons, that the Commission was without power to enter the order or that the court erred in denying the relief prayed for. Many of the assignments of error are not now insisted upon. None deserves detailed discussion. All are unsound. The decree dismissing the bill is

Affirmed.

[2] The Commerce Court dismissed the bill for want of jurisdiction on the ground that its jurisdiction to review orders of the Commission applied only to affirmative orders. 207 Fed. 591. Pending an appeal of the case to this court, Intermountain Rates Cases, 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. 1408, was decided, whereupon appellees herein confessed error, the decree was reversed and the case was remanded to the District Court for further proceedings.

(245 U. S. 398)

WALLER et al. v. TEXAS & P. RY. CO.

(Argued Dec. 17, 1917. Decided Jan. 7, 1918.)

No. 92.

1. TRUSTS ⟸365(3) — SUITS TO ESTABLISH AND ENFORCE—LACHES.

In 1872 the B. Company executed a mortgage on its railroad and its title and interest in lands granted to it by the government to secure bonds. The mortgage provided for the setting aside of 1 per cent. of the company's gross earnings after certain deductions and the proceeds of the sale of the granted lands for the benefit of the bondholders, and provided that on default in payment of interest, etc., outstanding bonds at the option of the holders of a majority in interest thereof should become due and payable, that on written request of the holders of at least 1,000 bonds outstanding, the trustee should foreclose, and that at the request of a bondholder the trustee might take possession of the road. In 1880 the B. Company conveyed its lands to the N. Company, which constructed the road, and which in 1883 transferred all of its property to the T. Company, with the object of merging with such company, expressly reserving, however, the land grant; its corporate existence being continued. No interest had been paid on the bonds since 1876, and in 1890 the lien of the mortgage was canceled as a cloud on the title to the lands in a suit against the trustee and some of the bondholders. Until 1913, 10 years after the maturity of the bonds, and 40 years after their issuance, no claim was made by the holders of certain bonds, at which time the executors of a bondholder brought suit to charge the T. Company as trustee on the theory that a trust was created that followed the lands into whosesoever hands they came and bound each possessor of them to execute the trust. *Held*, that the suit was barred by laches, though it appeared that the T. Company had acquired 1,183 of the 1,275 bonds outstanding, and it was claimed that complainants did not know of the merger of the N. and the T. Companies or of the suit to remove the cloud until 1908, it not appearing what their testator knew in this respect, and it not being supposable that they were ignorant of the open activities of the two companies and the possession and operation of the railroad by the T. Company.

2. TRUSTS ⟸365(3) — SUITS TO ESTABLISH AND ENFORCE—LACHES.

Where the T. Company had been in possession of and operating the property for many years, and had spent large sums of money upon it in the belief that it had a clear and unincumbered right, it would be inequitably affected by the claim asserted, and which, if upheld, would require the payment of over $100,000, and hence the contention that it had not changed its position was without merit.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Suit by David J. Waller, Jr., and another, trustees under the will of David J. Waller, deceased, etc., against the Texas & Pacific Railway Company and others. A decree in favor of the defendant named was affirmed by the Circuit Court of Appeals for the Second Circuit (229 Fed. 87, 143 C. C. A. 363), and complainants appeal. Affirmed.

*399 *Suit to compel payment of 30 bonds issued by the New Orleans, Baton Rouge & Vicksburg Railroad Company under the circumstances hereinafter detailed. It was originally brought against appellee and the New Orleans Pacific Railroad Company and the Union Trust Company of New York. The latter company was dismissed from the suit. No process was issued against the New Orleans Pacific Railroad Company.

The bill presents the jurisdictional qualification of the parties and the following facts, which we state narratively:

The New Orleans, Baton Rouge & Vicksburg Railroad Company, which we shall refer to as the Baton Rouge Company, was incorporated December 30, 1869, by a special act of the Louisiana Legislature and was given the usual powers to execute the purpose of its incorporation, to borrow money and issue bonds, etc., and secure their payment by a mortgage of its stock and franchises and property which it then owned or might thereafter acquire.

The Texas & Pacific Railway Company, herein referred to as the Texas & Pacific Company, was incorporated March 3, 1871, by an act of Congress (Act March 3, 1871, c. 122, 16 Stat. 573), and was granted certain lands to aid in the construction of its road, and by a section of the act (section 22) a *400 grant was made to the Baton Rouge Company of the same kind, that is, alternate sections of public lands per mile, in the state of Louisiana, upon the condition that the company complete the whole of the road within five years of the passage of the act, the lands to be selected on each side of its road on a route to be selected by the company to connect with the Texas Pacific at the eastern terminus of the latter through the public land from New Orleans to Baton Rouge and thence by the way of Alexandria. The company was empowered to mortgage the lands.

September 4, 1872, it exercised the power and executed a mortgage or deed of trust to the Union Trust Company of New York, transferring and conveying, among other things, all of its railroad and personal property and all the right, title, and interest it then had or it or its successors might acquire to the granted lands. The trust company accepted of record its trusteeship.

The mortgage was intended to secure 12,000 bonds of $1,000 each, payable September 1, 1902, with interest at 7 per cent. payable semiannually. 1,250 of the bonds were issued and certified by the trustee.

Complainants, as executors and trustees of the estate under the will of David J. Waller, who died in 1893, are the owners and holders before maturity of 30 of the bonds with 52 coupons attached thereto.

It was covenanted in the mortgage by the trustee thereof that a sinking fund should be established and maintained and an amount equal to 1 per cent. of the company's gross earnings, after certain deductions, and the proceeds of the sales of the granted lands should be paid to the trustee for the fund for the benefit of the bondholders. The mortgage was duly recorded.

The railroad company accepted the grant and filed a map of its general route from Baton Rouge to Shreveport and a like map showing the general route from New Orleans to Baton Rouge. The lands were then *401 withdrawn from entry and sale by the order of the Secretary of the Interior. And under the terms of the grant the lands vested in the company, subject only to the construction of the road.

January 5, 1881, the Baton Rouge Company, by deed of quitclaim, conveyed the lands to the New Orleans Pacific Railroad Company, referred to herein as the New Orleans Company, and its successors and assigns, and thereafter the Baton Rouge Company no longer maintained its separate corporate existence and became merged and consolidated with the New Orleans Company.

The conveyance and acceptance were filed by the New Orleans Company in the Interior Department, and the Secretary of the Interior, under an opinion of the Attorney General of the United States, recognized the New Orleans Company and that the Baton Rouge Company had title to the lands and could sell and assign the same.

On March 13, 1883, the Secretary of the Interior transmitted to the President a report of the examination of 260 miles of the road and recommended that they be accepted and that patents be issued for such lands as might have been earned by their construction by the New Orleans Company, as assignee of the Baton Rouge Company, the mortgagor thereof. The recommendation was approved and patents were issued to the New Orleans Company, but solely as the assignee of the Baton Rouge Company and as its grantee for 679,284.64 acres of lands in Louisiana. The foregoing state of facts in respect to the title of the lands were determined and adjudged in New Orleans Pacific Railway Co. v. United States, 124 U. S. 124, 8 Sup. Ct. 417, 31 L. Ed. 383.

By an act of Congress of February 8, 1887, all lands which were not forfeited thereby were relinquished, granted, conveyed, and confirmed to the New Orleans Company as assignee of Baton Rouge Company by the transfer above stated, and title confirmed to *402 approximately 746,954 acres within the grant to the Baton Rouge Company. At this time the New Orleans Company was and now is con-

solidated with and merged into the Texas & Pacific Company.

Within six months after the conveyance to it by the Baton Rouge Company the New Orleans Company transferred all of its property to the Texas & Pacific Company, with the object and intention to merge the former with the latter under the latter's name. The land grant acquired by the former company was expressly reserved and its corporate recognition was to be continued and maintained until further authorized corporate action. In addition to the lands patented to the amount of 679,284.64 acres to the New Orleans Company as assignee of the Baton Rouge Company other lands have been patented to it amounting in 1917 to 1,001,000 acres, and the New Orleans Company has since procured further patents and filed applications for additional lands and still continues to do so. The records of the Secretary of the Interior show that there is a balance still due of more than 1,000,000 acres.

By the act incorporating the Texas & Pacific Company (1871) it was provided that the property and franchises acquired from each of the consolidated or purchased railroad company or companies should vest and become absolutely the property of the Texas & Pacific Company, subject, however, to all of the debts and obligations of the acquired company or companies, and that the consolidation should not impair any lien which might exist on any railroads so consolidated. It was provided that there should be no consolidation with any competing road and that the contracts and obligations of railroads consolidated should be liens upon the Texas & Pacific Company.

*403 From about the time of the recognition of the New Orleans Company the Texas & Pacific Company *controlled it and still controls it and by the recited acts and transfers became charged with the lien of the mortgage by Baton Rouge Company to the Union Trust Company (September 4, 1872) and the other obligations of the New Orleans Company, particularly the performance of the covenants in the mortgage and the payment of the bonds secured thereby. The recognition of the companies and merger in the Texas & Pacific Company and transfer of the lands granted were all a part of a scheme to secure from the United States the grant for the purpose of raising money thereon by mortgages and bonds secured thereby to construct and equip a transcontinental railway from New Orleans to the Pacific, as appears from the act incorporating the Texas & Pacific Company (Act March 3, 1871).

The lands patented in the name of the New Orleans Company were appropriated by the Texas & Pacific Company, it continuing the other company in name for the sole purpose of receiving patents, and controlling its corporate books, accounts and records, the New Orleans Company maintaining no corporate existence and having no officers or directors (this on information and belief), and the Texas & Pacific, in violation of the terms of the covenants of the mortgage by the Baton Rouge Company to the Union Trust Company and the trust thereby created, has diverted the proceeds of the lands granted from the use and purpose of the mortgage and in fraud of complainants and the holders of bonds secured by the mortgage to its own use and to the use of the New Orleans Company and to other uses not authorized by the deed of trust. The persons to whom the sales of the lands have been made are so many that it is wholly impracticable to enforce the lien of the mortgage and who have by occupation under the color of title acquired an impregnable title thereto.

The Union Trust Company and certain bondholders *were made parties defendant in *404 an action brought against the Baton Rouge Company by the trustees under deeds of trust of April 17, 1883, and January 5, 1884, executed by the New Orleans Company, to declare them first liens upon the lands described therein and to secure an issue of bonds authorized thereby and asked for judgment that the deed of trust from the Baton Rouge Company to the Union Trust Company (September 4, 1872) did not affect or give any lien in or to the lands and that the same be canceled. A decree pro confesso was entered so declaring and adjudging.

The bondholders were dismissed from the case. The attorneys for the complainants were attorneys for the New Orleans Company and the Union Trust Company. There were false allegations in the bill, and the Union Trust Company, though in duty bound as trustee to defend the action and the trust created by the mortgage, failed to do so, permitted the destruction of the lien and permitted the New Orleans Company and the Texas & Pacific Company to appropriate to themselves or to other purposes the proceeds of the sales of the lands which were at least worth $5 per acre.

The subject-matter of the suit exceeds $3,000 and the complainants are without remedy at law.

Discovery is prayed of the quantity of lands patented, the amount of sales and the proceeds thereof and that the Union Trust Company and the Texas & Pacific Company account to complainants and to all other bondholders similarly situated for all money and property received from the enjoyment and sales of the lands to the extent of their bonds and coupons and that they be adjudged to pay complainants the amounts found due them.

The answer of the Texas & Pacific Company qualified or denied certain of the averments of the bill and admitted others. It set up the various acts of Congress referred to

*405 in the bill and the transactions between the Texas & Pacific Company and the New Orleans Company, but assigned a different cause and effect to them and to the acts of Congress and to what was done under them. Its defenses may be concentrated in four propositions stated by counsel:

"(1) That the Baton Rouge Company never acquired title to the land grant lands, and that its alleged mortgage of September 4, 1872, never became operative as a lien thereon.

"(2) That prosecution of the action is barred by the decree of the Circuit Court of the United States for the Eastern District of Louisiana in the suit of Dillon and Alexander against the New Orleans Pacific Railway Company and others.

"(3) That the Texas & Pacific Railway Company is in no way connected with the land grant or the transactions referred to in the complaint.

"(4) That the suit is barred by limitations and by the laches of the complainants."

Upon the issues thus formed, if it can be said there are issues upon anything else but the characterization and legal effect of the acts of Congress, the instruments referred to and the transactions detailed, the District Court expressed opinion that it was unable "to see how any express trust ever existed in plaintiff's favor or in favor of his decedent except that created by the mortgage to the Union Trust Company as trustee, the bounds and limitations of which are set forth in the deed itself," which instrument, the court said, was "in effect nothing more or less than a mortgage and to be treated as such." The mortgage and debt, therefore, the court said, might be enforced against the property at the situs of the latter, but by this suit, the court said further, it was sought to enforce the collection of the debt, not from the property mortgaged, but from another corporation now alleged to be personally liable for *406 it. Such liability, the court continued, could only result from some trust ex delicto to be implied from some state of fact shown, and not upon any direct undertaking by the New Orleans Company or the Texas & Pacific Company to pay the debt of another, to wit, the Baton Rouge Company. Therefore, the court concluded that its decision must turn upon either one or both of the affirmative defenses made by the Texas & Pacific Company, that is, either the statute of limitations or laches or both.

Reciting that the bonds matured September 4, 1902, and this suit was commenced May 7, 1913, the court finally applied the statute of limitations of 10 years according to the law of New York and Louisiana. It, however, expressed the view that the defense of laches should be sustained and referred to O'Brien v. Wheelock, 184 U. S. 493, 22 Sup. Ct. 354, 46 L. Ed. 636, and dismissed the bill.

The Court of Appeals affirmed the District Court, but rested its decision upon the defense of laches, citing therefor O'Brien v. Wheelock, supra, and saying:

"The proposition is somewhat startling that the holder of the obligations of one corporation secured by a mortgage on its property may maintain a suit 40 years after the date of such obligation and based thereon against another corporation not a party thereto."

Mr. Jesse C. Adkins, of Washington, D. C. (Messrs. David Bennett King, W. Russell Osborn, William A. Milliken, all of New York City, and C. C. Calhoun and Daniel B. Henderson, both of Washington, D. C., on the briefs), for appellants.

Mr. Thomas J. Freeman, of New Orleans, La., for appellee.

Mr. Justice McKENNA, after stating the case as above delivered the opinion of the court.

To establish a trust against the Texas & Pacific Company it is argued that the purpose *407 of the act of Congress of 1871 was to provide for the construction of a transcontinental railroad from Texas to San Diego, Cal., and from thence to San Francisco by another company, and that the Baton Rouge Company, the New Orleans Company and principally the Texas & Pacific Company were instruments of that purpose and the grant of the Baton Rouge Company, by its mortgage to the Union Trust Company, became charged with a lien for the payment of the bonds issued by the railroad company, which lien followed the conveyance of the lands to the New Orleans Company and to the Texas & Pacific Company, and that besides there was a personal trust first in the Union Trust Company and successively in the other companies. And the argument is attempted to be fortified by section 4 of the act of Congress of 1871, which authorized the Texas & Pacific Company to acquire other railroad corporations, and was by section 6 to become responsible for the debts or obligations of any company so acquired.

To sustain this contention the provisions of the various instruments are adduced and their requirements, especially that the bonds were entitled to the benefit and security of a sinking fund to be set apart for their redemption whereby the proceeds of all lands granted to the railroad company (the Baton Rouge Company) were to be applied to the payment of interest on the bonds and to their redemption and also 1 per cent. of the gross earnings of the company, and that the railroad and its equipment were mortgaged for like purposes and all "the lands and sections of land situated, lying and being on either side of the said railroad, as the same may be finally located and constructed in accordance with and as granted by the act of Congress" of March 3, 1871.

The mortgage to the Union Trust Company was in trust for the purposes expressed above, *408 and it was provided that, if default should be made in payment of interest or of any payment to the sinking fund and continue for the period of 6 months or in default of any requirement of the mortgage, all of the bonds outstanding, at the option of the holders of a majority in interest of such outstanding bonds, should forthwith become due and pay-

able. And further, upon written request of the holders of at least 1000 bonds then outstanding, the trustee should foreclose the equity of redemption of the property embraced in the hypothecation, and at the request of a bondholder might take possession of the road.

Sales of the lands were provided for and the disposition of the proceeds, any balance remaining to be appropriated to the purpose of the sinking fund. There was a covenant by the company to pay on June 1, 1880, and on the 1st of June of each succeeding year a sum which should equal 1 per cent. of the gross earnings received by the road from its operation 12 months immediately preceding, which sum should be applied by the trust company or its successors to the redemption of the bonds, and that the trust company on the 1st days of January and July of each and every year should designate by lot for redemption a number of bonds sufficient to equal, as near as might be, the accumulations of the sinking fund and cause a notice to be printed of such purpose.

It is contended that by reason of these provisions and the facts detailed a trust was created that followed the lands to whosesoever hands they reached and each possessor of them became a trustee and bound with respect to the property to the execution of the trust in the same manner as the original trustee, the Union Trust Company, was, citing for this result Ketchum v. City of St. Louis, 101 U. S. 306, 25 L. Ed. 999.

And by virtue of this principle the New Orleans Company is declared to have been a trustee and the lands granted to it subject to the execution of the trust and the Texas & Pacific Company has also become a trustee.

*409 *Another ground of liability is asserted against the latter company. It has been consolidated, the contention is, with the New Orleans Company and the latter has disappeared from sight and significance, leaving the Texas & Pacific in sole responsibility. And yet the instrument of consolidation expressly excepts "the lands and the land grants acquired or to be acquired" by the New Orleans Company from the United States, the state of Louisiana, or the Baton Rouge Company, or from any other source, other than lands necessary or needful for railway purposes. There is an express exemption and exclusion of such from the provisions of the instrument of consolidation. And it was provided that the corporate existence of the New Orleans Company should be maintained and its power to carry out the existing contracts and to mortgage any land grant it had acquired or might acquire from the Baton Rouge Company or otherwise should remain unimpaired.

There is, therefore, some ground for the contention of the Texas & Pacific Company that there is a want of that privity of property which, according to the insistence of appellant, is necessary to make that company trustee of the Baton Rouge Company's mortgage of 1872, and that sections 4 and 6 of the act incorporating the Texas & Pacific Company have not the meaning ascribed to them, and further that the Baton Rouge Company never acquired any lands to which a lien could attach, and that the asserted trust had nothing upon which it could be exercised, neither lands to sell nor railroad to take possession of and operate, both of which—sale of lands and operation of road—were necessary to the execution of the trust, and that it was so determined in a suit against proper parties by the decree of the Circuit Court of the United States for the Eastern District of Louisiana.

To this contention complainants reply: (1) The decree was collusively obtained; (2) it did not cover the right of way and roadbed *410 which, it is said, is admitted to have come to the Texas & Pacific Company from the New Orleans Company; (3) independently of the deed of trust and irrespective of it, the arrangement between those companies was an attempt to conserve the subordinate rights and interests of the stockholders of the Baton Rouge Company at the expense of its creditors; an attempt, it is insisted, always judicially condemned. Cases are cited, among others, N. P. Ry. Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931.

[1] The argument to sustain or oppose the respective contentions we need not recite. They have indication in the pleadings and, it may be, in what we have already said. We rest our decision on the defense of laches which, we think, has been sustained.

In 1872 the Baton Rouge Company executed the instrument the particular trusts of which are now attempted to be enforced. Before that time it had filed a map of general route but no map of definite location; but after that time the record discloses nothing done by it until 1880, when it conveyed the lands to the New Orleans Company.

The activities of the New Orleans Company are shown and through and by what struggles it was enabled to construct the road. The record shows assertion of rights by some of the bondholders, but also shows that the assertion was met by challenge of legality and judicially determined against. During all that time, during all of the notoriety of the transactions detailed, the owner or owners of the bonds in suit made no claim by word or act and now, over 10 years after their maturity and 40 years after their issue, a claim of personal liability is made against the Texas & Pacific Company. It is to be borne in mind that the interest on the bonds has always been in default, certainly since 1876, and there was remedy provided for such default. At the instance of *411 any holder of the bonds the trustee could have taken possession of the road, and, if of the Baton

Rouge Road, then of its successors in liability, the New Orleans and the Texas & Pacific Companies, for if they were successors in liability they were successively subject to the remedy. If it be said that such remedy was extreme and inconvenient, it had potency as a threat in the hands of a diligent creditor, and, besides, if there was a successive personal liability, it accrued against the New Orleans Company in 1880 and the Texas & Pacific Company in 1883.

The delay is attempted to be excused. It is said action for nonpayment of interest could only be taken by the holders of 1,000 or a majority of bonds outstanding, and that it appears the Texas & Pacific Company had acquired 1,183 of the 1,275 bonds which were outstanding. It is hence contended that complainants' testate could not have been guilty of laches before his death and that the present complainants could not act until the maturity of the bonds in 1902. It is further said that complainants filed a bill in 1908 in the United States District Court in Louisiana to collect the bonds and that until the filing of the answer in that case complainants were ignorant of the merger of the New Orleans and the Texas & Pacific companies or of the suit filed in 1890 to remove the cloud of the asserted lien of the mortgage of the Baton Rouge Company to the Union Trust Company of 1872.

But what complainants' testate knew does not appear and whether he was an original holder or a purchaser, except that it was thought he owned the bonds for 7 or 8 years before his death. And the ignorance of complainants is extraordinary in view of their interest, if it was an attentive interest. If we may suppose ignorance of records we cannot suppose, certainly not indulge, an ignorance of the open activities of the companies and the possession and operation of the railroad by the Texas & Pacific Company.

*412 *[2] It is again said in excuse that it does not appear that the Texas & Pacific Company has changed its position, which it is said is the same as it was in 1881, and that it has even realized the benefit of the trust and so far executed it as to pay before 1890 most of the bonds. Why those bonds were paid or acquired and upon what motive do not appear, and it cannot be said that a company which has been in possession of and operating a great property for many years, having spent large sums of money upon it, in the belief of having a clear and unincumbered right, is inequitably unaffected by a claim against it, asserted as a result of remote transactions with which it had no connection. And certainly it may be urged that it would surprise and strain any condition to be suddenly called upon to pay $107,700, that sum being the amount of principal and interest (7 per cent.) of complainants' demand.

Decree affirmed.

(215 U. S. 412)

UNION TRUST CO. v. GROSMAN et al.

(Argued Dec. 20, 21, 1917. Decided Jan. 7, 1918.)

No. 106.

1. CONTRACTS ⟸101(2) — LEGALITY — LAW GOVERNING.

A guaranty, executed in Illinois, by a married woman domiciled in Texas, whereby she subjected herself and her separate property to liability for her husband's debts, was not enforceable in Texas, where such a guaranty is void and contrary to public policy, though it would have been valid in Illinois, if she had been domiciled there.

2. HUSBAND AND WIFE ⟸159 — SEPARATE PROPERTY — GUARANTY OF HUSBAND'S DEBTS.

A married woman's guaranty, whereby she binds herself and her separate property to secure her husband's debts, is not authorized by the Texas statutes, and, not being authorized, is thereby prohibited, and is against the policy of the state.

3. COURTS ⟸366(14) — FEDERAL COURTS — STATE LAWS AS RULES OF DECISION—VALIDITY OF CONTRACTS.

As a married woman's guaranty, whereby she bound herself and her separate property for the payment of her husband's debts, would have been unenforceable in a Texas state court, it was unenforceable in a federal District Court sitting in Texas.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Suit by the Union Trust Company against Minnie Kahn Grosman and others. A judgment for plaintiff against the defendant named was reversed by the Circuit Court of Appeals for the Fifth Circuit (228 Fed. 610, 143 C. C. A. 132, Ann. Cas. 1917B, 613), and plaintiff brings certiorari. Affirmed.

Mr. William H. Atwell, of Dallas, Tex., for petitioner.

Mr. J. M. McCormick, of Dallas, Tex., for respondents.

*415 *Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit brought by the petitioner in the District Court of the United States for the Northern District of Texas upon two promissory notes made in Chicago by Hiram Grosman and another, and a continuing guaranty executed in the same place by the respondent, Mrs. Grosman, the wife of Hiram Grosman, as part of the same transaction as the earlier note. A decree was rendered for the plaintiff in the District Court, but upon appeal by Mrs. Grosman was reversed as against her by the Circuit Court of Appeals, on the ground that it subjected her separate property to the payment of the demand, contrary to the public policy of the State in which the suit was brought. 228 Fed. 610, 143 C. C. A. 132, Ann. Cas. 1917B, 613. Mrs. Grosman and her husband were domiciled in Texas, as the plaintiff seems to have known, and made the contracts while temporarily in Chicago. We assume for the moment that if she had given the

guaranty in Texas it would have been void, and on the other hand that if she had been domiciled in Illinois when she made her promise she would have been bound. The main question is which law is to prevail.

If this suit were brought in Illinois it would present broader issues. On the one side would be decisions that locus regit actum, and the consideration that when a woman goes through the form of contracting in an independent State, theoretically that State has the present*power to hold her to performance, whatever may be the law of her domicile. It might be urged that the contract should be given elsewhere the effect that the law of the place of making might have insured by physical force. See Michigan Trust Co. v. Ferry, 228 U. S. 346, 353, 33 Sup. Ct. 550, 57 L. Ed. 867. On the other hand it is obvious that practically at least no State would take any steps, if it could, before a breach of an undertaking like this. The contract being a continuing one of uncertain duration the plaintiff had notice that in case of a breach it probably might have to resort to the defendant's domicile for a remedy, as it did in fact. In such a case very possibly an Illinois Court might decide that a woman could not lay hold of a temporary absence from her domicile to create remedies against her in that domicile that the law there did not allow her to create, and therefore that the contract was void. This has been held concerning a contract made with a more definite view to the disregard of the laws of a neighboring State. Graves v. Johnson, 156 Mass. 211, 212, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446.

[1] But when the suit is brought in a court of the domicile there is no room for doubt. It is extravagant to suppose that the courts of that place will help a married woman to make her property there liable in circumstances in which the local law says that it shall be free, simply by stepping across a State line long enough to contract. The Kensington, 183 U. S. 263, 269, 22 Sup. Ct. 102, 46 L. Ed. 190; Armstrong v. Best, 112 N. C. 59, 17 S. E. 14, 25 L. R. A. 188, 34 Am. St. Rep. 473; Bank of Louisiana v. Williams, 46 Miss. 618, 12 Am. Rep. 319; Baer v. Terry, 105 La. 479, 480, 29 South. 886; Palmer v. Palmer, 26 Utah, 31, 40, 72 Pac. 3, 61 L. R. A. 641, 99 Am. St. Rep. 820. See generally, Seamans v. Temple Co., 105 Mich. 400, 63 N. W. 408, 28 L. R. A. 430, 55 Am. St. Rep. 457; Dicey, Conflict of Laws (2d Ed.) 34, General Principle No. II (B) and as to torts, Id. 645, Rule 177. There is nothing opposed to this view in those decisions in which the Courts have enforced similar contracts of women domiciled where the law allowed such contracts to be made. It is one thing*for a Court to decline to be an instrument for depriving citizens belonging to the jurisdiction of their property in ways not intended by the law that governs them, another to deny its offices to enforce obligations good by the lex domicilii and the lex loci contractus against women that the local laws have no duty to protect. International Harvester Co. v. McAdam, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774, 20 Ann. Cas. 614; Merrielles v. State Bank of Keokuk, 5 Tex. Civ. App. 483, 24 S. W. 564. The case of Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241, went to the verge of the law in holding a Massachusetts woman liable in Massachusetts on a contract that she could not have made there, because made by a letter in Maine, although her person remained always within the jurisdiction of Massachusetts. It is safe to conjecture that the decision would have been different if the law of Massachusetts had not been changed before the bringing of the suit so as to allow such contracts to be made. 125 Mass. 377, 383, 28 Am. Rep. 241.

[2] Texas legislation is on the background of an adoption of the common law. If the statutes have not gone so far as to enable a woman to bind her separate property or herself in order to secure her husband's debts, they prohibit it, and no argument can make it clearer that the policy of that State is opposed to such an obligation. It does not help at all to point out the steps in emancipation that have been taken and to argue prophetically that the rest is to come. We have no concern with the future. It has not come yet. The only question remaining, then, is whether the Court below was right in its interpretation of the Texas law. This was not denied with much confidence and we see no sufficient reason for departing from the opinion of the Court below and the intimations of all the Texas decisions that we have seen. Red River National Bank v. Ferguson, (Tex. Civ. App.) 192 S. W. 1088; Shaw v. Proctor (Tex. Civ. App.) 193 S. W. 1104; Akin v. First National Bank of Bridgeport (Tex. Civ. App.) 194 S. W. 610,*612; First State Bank of Tomball v. Tinkham (Tex. Civ. App.) 195 S. W. 880.

[3] If the decree would have been right in a Court of the State of Texas it was right in a District Court of the United States sitting in the same State. Pritchard v. Norton, 106 U. S. 124, 129, 1 Sup. Ct. 102, 27 L. Ed. 104.

Decree affirmed.

(245 U. S. 467)

ROSEN et al. v. UNITED STATES.
PAKAS v. SAME.

(Argued Dec. 12, 1917. Decided Jan. 7, 1918.)

Nos. 365, 438.

1. COURTS ⇐349 — FEDERAL COURTS — CONFORMITY TO STATE PRACTICE—COMPETENCY OF WITNESSES.

A witness, who had been convicted of forgery, was a competent witness on a criminal trial in a federal court, though he would have been incompetent under the law of the state where the trial was had in force when the Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 73) was passed.

2. Post Office ⊂⊃4, 44 — Stealing Mail Matter — Departmental Regulations — "Authorized Depositories of Mail Matter."

Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1125 [Comp. St. 1916, § 10364]) § 194, provides that whoever shall steal, take, or abstract any letters, etc., from an authorized depository of mail matter, or abstract or remove any article from any such letter, shall be fined, etc. Rev. St. § 161 (Comp. St. 1916, § 235), authorizes the head of each Department to prescribe regulations not inconsistent with law for the government of his Department, the conduct of his officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the property appertaining thereto. *Held*, that a regulation of the Post Office Department designating any mail box or other receptacle intended or used for the receipt of any mail matter, on any mail route, as a mail box for the receipt or delivery of mail matter, within the meaning of the Criminal Code, was within the authority conferred upon the Postmaster General, and had the force and effect of law, and thereunder boxes placed by tenants for the receipt of mail in the halls of buildings in which they had their places of business, and in which their mail was deposited, were "authorized depositories of mail matter," within section 194.

3. Post Office ⊂⊃44—Stealing Mail Matter—Private Mail Box.

Mail did not pass out of the custody of the government, and beyond the protection of the law, on being placed in the addressee's privately owned box, constituting an authorized depository, so as to prevent the stealing of such mail constituting a violation of Cr. Code, § 194, where it was stolen before it reached the manual possession of the person to whom it was addressed.

Mr. Justice Van Devanter and Mr. Justice McReynolds dissenting in part.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Theodore S. Rosen and another and Victor Pakas were convicted of offenses, and their convictions were affirmed by the Circuit Court of Appeals for the Second Circuit (237 Fed. 810, 151 C. C. A. 52; 240 Fed. 350, 153 C. C. A. 276), and they bring certiorari. Affirmed.

See, also, 243 U. S. 637, 37 Sup. Ct. 402, 61 L. Ed. 941; 243 U. S. 647, 37 Sup. Ct. 475, 61 L. Ed. 945.

No. 438:

Mr. Terence J. McManus, of New York City, for petitioner Pakas.

Mr. Assistant Attorney General Fitts, for the United States.

No. 365:

Mr. Meier Steinbrink, of Brooklyn, N. Y., for petitioners.

The Attorney General, for the United States.

*468 *Mr. Justice CLARKE delivered the opinion of the Court.

These two cases present precisely the same questions for decision. They were argued and will be decided together.

In No. 365 Rosen and Wagner were indicted in the District Court of the United States for the Eastern District of New York with one Broder for conspiring to buy and receive certain checks and letters which had been stolen from "duly authorized depositories of United States mail matter," and which were known to the accused to have been so stolen. Broder pleaded guilty, and when he was *469 afterwards called as a witness for the government the objection was made that he was not competent to testify for the reason that, as was admitted by the government, he had theretofore pleaded guilty to the crime of forgery in the second degree, in the Court of General Sessions, in the county and state of New York, had been sentenced to imprisonment, and had served his sentence. The objection was overruled and Broder was permitted to testify. This ruling was assigned as error in the Circuit Court of Appeals, where it was affirmed, and it is now assigned as error in this court.

The second claim of error is that the trial court erred in refusing the motion of the defendants to direct a verdict of acquittal on the ground that no crime had been committed, for the reason that the box from which the mail was taken was not "an authorized depository of the mail," and that it was taken therefrom after it had left the possession of the government.

Broder testified, and it was not disputed, that the letters were stolen from boxes placed by tenants for the receipt of mail in the halls of buildings in which they had their places of business. The boxes bore the names of the owners and were not locked, and while mail was deposited in them by the carriers no mail was collected from them.

In No. 438 Pakas and Broder, the same Broder as in No. 365, were jointly indicted for buying and receiving three designated checks, knowing the same to have been stolen from letters which had been deposited in the United States mail for delivery by the post office establishment of the United States. The same questions are presented, raised in the same manner, as in No. 365.

[1] For the validity of the claim that Broder was disqualified as a witness by his sentence for the crime of forgery, the plaintiffs in error rely upon United States v. Reid et al., 12 How. 361, 13 L. Ed. 1023, decided in *470 1851. In that case it was held that the competency of witnesses in criminal trials in United States courts must be determined by the rules of evidence which were in force in the respective states when the Judiciary Act of 1789 was passed, and the argument in this case is, that by the common law as it was administered in New York in 1789 a person found guilty of forgery and sentenced, was thereby rendered incompetent as a witness until pardoned, and that, therefore, the objection to Broder should have been sustained.

While the decision in United States v. Reid, supra, has not been specifically over-

ruled, its authority must be regarded as seriously shaken by the decisions in Logan v. United States, 144 U. S. 263–301, 12 Sup. Ct. 617, 36 L. Ed. 429, and in Benson v. United States, 146 U. S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991.

The Benson Case differed from the Reid Case only in that in the former the witness whose competency was objected to was called by the government while in the latter he was called by the defendant. The testimony of the witness was admitted in the one case but it was rejected in the other, and both judgments were affirmed by this court—however forty years had intervened between the two trials. In the Benson Case, decided in 1891, this court, after determining that the Reid Case was not decisive of it, proceeded to examine the question then before it "in the light of general authority and of sound reason," and after pointing out the great change in the preceding fifty years in the disposition of courts to hear witnesses rather than to exclude them, a change "which was wrought partially by legislation and partially by judicial construction," and how "the merely technical barriers which excluded witnesses from the stand had been removed," proceeded to dispose of the case quite without reference to the common-law practice, which it was claimed should rule it.

Accepting as we do the authority of the later, the Benson Case, rather than that of the earlier decision, we shall dispose of the first question in this case, "in the light of general authority and of sound reason."

In the almost twenty years which have elapsed since the decision of the Benson Case, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain.

Since the decision in the Benson Case we have significant evidence of the trend of congressional opinion upon this subject in the removal of the disability of witnesses convicted of perjury, R. S. 5392 (Comp. St. 1916, § 10295), by the enactment of the federal Criminal Code in 1909 with this provision omitted and section 5392 repealed. This is significant, because the disability to testify, of persons convicted of perjury, survived in some jurisdictions much longer than many of the other common-law disabilities, for the reason that the offense concerns directly the giving of testimony in a court of justice, and conviction of it was accepted as showing a greater disregard for the truth than it was thought should be implied from a conviction of other crime.

Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved.

[2] There remains the claim that the boxes from which the letters were stolen were not "authorized depositories of mail matter," and that, therefore, the stealing of the letters from them did not violate section 194 of the federal Criminal Code, of March 4, 1909 (Comp. St. 1916, § 10364), under which petitioners were indicted.

Section 194 provides that:

"Whoever shall steal, take, or abstract * * * from * * * any * * * *authorized depository for mail matter* * * * any letter * * * or shall abstract or remove from any such letter * * * any article," etc., shall be fined, etc.

Section 161 of the Revised Statutes of the United States provides:

"The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of his officers and clerks, the distribution and performance of its business, and the custody, use, and preservation * * * of the * * * property appertaining thereto." Comp. St. 1916, § 235.

A regulation promulgated as an order of the Post Office Department prior to the dates on which the defendants are charged with having committed the crime for which they were indicted was introduced in evidence and reads as follows:

"Any letter box or other receptacle intended or used for the receipt or delivery of mail matter on any city delivery route * * * or other mail route * * * is hereby designated a letter box for the receipt or delivery of mail matter, within the meaning of the Act of March 4, 1909."

This regulation was obviously intended to supplement section 194 of the Criminal Code, under which the defendants were indicted, by supplying the detail which Congress contemplated should be so supplied when it left undefined "or other authorized depository of mail matter." Such a regulation if fairly within the scope of the authority given by Congress to make it, has the force and effect of law, and violations of it are punishable under the act which it supplements.

That section 194 contemplates that its general language shall be made definite by such order is plain, and that the order is well within the authority conferred upon the Postmaster General by R. S. § 161, cannot be doubted, prescribing, as it does, a rule for

the conduct of carriers in the discharge of their duties in the delivery of mail and for safely preserving the property committed to the care of the Department until it shall reach the persons to whom it is addressed. This satisfies the law. Searight v. Stokes, 3 How. 151–169, 11 L. Ed. 537; Ex Parte Reed, 100 U. S. 13, 22, 25 L. Ed. 538; United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563; Light v. United States, 220 U. S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570; Utah Power & Light Co. v. United States, 243 U. S. 389, 37 Sup. Ct. 387, 61 L. Ed. 791.

[3] The suggestion that when the mail was deposited in a privately owned box it passed out of the custody of the government and beyond the protection of the law does not deserve extended notice. The letters which were stolen did not reach the manual possession of the persons to whom they were addressed, but were taken from an authorized depository over which the Act of Congress, by its express terms, extended its protection until its function had been served.

It results that the judgments of the Circuit Court of Appeals must be

Affirmed.

Mr. Justice VAN DEVANTER and Mr. Justice McREYNOLDS dissent from so much of the opinion as departs from the rule settled in United States v. Reid and Logan v. United States, which they think is in no way modified by what actually was decided in Benson v. United States.

(245 U. S. 392)

UNITED STATES v. MORENA.

(Argued Dec. 13, 1917. Decided Jan. 7, 1918.)

No. 523.

1. ALIENS ⇐68—NATURALIZATION—TIME FOR FILING PETITION.

Naturalization Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (Comp. St. 1916, § 4352), provides that an alien, to be admitted to citizenship, shall declare his intention to become a citizen two years prior to his admission, provided that no alien, who in conformity with the law in force at the date of his declaration has declared his intention to become a citizen, shall be required to renew such declaration, and that not less than two years nor more than seven years after he has made such declaration of intention he shall make and file a petition for citizenship. *Held*, that an alien, who had declared his intention to become a citizen prior to the enactment of such statute, was required to file his petition for citizenship within seven years after the date of such act, but not necessarily within seven years after the date of such declaration, as this construction does not invalidate declarations previously made, or destroy the declarant's rights or privileges, in violation of the proviso of section 4, but merely specifies a time for the assertion of such rights or privileges.

2. ALIENS ⇐68—NATURALIZATION—TIME FOR FILING PETITION.

It was within the power of Congress to limit the time within which aliens, who had declared their intention of becoming citizens prior to the Act of June 29, 1906, should petition for citizenship, though there was no limitation of time when the declaration was made.

3. ALIENS ⇐68—NATURALIZATION—DECLARATIONS OF INTENTION.

Declarations of intention to become citizens, filed prior to the Act of June 29, 1906, were not rendered nugatory by that act.

On a Certificate from the United States Circuit Court of Appeals for the Third Circuit.

Suit by the United States against Antonio Morena to cancel a certificate of naturalization. From a decree dismissing the bill, the government appealed to the Circuit Court of Appeals for the Third Circuit, which certified certain questions to the Supreme Court. Questions answered.

Mr. Assistant Attorney General Fitts, for the United States.

*303 *Mr. Justice McKENNA delivered the opinion of the Court.

This certificate presents for construction certain sections of an Act of Congress passed June 29, 1906, and entitled "An act to establish a Bureau of Immigration and Naturalization, and to provide a uniform rule for the naturalization of aliens throughout the United States." Chapter 3592, 34 Stat. 596.

The pertinent parts of the act are as follows:

"Sec. 4. That an alien may be admitted to and become a citizen of the United States in the following manner, and not otherwise:

"First. He shall declare on oath before a clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States: * * * Provided, however, that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration.

"Second. Not less than two years nor more than seven years after he has made such declaration of intention he *shall make and file, in duplicate a petition" for citizenship. *304

The facts certified are these:

Morena, on December 15, 1905, declared his intention to become a citizen of the United States and on December 21, 1914, filed in the District Court of the United States for the Western District of Pennsylvania a petition for citizenship. On April 6, 1915, the petition was granted and he was admitted to citizenship.

July, 1915, the United States filed in the District Court a bill praying that the order admitting Morena to citizenship be vacated and his certificate be canceled upon the ground, among others, that the certificate was void because it had been granted upon a petition filed more than seven years after he had made his declaration and more than seven years after the passage of the Act of Congress of June 29, 1906.

The District Court dismissed the bill and

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an appeal was taken to the Circuit Court of Appeals for the Third Circuit.

The Circuit Court of Appeals, reciting that there are conflicting decisions upon the construction of the act of Congress, has certified the following questions:

"1. Is a declaration of intention made before the naturalization act of 1906 saved by the proviso of the first paragraph from the seven-year limitation of the second paragraph of section 4 of the act?

"2. Is an alien who has made a declaration of intention before the act of 1906 required to file his petition for citizenship at a time not more than seven years after the date of such declaration of intention?

"3. Is an alien who has made a declaration of intention before the act of 1906 required to file his petition for citizenship at a time not more than seven years after the date of the act?"

395 The question in the case then, to state it succinctly, is whether the act of 1906 is applicable to declarations of intention made prior to its passage and to what extent applicable, if at all.

That the question is susceptible of different answers is indicated by the diversity of views[1] of the courts which have passed upon it.

The cases that have answered the question in the negative have invoked in support of their view the presumption that statutes have prospective operation unless controlled by contrary intention clearly expressed and certain provisions of the act which indicate, it was said, that it was not the intention of Congress to invalidate a declaration of intention made prior to the act "at any future time." And one case adduces the contemporaneous construction of an administrative board.

396 [1] The words especially relied on are those of the proviso in the first paragraph of section 4 and those of section 8 (Comp. St. 1916, § 4364).[2] The latter may be disregarded. It prohibits the naturalization of aliens who cannot speak the English language, if physically able to do so, but preserves prior declarations if made in conformity with law in force at their date. The proviso of section 4 deserves more notice. It is that no alien whose declaration conformed to law when made "shall be required to renew such declaration." To this provision the cases we have summarized—and we refer to them because there is no brief on file for Morena—have ascribed the direct influence of excluding declarations theretofore made.

We cannot assent to that view or to the view that if a limitation be put upon the time to complete the declaration by the final application for citizenship it can be construed as invalidating the declaration. It is no destruction of a right or privilege to limit the time for its assertion, and the cited provision does no more. Section 4 prescribes a time for completing the declaration, a time so liberal, regarding the privilege granted and the reason for granting and seeking it, as not to be considered in any just appreciation of words as even a limitation of it. And there was appealing purpose. There were reasons for diligence and reasons for giving to all declarations the same duration.

It is to be remembered that the resolution of the alien to change his allegiance is expressed in his declaration. The interval of time between it and admission to citizenship is the precaution of the law to assure of qualification. In the old law this interval could not be less than two years, and so in the new law. Aside from this there was no other prescription in the old law of the time that should* elapse between the declaration* and the final petition. The minimum of time was preserved in the new law, but there was a maximum time prescribed for the completion of the declaration, and unless this was made applicable to "old-law declarations" as well as to "new-law declarations," the act of 1906 would not do what its title declares it was intended to do—"provide a uniform rule for the naturalization of aliens throughout the United States."

*397

[2] A limitation of time even upon the assertion of a right theretofore having no limitation upon its assertion, or a different limitation, is not infrequent, and its legality is unquestionable if a time reasonable, in view of the subject-matter, be given. Wilson v. Iseminger, 185 U. S. 55, 22 Sup. Ct. 573, 46 L. Ed. 804; Soper v. Anderson, 201 U. S. 359, 26 Sup. Ct. 473, 50 L. Ed. 788; Blinn v. Nelson, 222 U. S. 1, 32 Sup. Ct. 1, 56 L. Ed. 65, Ann. Cas. 1913B, 555. See, also, Sohn v. Waterson, 17 Wall. 596, 21 L. Ed. 737; Union Pacific Railroad Co. v. Laramie Stockyards Co., 231 U. S. 190, 34 Sup. Ct. 101, 58 L. Ed. 179. This being the power of Congress, there were, as we have seen, promptings to its exercise.

The act, therefore, does not invalidate old

[1] The cases deciding that the seven-year limitation is applicable to prior declarations are as follows:

In re Goldstein et al. (D. C.) 211 Fed. 163; Yunghauss v. United States (C. C. A. 2d Cir.) 218 Fed. 168, 134 C. C. A. 67, sustaining (D. C.) 210 Fed. 545; Harmon v. United States (C. C. A. 1st Cir.) 223 Fed. 425, 139 C. C. A. 19, affirming decree of District Court; and In re Lee (D. C.) 236 Fed. 987.

The cases contra are:

Eichhorst v. Lindsey (D. C.) 209 Fed. 708; In re Anderson (D. C.) 214 Fed. 662. And to like effect are: United States v. Lengyell (D. C.) 220 Fed. 720; In re Valhoff (D. C.) 238 Fed. 405; Linger v. Balfour (Tex. Civ. App.) 149 S. W. 795.

[2] "Sec. 8. That no alien shall hereafter be naturalized or admitted as a citizen of the United States who cannot speak the English language: Provided, that this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States: And provided further, that the requirements of this section shall not apply to any alien who has prior to the passage of this act declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration: Provided further, that the requirements of section eight shall not apply to aliens who shall hereafter declare their intention to become citizens and who shall make homestead entries upon the public lands of the United States and comply in all respects with the laws providing for homestead entries on such lands."

declarations. It only specifies a time for their realization, a time ample to consider and estimate the value of realization, the extent of its duty and responsibility, a time determined and applied, therefore, upon full consideration; and we are not impressed with the argument that would assign an eternity of duration to prior declarations.

[3] The first question certified would seem to be addressed to the view that the act of 1906 made nugatory declarations theretofore filed. This, however, is not urged by the government and we consider it untenable for the reasons which we have already expressed. Such has been the ruling of the cases.

We therefore answer the first and second questions in the negative and the third in the affirmative.

And it is so ordered.

(245 U. S. 446)

CITY OF CINCINNATI v. CINCINNATI & HAMILTON TRACTION CO. et al.

(Argued Jan. 24, 25, 1916. Restored to Docket for Reargument June 12, 1916. Reargued Oct. 26, 27, 1916. Restored to Docket for Second Reargument May 7, 1917. Second Reargument Oct. 17, 18, 1917. Decided Jan. 7, 1918.)

No. 10.

1. INJUNCTION ⇐⇒85(2) — ENFORCEMENT OF ORDINANCES—ON GROUND OF INVALIDITY.

The city council of the city of Cincinnati adopted an ordinance reciting that certain street car companies were operating cars on streets under grants which had expired, or for which the companies never had grants, and granting permission to use such streets from day to day only on terms and conditions therein specified, and providing that the operation of cars on such streets should be deemed an acceptance of the ordinance, and that, if the company refused or failed to comply therewith, the city solicitor should be, and was thereby, authorized and directed to take legal proceedings to enforce the ordinance or to require such companies to abandon the streets and remove their tracks. The companies, which were Ohio corporations, filed a bill in the United States District Court to have the ordinance declared null and void and its enforcement enjoined, alleging that they had contract rights in the streets as therein set forth, that the ordinance repudiated the contract grants and impaired or attempted to impair the obligations of such contracts, and that the enforcement of the ordinance would deprive plaintiffs of their property without due process of law and without compensation, in violation of the Constitution of the United States, and that the city, under the pretended authority of the ordinance, would, unless restrained, interfere with the maintenance and operation of their lines, and would cause great and irreparable injury to them. *Held*, that the jurisdiction of the District Court was properly invoked, and it had power to adjudicate the issues presented, though it was claimed that the ordinance authorized no steps to enforce it prior to legal proceedings to determine the parties' rights.

2. COURTS ⇐⇒385(7) — SUPREME COURT — REVIEW OF DECISIONS OF DISTRICT COURTS.

On an appeal from a decree of the District Court in a suit to enjoin the enforcement of an ordinance on the ground that it violated the federal Constitution, the cause was reviewable upon both the law and the facts, and such relief will be granted as is proper under the circumstances disclosed at the time the case is decided.

3. INJUNCTION ⇐⇒85(2) — ENFORCEMENT OF ORDINANCES—ON GROUND OF INVALIDITY.

Where, on the hearing in the Supreme Court on an appeal from a decree in a suit to enjoin the enforcement of an ordinance imposing terms and conditions on the operation of street cars and providing that the continued operation of cars should be deemed an acceptance of such ordinance, it is expressly represented and admitted by counsel for the city that the ordinance authorizes no action except proceedings in court, and can have no effect prior to a judicial determination, and that no other steps can be taken or will be attempted to enforce the ordinance, and that noncompliance therewith will not injuriously affect the street car companies, the decree will be modified to exclude any finding concerning the validity of the franchises, or rights claimed by the companies, and to limit the affirmative relief to an injunction restraining the city from taking any steps to enforce the ordinance except necessary court proceedings prior to final adjudication of the controversies involved, and from ever setting up a claim that the continued operation of the cars pending such final adjudication amounted to an acceptance of the ordinance or prejudiced the rights of the companies.

Mr. Justice Clarke and Mr. Justice Brandeis, dissenting.

Appeal from the District Court of the United States for the Southern District of Ohio.

Suit by the Cincinnati & Hamilton Traction Company and another against the City of Cincinnati. From a decree in favor of complainants, defendant appeals. Modified and affirmed.

Messrs. Constant Southworth, Charles A. Groom and Walter M. Schoenle, all of Cincinnati, Ohio, for appellant.

Messrs. Lawrence Maxwell, Alfred C. Cassatt, Ellis G. Kinkead, and George H. Warrington, all of Cincinnati, Ohio, for appellees.

*448 *Mr. Justice McREYNOLDS delivered the opinion of the court.

*449 The Cincinnati & Hamilton Traction Company is owner and the Ohio Traction Company lessee and operator of an electric railway line extending from Vine street, Cincinnati, northward along Erkenbrecher avenue, Carthage pike, Wayne avenue, Springfield pike, etc., some five or six miles to the city limits. It was built in sections or links under grants, ordinances, permissions, contracts, etc., whose validity, effect, and continuation have given rise to conflicting contentions, based primarily upon different interpretations of statutes and laws of Ohio. April 21, 1914, the city council passed the ordinance copied in the margin.[1]

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[1] An Ordinance No. —.

Specifying the terms and conditions upon which the Cincinnati & Hamilton Traction Company and the Ohio Traction Company, as its lessee, may operate street cars on certain streets of the city, and authorizing the city solicitor to take legal proceedings to enforce this ordinance.

Whereas, the Ohio Traction Company, as lessee of the Cincinnati & Hamilton Traction Company,

*450 *Shortly before the ordinance was to become effective, appellee companies—both Ohio corporations—filed a bill in the United States District Court, Southern District of Ohio, wherein they set out their interest in the railway, the various grants, ordinances, contracts, etc., under which it had been constructed, together with rights claimed. It then alleged:

*451 "Notwithstanding the contract rights of plaintiffs as hereinabove set forth, the defendant, the city of Cincinnati on or about the 21st day of April passed * * * [the ordinance copied ante]. In and by said ordinance said city repudiated the grants aforesaid and thereby impaired and attempted to impair the obligations of the aforesaid contracts and each of them, in violation of article 1, § 10, of the Constitution of the United States, and the enforcement of said ordinance will deprive plaintiffs of their property without due process of law and without compensation, in *violation of the Constitution of the United States, and particularly article 14 in amendment thereto." "The defendant, the city of Cincinnati, by its agents and employés, under the pretended authority of the ordinance of the city of Cincinnati aforesaid, threaten to and will, unless restrained by order of this court, interfere with and prevent the maintenance and operation by plaintiffs of said electric street railway over the routes described in the grants aforesaid and under authority and in accordance with the terms and conditions thereof, which will cause great and irreparable injury to these plaintiffs for which they have no adequate remedy at law."

*452

It prayed:

"That the court decree said ordinance passed April 21, 1914, to be null and void, and that the defendant, the city of Cincinnati, and its officers, agents, and employés, be enjoined by a restraining order, preliminary injunction, and final decree, from interfering or attempting to interfere in any way with the maintenance and operation, or either, by the plaintiffs, or either of them, of said line of electric street railway or any part thereof, and from enforcing or attempting or taking any steps to enforce the pretended ordinance of the city of Cincinnati

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is now operating street cars on certain streets of the City of Cincinnati; and

Whereas, on portions of the streets so occupied and used alleged grants have heretofore expired and on other portions, including that part of Carthage pike formerly known as Springfield pike there never have been any grants and said companies have no longer any right to occupy the same: Now, therefore,

Be it ordained by the council of the city of Cincinnati, state of Ohio:

Section 1. That upon the terms and conditions in this ordinance specified, and upon no other, permission is hereby granted to said the Cincinnati & Hamilton Traction Company and to the Ohio Traction Company, as its lessee, to continue from day to day only from the date on which this ordinance becomes effective to operate street cars on the following streets, to wit:

Erkenbrecher avenue from Vine street and Erkenbrecher avenue to Carthage avenue; thence north on Carthage avenue and Carthage pike (formerly called Main street) to Lockland avenue, excepting the portions in the municipalities of St. Bernard and Elmwood place; thence north on Lockland avenue and Anthony Wayne avenue to the northern boundary of the city through the district formerly known as Hartwell; and also from the intersection of Anthony Wayne and Woodbine (formerly called Rural) avenues westwardly over Woodbine avenue and over De Camp avenue to Carthage (formerly called Springfield) pike; thence north on said Carthage pike to the northern boundary of the city in the district formerly known as Hartwell; on the tracks now existing in said streets.

Sec. 2. On and after the taking effect of this ordinance the operation of street cars on said streets shall be subject to the same terms and conditions as existed under the prior alleged grants, if any, so far as not inconsistent with the provisions of this ordinance, and shall be subject to the following conditions:

A. That the necessary arrangements be made to operate cars from the aforesaid northern boundary of the city over said streets to Sixth and Walnut streets in substantially the same manner and with substantially the same frequency as now, and as a continuous line, and that street cars shall be operated.

B. That for a continuous trip between any two points between the aforesaid northern boundary of the city and Sixth and Walnut streets the fare for each passenger shall not exceed five (5c.) cents except that for children under ten years of age the fare shall not exceed three (3c.) cents, and children in arms shall be carried free.

C. That the necessary arrangements be made so that without additional charge passengers on street cars operated on the streets mentioned in section 1, and passengers on street cars operated by the Cincinnati Traction Company may transfer to and from either to the other; but transfers given hereunder shall be good only on the first street car available and on one not going in a substantially parallel and opposite direction.

D. That during the operation of this ordinance the director of public service may make from time to time further and reasonable regulations as to the character, mode, manner and frequency of service and maintenance of the street cars and tracks.

Sec. 3. Should it be adjudged that on only a portion or portions of the said streets now occupied by the tracks of said the Cincinnati & Hamilton Traction Company the right to operate street cars has never been granted, or if granted has ceased to exist, then this ordinance shall be construed to forbid the further operation of street cars on such portions except on the compliance by the said the Cincinnati & Hamilton Traction Company and the Ohio Traction Company and each of them with all of the terms and conditions specified in this ordinance.

Sec. 4. The continuing by said companies, or either of them, to operate street cars on said streets shall be deemed an acceptance of this ordinance and of all the terms hereof.

Sec. 5. In case the Cincinnati & Hamilton Traction Company and the Ohio Traction Company, or either of them, refuse or fail to comply with the terms of this ordinance upon the taking effect hereof, the city solicitor shall be, and he is hereby authorized and directed to take such legal proceedings as may be proper and necessary to enforce the provisions of this ordinance, or to require the said companies and each of them to abandon the streets covered by this ordinance, and to remove their tracks from said streets.

Sec. 6. Should the Cincinnati & Hamilton Traction Company and the Ohio Traction Company, or either of them, surrender or transfer all or any part of their rights, if any, to operate street cars over all or any part of the aforesaid streets, to the Cincinnati Street Railway Company, or to the Cincinnati Traction Company, either or both, this ordinance shall apply also to the two last named companies, either or both as the case may be.

Sec. 7. Should any part of this ordinance be adjudged invalid, such adjudication shall not affect the validity of the remainder of this ordinance.

Sec. 8. This ordinance and any rights granted or acquired hereunder are subject to repeal, amendment, or revocation in whole or in part at any time at the will of council.

Sec. 9. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

aforesaid, or any part thereof, and from taking any action which would alter, impair, limit, or destroy the right and title of plaintiffs under their said grants and contracts."

Answering, the city denied jurisdiction of the court; that the bill stated a cause of action; that complainant companies had any right to operate a railway on Erkenbrecher avenue or over portions of Carthage pike or over streets and roads formerly in the village of Hartwell, etc., and further:

"The defendant denies that under the authority of said ordinance, or otherwise, it will, unless restrained by this court, interfere with or prevent the maintenance and operation by the plaintiffs, or either of them, of said electric street railway, or cause any damage or injury of any kind to the plaintiffs, or either of them, and defendant avers that the enforcement of said ordinance is only authorized and will only be sought by and through an order of a court of competent jurisdiction first had and obtained, and after a hearing on due and reasonable notice to all interested parties."

Having finally heard the cause upon a record presenting many difficult problems arising under local laws, the trial court sustained its jurisdiction, adjudicated in favor of the companies in respect of the grants, ordinances, and contracts relied upon, and granted an injunction as prayed. The city has appealed and the questions presented below have again been elaborately discussed before us.

There is radical disagreement concerning interpretation and effect of the ordinance of April 21st. Counsel for appellees maintain:

"The city does not seek to eject plaintiffs from the occupancy of any particular part of the streets in question, but undertakes by the ordinance complained of to require plaintiff, in disregard of its rights under existing contracts, some of which the ordinance assumes may be good, either to abandon its line over the route in question, or to operate it on a day-to-day license and at a reduced fare." "The question therefore is not whether there is one bad link, but whether there is one good link, because, if there is a good link, the ordinance impairs its obligation."

"All parts of the ordinance go into operation at once at 'the earliest period allowed by law,' which is 30 days after it is filed with the mayor. The day the ordinance takes effect it gives to passengers the right to a reduced fare and transfers; and at the same time the companies, by operating on the said streets, are deemed to have accepted all the terms of the ordinance, which apply to all the links. This operation of the ordinance, and these results, do not await any litigation or any adjudication of any kind."

"While section 5 authorizes and directs the city solicitor in the event of noncompliance to take the proper legal proceedings to enforce the ordinance, they might not be taken, and the operation of the ordinance does not await the beginning or outcome of such proceedings, nor is the city precluded by section 5 from enforcing it in any other way, by tearing up the tracks or otherwise."

In the brief for appellant it is said:

"These two provisions [sections 3 and 5] clearly indicate that the rights of the city must be and will be established only after an orderly procedure through the courts, and it was contemplated and directed that this should be through legal proceedings brought by the solicitor." "The fair reading of section 4 is that the operation of the cars over the portion of the line where it is adjudged appellees have no franchise shall be an acceptance of the ordinance."

During the oral argument here counsel for the city expressly affirmed that, properly construed and except as it authorized proceedings in court, the ordinance could have no effect prior to a judicial determination of the parties' rights; that until this was had no other steps could be taken, or would be attempted, to enforce the ordinance, and noncompliance therewith would in no wise injuriously affect the appellees; and, moreover, that the above-quoted paragraph from the answer was intended to express that view.

[1] We think the jurisdiction of the court below was properly invoked, and that it had power to adjudicate the issues presented. Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; Owensboro v. Cumberland Telephone Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. Ed. 1389.

[2] As the cause is here upon appeal, it is subject to review upon both law and facts; we should grant the relief proper under circumstances now disclosed. Wiscart v. Dauchy, 3 Dall. 321, 327, 1 L. Ed. 619; Capital Traction Co. v. Hof, 174 U. S. 1, 37, 19 Sup. Ct. 580, 43 L. Ed. 873; Daniell's Ch. Pl. & Pr. (5th Ed.) *1484, *1489; Elliott v. Toeppner, 187 U. S. 327, 334, 23 Sup. Ct. 133, 47 L. Ed. 200.

[3] The answer failed to set out with adequate precision, if at all, what counsel now claim were the powers of the city's officers under, and its purposes in respect of, the ordinance; otherwise a different result might have been reached in the trial court. Accepting and, for all purposes of the cause, relying upon representations and admissions of counsel for the city as above detailed, we conclude that the decree below should be modified so as to exclude from it any finding concerning validity of franchises involved or rights claimed by appellees and to limit the affirmative relief granted to an injunction restraining the city (1) from taking any steps to enforce the ordinance (except institution of necessary court proceedings) prior to final adjudication of controversies involved, and (2) from ever setting up a claim that appellees' continued operation of cars over streets now used pending such final adjudication does or will amount to an acceptance of the ordinance by appellees, or in any way prejudice their rights.

As modified, the decree below is affirmed. Appellant will pay all costs.

Modified and affirmed.

Mr. Justice CLARKE, dissenting.

The opinion and and decree announced in this case seem to me so unsupported by the record and so unusual in character that I am impelled, reluctantly, to state my reasons for dissenting from both.

The court finds that the District Court had

and that this court now has jurisdiction in the case such as to warrant permanently enjoining the city of Cincinnati in the two respects stated in the opinion, and with instructions to limit its decree to such an injunction the case is remanded to the District Court, leaving open for further litigation the validity and effect of the ordinance of April 21, 1914 (copied in the margin of the court's opinion) and of prior grants claimed by the plaintiffs.

* Assuming, as we must, that if the District Court had jurisdiction of the cause, it had authority to go forward and completely dispose of the controversy, this action taken by the majority of the court seems to me to be anomalous if not unprecedented.

But my dissent goes also upon the more fundamental ground that the District Court did not have, and that this court does not now have, any jurisdiction over the case, for reasons which I stall state as briefly as I may.

The bill alleges that the plaintiffs and the defendant are all Ohio corporations, and after setting out in detail the grants which had been made to the plaintiffs over the various routes described in the ordinance of April 21, 1914, it continues in paragraphs 13 and 14, as follows:

"(13) Notwithstanding the contract rights of plaintiffs as hereinabove set forth, the defendant, the city of Cincinnati, on or about the 21st day of April, 1914, passed a certain alleged ordinance entitled, "An Ordinance No. ——— specifying the terms and conditions upon which the Cincinnati and Hamilton Traction Company and the Ohio Traction Company, as its lessee, may operate street cars on certain streets of the city, and authorizing the city solicitor to take legal proceedings to enforce this ordinance," a copy of which is hereto attached, marked Exhibit A, and made a part hereof. In and by said ordinance said city repudiated the grants aforesaid, and thereby impaired and attempted to impair the obligations of the aforesaid contracts and each of them, in violation of article 1, § 10, of the Constitution of the United States, and the enforcement of said ordinance will deprive plaintiffs of their property without due process of law and without compensation, in violation of the Constitution of the United States and particularly article 14 in amendment thereof."

*457 "(14) The defendant, the city of Cincinnati, by its agents and employés, under the pretended authority of the ordinance of the city of Cincinnati aforesaid, threatens to and will, unless restrained by the order of this court, interfere with and prevent the maintenance and operation by plaintiffs of said electric street railway over the routes described in the grants aforesaid and under authority and in accordance with the terms and conditions thereof, which will cause great and irreparable injury to these plaintiffs for which they have no adequate remedy at law."

Since there is no diversity of citizenship, there must be found in these two paragraphs, if anywhere in the bill, the assertion of federal right sufficient to give jurisdiction to the district court.

Confining our attention to paragraph 13. It seems to me very clear that this paragraph simply alleges that the city passed the ordinance copied in the margin of the court's opinion, and thereby "authorized the city solicitor to take legal proceedings to enforce it." This allegation is emphasized by making the ordinance, by reference, a part of the bill, which in section 5 specifically provides that, if the plaintiffs shall fail or refuse to comply with the terms of the ordinance, "the city solicitor be and he hereby is authorized and directed to take such legal proceedings as may be proper and necessary to enforce the provisions of this ordinance." or to require the company to remove their tracks from the streets. The making of this declaration by ordinance, it is averred, impaired the obligation of the grants, the contract rights, which the plaintiffs claim they had when the ordinance was passed. No action other than the passing of the ordinance had been taken by the city when the bill for injunction was filed; in fact, the ordinance did not become effective for 30 days after the bill was filed.

It has been decided by this court, within recent years, at least twice, that for a municipal corporation to thus assert by resolution or by ordinance that a claim of contract right against it is not valid and to direct its legal representative to test in the courts the right so asserted neither impairs the obligation of the contract assailed nor deprives the persons claiming under it of their property without due process of law. *458

In Des Moines v. Des Moines City Railway Co., 214 U. S. 179, 29 Sup. Ct. 553, 53 L. Ed. 958, it was asserted as a ground of federal jurisdiction that a resolution of the Des Moines city council was a law which impaired the obligation of the contract which the railway company claimed to have with the city, and that, if given effect, it would deprive the company of its property without due process of law. The Circuit Court overruled an objection to its jurisdiction and granted an injunction against the enforcement of the resolution. This resolution, in terms, ordered the railway companies to remove their tracks, poles, and wires from the streets, and in case of failure to do so within a time stated, the city solicitor was "instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the resolution." In a unanimous decision, this court reverses the lower court, saying:

"We are of opinion that this is not a law impairing the rights alleged by the appellee, and therefore that the jurisdiction of the Circuit Court cannot be maintained. Leaving on one side all questions as to what can be done by resolution as distinguished from ordinance under Iowa laws, we read this resolution as simply a denial of the appellee's claim and a direction to the city solicitor to resort to the courts if the appellee shall not accept the city's views. The resolution begins with a recital that questions as to the railway company's rights have been raised, and ends with a direction to the city solicitor to take action to enforce the city's position. The only action to be expected from a city solicitor is a suit in court. We cannot take it to have been within the meaning of the direction to him that he should take a posse and

begin to pull up the tracks. The order addressed to the companies to remove their tracks was simply to put them in the position of disobedience, as ground for a suit, if the city was right."

Since the court "lays on one side" the distinction between a resolution and an ordinance, this decision seems clearly to rule the case at bar.

Again, in Defiance Water Co. v. Defiance, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140, a claim to federal jurisdiction was based on a resolution of an Ohio city council which it was claimed impaired the obligation of a contract which the water company had with the city. But this court, while finding that the record disclosed the city as claiming that the water company did not have a valid contract with the city and that a suit to test its validity had been instituted in a state court by the city solicitor, nevertheless held that the action so taken was not obnoxious to the prohibition of the federal Constitution, and the case was dismissed for want of jurisdiction.

The ordinance involved in this case, like the one in the Des Moines Case, having regard to all of its provisions, even including its title, seems very clearly to be no more than an assertion on the part of the city council of what it considers the rights of the city to be with authority and direction to the city solicitor to resort to the courts to test the validity of the claims made if they are denied by the traction companies, and the cases cited are authority sufficient, if indeed authority be needed, to justify the conclusion that such an expression of purpose to resort to the courts of the country and to abide by their decision is not a law impairing the obligation of a contract, within the meaning of the Constitution.

A careful reading of this ordinance, especially of sections 3 and 5, makes it convincingly clear that the writer of it must have had in mind the decisions which we have cited,* and that he has attempted, successfully it seems to me, to keep clearly within the law established by them.

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The allegation in paragraph 14 of the bill that the city and its agents and employés threaten to interfere with and prevent the operation of the street railways states no invasion of a federal right, unless such action is threatened under warrant of an invalid ordinance. If the ordinance is valid, it can add nothing to the other allegations of the bill, and, if invalid, it is futile.

It is impossible for me, also, to share in the interpretation given to section 4 of the ordinance, which makes it the subject of special injunctive relief. The section provides that the continuing to operate cars on the streets in controversy "shall be deemed an acceptance of this ordinance and of all of the terms thereof." Considering the ordinance as a whole, and not as if it were a group of independent provisions, if this section has any meaning at all, it cannot be more than an assertion on the part of the city, that if the companies, without formal acceptance, but without protest, should continue to operate the lines of railway, such action would be taken as implying an acceptance of the burdens as well as of the benefits of the ordinance. But such an implication of acceptance certainly could not prevail in any court against an assertion to the contrary by the companies.

If the companies really have contract rights in the streets, as they claim that they have, such rights cannot be impaired by the exercise of them, and if they do not have such rights, this declaration of the section cannot harm them, and therefore it cannot properly serve as a basis, either for jurisdiction or for an injunction.

Thus considering the question of jurisdiction as depending wholly upon the form of the allegations of the bill, it seems very clear that the federal courts are without jurisdiction in the case.

If, now, we consider the answer in the case, we shall find the strongest possible confirmation of the conclusion just arrived at. *461

The first paragraph of the answer denies the jurisdiction of the court and asserts that it is apparent on the face of the bill that it seeks to prevent the city of Cincinnati from resorting to the state courts for a decision of the controversy, and the answer to paragraph 13 of the bill, quoted above, is a special denial. Then follows this paragraph of the answer:

"(13) The defendant denies that under authority of said ordinance, or otherwise, it will, unless restrained by this court, interfere with or prevent the maintenance and operation by the plaintiffs, or either of them, of said electric street railway, or cause any damage or injury of any kind to the plaintiffs, or either of them, and defendant avers that the enforcement of said ordinance is only authorized and will only be sought by and through an order of a court of competent jurisdiction first had and obtained, and after a hearing on due and reasonable notice to all interested parties."

It is difficult to imagine how a clearer statement than this could be framed on the part of the city, that the enforcement of the ordinance is only authorized and will only be sought by and through an order of a court of competent jurisdiction.

When to all this we add that not one word of evidence was offered on the trial tending to sustain the allegations of paragraph 14 of the bill that the defendant threatened and intended to interfere with and unless enjoined would prevent the operation of the street railways, it becomes very clear that we have before us an utterly unsubstantial and purely paper attempt to carry into the federal courts a case which, because of its "many difficult problems arising under local laws," is peculiarly one for first decision in the state courts, with the right of revision in this court as provided for by law. *462

* It has been for many years the constant effort, repeatedly declared, of Congress and

of this court, to prevent the evasion of the Constitution and laws of the United States by bringing into the federal courts controversies between citizens of the same state (Bernard's Township v. Stebbins, 109 U. S. 341, 350, 3 Sup. Ct. 252, 27 L. Ed. 956), and it is because of my conviction that the integrity of the jurisdiction of the federal courts can best be preserved by refusing to extend it to doubtful cases that this dissent is written thus at length. My conclusion is that the plea of the defendant to the jurisdiction of the District Court should have been sustained on the face of the bill, but that, if doubt were entertained as to this, then when the plaintiffs rested without attempting to prove their allegations of intended interference by the city with the operation of the roads, it became the duty of the District Court to proceed no further, but to dismiss the case, for the reason that it did not really and substantially involve a controversy properly within the jurisdiction of the court. Judicial Code, § 37 (Act March 3, 1911, c. 231, 36 Stat. 1098 [Comp. St. 1916, § 1019]).

There remains to be added only this: That, even if agreement were possible with the conclusion that the court has jurisdiction in the case, nevertheless I could not agree with the judgment rendered, for the reason that it seems to me very clear that the principal grant on which the plaintiffs rely, that from the county commissioners dated March 23, 1889, expired on March 23, 1914, before the ordinance complained of was passed. My reason for this conclusion is that the Supreme Court of Ohio in 1905 held the Ohio act of 1883 (80 Ohio Laws, p. 173) invalid because in violation of section 26 of article 2 of the state Constitution. Railway Co. v. Railway Co., 5 Ohio Cir. Ct. R. (N. S.) 583, affirmed 73 Ohio St. 364, 78 N. E. 1122. This is conclusive on all federal courts. If unconstitutional in 1905, the act was unconstitutional in 1889, when the grant by the commissioners was made, and therefore sections 3439 and 2502 of the Revised Statutes of Ohio of 1880 were then in force and imposed the limitation of 25 years on all grants by county commissioners. The doctrine that rights acquired before cannot be impaired by a change of judicial decision has no application to this case, for the reason that there was no settled principle of decision in Ohio in cases such as we have here, where counties were concerned, prior to 1889, or at any other time, but, as the decisions abundantly prove each case as it arose was disposed of on its own peculiar facts, e. g., State v. Powers, 38 Ohio St. 54 (1882), overruled in State ex rel. v. Shearer, 46 Ohio St. 275, 20 N. E. 335 (1889).

For the reasons here given and upon the authorities cited, my conclusion is that the decree of the District Court should be reversed, and the case remanded, with instructions to dismiss the bill for want of jurisdiction.

Mr. Justice BRANDEIS concurs in this dissent.

(245 U. S. 418)

TOWNE v. EISNER, Collector of United States Internal Revenue for the Third District of the State of New York.

(Argued Dec. 12, 1917. Decided Jan. 7, 1918.)

No. 563.

1. COURTS ⟸385(6) — SUPREME COURT — REVIEW OF DECISIONS OF DISTRICT COURT.

Where plaintiff was compelled to pay an income tax on stock dividends and contended that the statute as construed by the District Court and administered was unconstitutional, the constitutionality of the statute, and not merely its construction, was involved so as to authorize plaintiff to take the case to the Supreme Court on writ of error, though the statute and the constitutional amendment both use the word "income," as the word does not necessarily mean the same thing in both places, and the government's refusal to adhere to the construction by virtue of which it has taken plaintiff's money, if such construction would make the act unconstitutional, cannot defeat plaintiff's right to such review.

2. COURTS ⟸385(6) — SUPREME COURT — REVIEW OF DECISIONS OF DISTRICT COURT.

On writ of error to review a decision of the District Court on the ground that the constitutionality of a statute is involved, the construction of the statute as well as its constitutionality are open to consideration in the Supreme Court.

3. INTERNAL REVENUE ⟸7 — INCOME TAX — STOCK DIVIDENDS—"CAPITAL"—"INCOME."

A stock dividend is "capital" for the purposes of the Income Tax Act (Act Oct. 3, 1913, c. 16, 38 Stat. 114), and is not taxable as "income," as the interests of the stockholders are not thereby increased; the only change being in the evidence representing that interest.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Capital; Income.]

In Error to the District Court of the United States for the Southern District of New York.

Action by Henry R. Towne against Mark Eisner, Collector of United States Internal Revenue for the Third District of the State of New York. Judgment for defendant (242 Fed. 702), and plaintiff brings error. Reversed.

Messrs. Charles E. Hughes, George Welwood Murray, Charles P. Howland, and Louis H. Porter, all of New York City, for plaintiff in error.

Mr. Solicitor General Davis, of Washington, D. C., for defendant in error.

* Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit to recover the amount of a tax paid under duress in respect of a stock dividend alleged by the Government to be income. A demurrer to the declaration was sustained by the District Court and judgment was entered for the defendant. 242 Fed. 702. The facts alleged are that the corporation voted on December 17, 1913, to transfer $1,500,000 surplus, being profits earned before January 1, 1913, to its

capital account and to issue fifteen thousand shares of stock representing the same to its stockholders of record on December 26; that the distribution took place on January 2, 1914, and that the plaintiff received as his due proportion four thousand one hundred and seventy-four and a half shares. The defendant compelled the plaintiff to pay an income tax upon this stock as equivalent *425 to $417,450 income in cash. The District Court held that the stock was income within the meaning of the Income Tax of October 3, 1913, c. 16, Section II; A, subdivisions 1 and 2; and B. 38 Stat. 114, 116, 167. It also held that the Act so construed was constitutional, whereas the declaration set up that so far as the Act purported to confer power to make this levy it was unconstitutional and void.

[1] The Government in the first place moves to dismiss the case for want of jurisdiction, on the ground that the only question here is the construction of the statute not its constitutionality. It argues that if such a stock dividend is not income within the meaning of the Constitution it is not income within the intent of the statute, and hence that the meaning of the Sixteenth Amendment is not an immediate issue, and is important only as throwing light on the construction of the Act. But it is not necessarily true that income means the same thing in the Constitution and the Act. A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. Lamar v. United States, 240 U. S. 60, 65, 36 Sup. Ct. 255, 60 L. Ed. 526. Whatever the meaning of the Constitution, the Government had applied its force to the plaintiff, on the assertion that the statute authorized it to do so, before the suit was brought, and the Court below has sanctioned its course. The plaintiff says that the statute as it is construed and administered is unconstitutional. He is not to be defeated by the reply that the Government does not adhere to the construction by virtue of which alone it has taken and keeps the plaintiff's money, if this Court should think that the construction would make the Act unconstitutional. While it keeps the money it opens the question whether the Act construed as it has construed it can be maintained. The motion to dismiss is overruled. Billings v. United States, 232 U. S. 261, 276, 34 Sup. Ct. 421, 58 L. Ed. 596; B. Altman & Co. v. United States, 224 U. S. 583, 596, 597, 32 Sup. Ct. 593, 56 L. Ed. 894. *426

[2, 3] The case being properly here, however, the construction of the act is open, as well as its constitutionality if construed as the Government has construed it by its conduct. Billings v. United States, ubi supra. Notwithstanding the thoughtful discussion that the case received below we cannot doubt that the dividend was capital as well for the purposes of the Income Tax Law as for distribution between tenant for life and remainderman. What was said by this Court upon the latter question is equally true for the former. "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. * * * The proportional interests of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones." Gibbons v. Mahon, 136 U. S. 549, 559, 560, 10 Sup. Ct. 1057, 34 L. Ed. 525. In short, the corporation is no poorer and the stockholder is no richer than they were before. Logan County v. United States, 169 U. S. 255, 261, 18 Sup. Ct. 361, 42 L. Ed. 737. If the plaintiff gained any small advantage by the change, it certainly was not an advantage of $417,450, the sum upon which he was taxed. It is alleged and admitted that he receives no more in the way of dividends and that his old and new certificates together are worth only what the old ones were worth before. If the sum had been carried from surplus to capital account without a corresponding issue of stock certificates, which there was nothing in the nature of things to prevent, we do not suppose that any one would contend that the plaintiff had received an accession to his income. Presumably his certificate would have the same value as before. Again, if certificates for $1,000 par were split up into ten certificates each, for $100, we presume that *427 no one would call the new certificates income. What has happened is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new.

Judgment reversed.

Mr. Justice McKENNA concurs in the result.

(245 U. S. 366)

ARVER v. UNITED STATES. GRAHL v. SAME. WANGERIN v. SAME (two cases). KRAMER v. SAME. GRAUBARD v. SAME.

(Argued Dec. 13, 14, 1917. Decided Jan. 7, 1918.)

Nos. 663, 664, 665, 666, 681, 769.

1. ARMY AND NAVY ⇐20—COMPULSORY SERVICE—POWER OF CONGRESS.

Under Const. art. 1, § 8, authorizing Congress to declare war, to raise and support armies, and to make rules for the government and regulation of the land and naval forces,

and to make all laws necessary and proper for carrying the foregoing powers into execution, and article 6, providing that the Constitution and laws of the United States made in pursuance thereof shall be the supreme law of the land, Congress has power to raise armies by conscription, and such power is not denied by reason of the fact that under the Constitution as originally framed state citizenship was primary, and United States citizenship but derivative and dependent thereon, or by the fact that, prior to the Constitution, the state authority over the militia embraced every citizen, and therefore Act May 18, 1917, c. 15, providing for raising an army by means of a selective draft, is valid.

2. ARMY AND NAVY ⟸20—COMPULSORY SERVICE—POWER OF CONGRESS.

When Congress exercises its power to call a citizen into the army without his consent, the army into which he enters is not limited to services such as those for which it is claimed the militia may only be used.

3. ARMY AND NAVY ⟸1—POWER TO RAISE ARMIES.

The powers of Congress respecting the militia under Const. art. 1, § 8, authorizing Congress to provide for calling forth the militia to execute the laws of the nation, suppress insurrections, and repel invasions, and to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of officers and the authority of training the militia according to the discipline prescribed by Congress, and the power to raise armies conferred by the same section, are separate powers, and the army power embraces complete authority, and is not diminished by the control over the militia left in the states, though the militia power may diminish the occasion for the exertion by Congress of its military power, and though the power to raise armies is susceptible of narrowing the area over which the militia clause operates.

4. CITIZENS ⟸11 — UNITED STATES AND STATE CITIZENSHIP.

Under Const. Amend. 14, providing that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside, citizenship in the United States is paramount and dominant, instead of being subordinate to and derivative from state citizenship.

5. ARMY AND NAVY ⟸20—COMPULSORY SERVICE—STATUTORY PROVISIONS.

Act May 18, 1917, c. 15, providing for the raising of an army by means of a selective draft, is not void as delegating federal powers to state officials because of some of its administrative features.

6. CONSTITUTIONAL LAW ⟸62—LEGISLATIVE POWERS—DELEGATION.

Act May 18, 1917, c. 15, providing for raising an army by a selective draft, is not void, as vesting administrative officers with legislative discretion.

7. CONSTITUTIONAL LAW ⟸80(1) — EXECUTIVE POWER—ENCROACHMENT ON JUDICIARY.

Act May 18, 1917, c. 15, providing for raising an army by selective draft, is not void, as conferring judicial power on administrative officers.

8. CONSTITUTIONAL LAW ⟸84 — RELIGIOUS LIBERTY—EXEMPTION FROM MILITARY SERVICE.

Act May 18, 1917, c. 15, providing for the raising of an army by means of a selective draft, and exempting from the draft regular or duly ordained ministers of religion and theological students under prescribed conditions, and also relieving from military service, other than service of a noncombatant character, members of religious sects whose tenets exclude the moral right to engage in war, does not violate Const. Amend. 1, providing that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

9. CONSTITUTIONAL LAW ⟸83(2)—INVOLUNTARY SERVITUDE — COMPULSORY MILITARY SERVICE.

Act May 18, 1917, c. 15, providing for raising an army by means of a selective draft, does not impose involuntary servitude, in violation of Const. Amend. 13.

In Error to the District Court of the United States for the District of Minnesota.

In Error to the District Court of the United States for the Southern District of New York.

Joseph F. Arver, Alfred F. Grahl, Otto Wangerin, Walter Wangerin, Louis Kramer, and Meyer Graubard were convicted of failing to present themselves for registration under the Act of May 18, 1917, c. 15, and they bring error. Affirmed.

Mr. T. E. Latimer, of Minneapolis, Minn., for plaintiffs in error Arver, Grahl, Otto Wangerin, and Walter Wangerin.

Mr. Harry Weinberger, of New York City, for plaintiff in error Kramer.

Mr. Edwin T. Taliaferro, of New York City, for plaintiff in error Graubard.

Mr. Solicitor General Davis, of Washington, D. C., for the United States.

* Mr. Chief Justice WHITE delivered the opinion of the Court.

We are here concerned with some of the provisions of the Act of May 18, 1917 (Public No. 12, 65th Congress, c. 15, 40 Stat. 76), entitled "An act to authorize the President to increase temporarily the military establishment of the United States." The law, as its opening sentence declares, was intended to supply temporarily the increased military force which was required by the existing emergency, the war then and now flagrant. The clauses we must pass upon and those which will throw light on their significance are briefly summarized.

The act proposed to raise a national army, first, by increasing the regular force to its maximum strength and there maintaining it; second, by incorporating into such army the members of the National Guard and National Guard Reserve already in the service of the United States (Act of Congress of June 5, 1916, c. 134, 39 Stat. 211) and maintaining their organizations to their full strength; third, by giving the President power in his discretion to organize by volunteer enlistment four divisions of infantry; fourth, by subjecting all male citizens between the ages of twenty-one and thirty to duty in the national army for the period of the existing emergency after the proclamation of the President announcing the necessity for their service; and fifth, by providing

for selecting from the body so called, on the further proclamation of the President, 500,000 enlisted men, and a second body of the same number should the President in his discretion deem it necessary. To carry out its purposes the act made it the duty of those liable to the call to present themselves for registration on the proclamation of the President so as to subject themselves to the terms of the act and provided full federal means for carrying out the selective draft. It gave the President in his discretion power to create local boards to consider claims for exemption for physical disability or otherwise made by those called. The act exempted from subjection to the draft designated United States and state officials as well as those already in the military or naval service of the United States, regular or duly ordained ministers of religion and theological students under the conditions provided for, and while relieving from military service in the strict sense the members of religious sects as enumerated whose tenets excluded the moral right to engage in war, nevertheless subjected such persons to the performance of service of a noncombatant character to be defined by the President.

The proclamation of the President calling the persons designated within the ages described in the statute was made and the plaintiffs in error who were in the class and under the statute were obliged to present themselves for registration and subject themselves to the law failed to do so and were prosecuted under the statute for the penalties for which it provided. They all defended by denying that there had been conferred by the Constitution upon Congress the power to compel military service by a selective draft and if such power had been given by the Constitution to Congress, the terms of the particular act for various reasons caused it to be beyond the power and repugnant to the Constitution. The cases are here for review because of the constitutional questions thus raised, convictions having resulted from instructions of the courts that the legal defences were without merit and that the statute was constitutional.

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The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power "to declare war; * * * to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; * * * to make rules for the government and regulation of the land and naval forces." Article 1, § 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Article 1, § 8.

[1] As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice. It is said, however, that since under the Constitution as originally framed state citizenship was primary and United States citizenship but derivative and dependent thereon, therefore the power conferred upon Congress to raise armies was only coterminous with United States citizenship and could not be exerted so as to cause that citizenship to lose its dependent character and dominate state citizenship. But the proposition simply denies to Congress the power to raise armies which the Constitution gives. That power by the very terms of the Constitution, being delegated, is supreme. Article 6. In truth the contention simply assails the wisdom of the framers of the Constitution in conferring authority on Congress and in not retaining it as it was under the Confederation in the several states. Further it is said, the right to provide is not denied by calling for volunteer enlistments, but it does not and cannot include the power to exact enforced military duty by the citizen. This however but challenges the existence of all power, for a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power. It is argued, however, that although this is abstractly true, it is not concretely so because as compelled military service is repugnant to a free government and in conflict with all the great guarantees of the Constitution as to individual liberty, it must be assumed that the authority to raise armies was intended to be limited to the right to call an army into existence counting alone upon the willingness of the citizen to do his duty in time of public need, that is, in time of war. But the premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion. Let us see if this is not at once demonstrable. It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. Vattel, Law of Nations, book III, cc. 1 and 2. To do more than state the proposition is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation to that effect now in force.[1] In

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[1] In the argument of the government it is stated: "The Statesman's Yearbook for 1917 cites the following governments as enforcing military service: Argentine Republic, p. 656; Austria-Hungary, p. 607; Belgium, p. 712; Brazil, p. 738; Bulgaria, p. 747; Bolivia, p. 728; Columbia, p. 790; Chili, p. 754; China, p. 770; Denmark, p. 811; Ecuador, p. 820; France, p. 841; Greece, p. 1001; Germany, p. 914; Guatemala, p. 1009; Honduras, p. 1018; Italy, p. 1036; Japan, p. 1064; Mexico, p. 1090; Montenegro, p. 1098; Netherlands, p. 1191; Nicaragua, p. 1142; Norway, p. 1152; Peru, p. 1191; Portugal, p. 1201; Roumania, p. 1220; Russia, p. 1240; Serbia,

*379 England it is certain that before the*Norman Conquest the duty of the great militant body of the citizens was recognized and enforceable. Blackstone, book I, c. 13. It is unnecessary to follow the long controversy between Crown and Parliament as to the branch of the government in which the power resided, since there never was any doubt that it somewhere resided. So also it is wholly unnecessary to explore the situation for the purpose of fixing the sources whence in England it came to be understood that the citizen or the force organized from the militia as such could not without their consent be compelled to render service in a foreign country, since there is no room to contend that such principle ever rested upon any challenge of the right of Parliament to impose compulsory duty upon the citizen to perform military duty wherever the public exigency exacted whether at home or abroad. This is exemplified by the present English Service Act.[2]

In the Colonies before the separation from England there cannot be the slightest doubt that the right to enforce military service was unquestioned and that practical effect was given to the power in many cases. Indeed*the brief of the government contains a list of Colonial Acts manifesting the power and its enforcement in more than two hundred cases. And this exact situation existed also after the separation. Under the Articles of Confederation it is true Congress had no such power, as its authority was absolutely limited to making calls upon the states for the military forces needed to create and maintain the army, each state being bound for its quota as called. But it is indisputable that the states in response to the calls made upon them met the situation when they deemed it necessary by directing enforced military service on the part of the citizens. In fact the duty of the citizen to render military service and the power to compel him against his consent to do so was expressly sanctioned by the Constitutions of at least nine of the states, an illustration being afforded by the following provision of the Pennsylvania Constitution of 1776:

"That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion toward the expense of that protection, and yield his personal service when necessary, or an equivalent thereto." Article 8 (Thorpe, American Charters, Constitutions and Organic Laws, vol. 5, pp. 3081, 3083).[3]

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While it is true that the states were sometimes slow in exerting the power in order to fill their quotas—a condition shown by resolutions of Congress calling upon them to comply by exerting their compulsory power to draft and by earnest requests by Washington to Congress that a demand be made upon the states to*resort to drafts to fill their quotas[4]—that fact serves to demonstrate instead of to challenge the existence of the authority. A default in exercising a duty may not be resorted to as a reason for denying its existence.

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When the Constitution came to be formed it may not be disputed that one of the recognized necessities for its adoption was the want of power in Congress to raise an army and the dependence upon the states for their quotas. In supplying the power it was manifestly intended to give it all and leave none to the states, since besides the delegation to Congress of authority to raise armies the Constitution prohibited the states, without the consent of Congress, from keeping troops in time of peace or engaging in war. Article 1, § 10.

[2] To argue that as the state authority over the militia prior to the Constitution embraced every citizen, the right of Congress to raise an army should not be considered as granting authority to compel the citizen's service in the army, is but to express in a different form the denial of the right to call any citizen to the army. Nor is this met by saying that it does not exclude the right of Congress to organize an army by voluntary enlistments, that is, by the consent of the citizens, for if the proposition be true, the right of the citizen to give consent would be controlled by the same prohibition which would deprive Congress of the right to compel unless it can be said that although Congress had not the right to call because of state authority, the citizen had a right to obey the call and set aside state authority

p. 1281; Siam, p. 1288; Spain, p. 1300; Switzerland, p. 1337; Salvador, p. 1270; Turkey, p. 1353." See also the recent Canadian conscription act, entitled, "Military Service Act" of August 27, 1917, expressly providing for service abroad (printed in the Congressional Record of September 20, 1917, 55th Cong. Rec., p. 7959); the Conscription Law of the Orange Free State, Law No. 10, 1899; Military Service and Commando Law, sections 10 and 28; Laws of Orange River Colony, 1901, p. 855; of the South African Republic, "De Locale Wetten en Volksraadsbesluiten der Zuid Afr. Republick," 1898, Law No. 20, pp. 230, 233, article 6, 28; Constitution, German Empire, April 16, 1871, Art. 57, 59; Dodd, 1 Modern Constitutions, p. 344; Gesetz, betreffend Aenderungen der Wehrpflicht, vom 11 Feb. 1888, No. 1767, Reichs-Gesetzblatt, p. 11, amended by law of July 22, 1913, No. 4264, RGBl., p. 593; Loi sur de recrutement de l'armee of 15 July, 1889 (Duvergier, vol. 89, p. 440), modified by act of 21 March, 1905 (Duvergier, vol. 105, p. 133).

[2] Military Service Act, January 27, 1916, 5 and 6 George V, c. 104, p. 367, amended by the Military Service Act of May 25, 1916, 2d session 6 and 7 George V, c. 15, p. 33.

[3] See also Constitution of Vermont, 1777, c. 1, art. 9 (Thorpe, vol. 6, pp. 3737, 3740); New York, 1777, art. 40 (Id. vol. 5, p. 2637); Massachusetts Bill of Rights, 1780, art. 10 (Id. vol. 3, p. 1891); New Hampshire, 1784, pt. 1, Bill of Rights, art. 12 (Id. vol. 4, p. 2455); Delaware, 1776, art. 9 (Id. vol. 1, pp. 563, 564); Maryland, 1776, art. 33 (Id. vol. 3, pp. 1686, 1696); Virginia, 1776, Militia (Id. vol. 7, p. 3817); Georgia, 1777, arts. 33, 35 (Id. vol. 2, pp. 777, 782).

[4] Journals of Congress, Ford's Ed., Library of Congress, vol. 7, pp. 262, 263; vol. 10, pp. 199, 200; vol. 13, p. 299. 7 Sparks, Writings of Washington, pp. 162, 167, 442, 444.

if he pleased to do so. And a like conclusion demonstrates the want of foundation for the contention that although it be within the power to call the citizen into the army without his consent, the army into which he enters after the call is to be limited in some respects to services for which the militia it is assumed may only be used, since this admits the appropriateness of the call to military service in the army and the power to make it and yet destroys the purpose for which the call is authorized—the raising of armies to be under the control of the United States.

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[3] The fallacy of the argument results from confounding the constitutional provisions concerning the militia with that conferring upon Congress the power to raise armies. It treats them as one while they are different. This is the militia clause:

"The Congress shall have power: * * * To provide for calling forth the militia to execute the laws of the nation, suppress insurrections and repel invasions; to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." Article 1, § 8.

The line which separates it from the army power is not only inherently plainly marked by the text of the two clauses, but will stand out in bolder relief by considering the condition before the Constitution was adopted and the remedy which it provided for the military situation with which it dealt. The right on the one hand of Congress under the Confederation to call on the states for forces and the duty on the other of the states to furnish when called, embraced the complete power of government over the subject. When the two were combined and were delegated to Congress all governmental power on that subject was conferred, a result manifested not only by the grant made but by the limitation expressly put upon the states on the subject. The army sphere therefore embraces such complete authority. But the duty of exerting

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the power thus conferred in all its plenitude was not made at once obligatory but was wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play. There was left therefore under the sway of the states undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. This did not diminish the military power or curb the full potentiality of the right to exert it but left an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared. This, therefore, is what was dealt with by the militia provision. It diminished the occasion for the exertion by Congress of its military power beyond the strict necessities for its exercise by giving the power to Congress to direct the organization and training of the militia (evidently to prepare such militia in the event of the exercise of the army power) although leaving the carrying out of such command to the states. It further conduced to the same result by delegating to Congress the right to call on occasions which were specified for the militia force, thus again obviating the necessity for exercising the army power to the extent of being ready for every conceivable contingency. This purpose is made manifest by the provision preserving the organization of the militia so far as formed when called for such special purposes although subjecting the militia when so called to the paramount authority of the United States. Tarble's Case, 13 Wall. 397, 408, 20 L. Ed. 597. But because under the express regulations the power was given to call for specified purposes without exerting the army power, it cannot follow that the latter power when exerted was not complete to the extent of its exertion and dominant. Because the power of Congress to raise armies was not required to be exerted to its full limit but only as in the discretion of Congress it was deemed the public interest required, furnishes no ground for supposing that the complete power was lost by its partial exertion. Because, moreover, the power granted to Congress to raise armies in its potentiality was susceptible of narrowing the area over which the militia clause operated, affords no ground for confounding the two areas which were distinct and separate to the end of confusing both the powers and thus weakening or destroying both.

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And upon this understanding of the two powers the legislative and executive authority has been exerted from the beginning. From the act of the first session of Congress carrying over the army of the government under the Confederation to the United States under the Constitution (Act of September 29, 1789, c. 25, 1 Stat. 95) down to 1812 the authority to raise armies was regularly exerted as a distinct and substantive power, the force being raised and recruited by enlistment. Except for one act formulating a plan by which the entire body of citizens (the militia) subject to military duty was to be organized in every state (Act of May 8, 1792, c. 33, 1 Stat. 271) which was never carried into effect, Congress confined itself to providing for the organization of a specified number distributed among the states according to their quota to be trained as directed by Congress and to be called by the President as need might require.[5] When the War of 1812 came the result of these two forces composed the army to be relied upon by Con-

[5]Act of May 9, 1794, c. 27, 1 Stat. 367; Act of February 28, 1795, c. 36, 1 Stat. 424; Act of June 24, 1797, c. 4, 1 Stat. 522; Act of March 3, 1803, c. 32, 2 Stat. 241; Act of April 18, 1806, c. 32, 2 Stat. 383; Act of March 30, 1808, c. 39, 2 Stat. 478; Act of April 10, 1812, c. 55, 2 Stat. 705.

gress to carry on the war. Either because it proved to be weak in numbers or because of insubordination developed among the forces called and manifested by their refusal to cross the border,[6] the government determined that the exercise of the power to organize an army by compulsory draft was necessary and Mr. Monroe, the Secretary of War (Mr. Madison being President), in a letter to Congress recommended several plans of legislation on that subject. It suffices to say that by each of them it was proposed that the United States deal directly with the body of citizens subject to military duty and call a designated number out of the population between the ages of 18 and 45 for service in the army. The power which it was recommended be exerted was clearly an unmixed federal power dealing with the subject from the sphere of the authority given to Congress to raise armies and not from the sphere of the right to deal with the militia as such, whether organized or unorganized. A bill was introduced giving effect to the plan. Opposition developed, but we need not stop to consider it because it substantially rested upon the incompatibility of compulsory military service with free government, a subject which from what we have said has been disposed of. Peace came before the bill was enacted.

Down to the Mexican War the legislation exactly portrayed the same condition of mind which we have previously stated. In that war, however, no draft was suggested, because the army created by the United States immediately resulting from the exercise by Congress of its power to raise armies, that organized under its direction from the militia and the volunteer commands which were furnished, proved adequate to carry the war to a successful conclusion.

So the course of legislation from that date to 1861 affords no ground for any other than the same conception of legislative power which we have already stated. In that year when the mutterings of the dread conflict which was to come began to be heard and the proclamation of the President calling a force into existence was issued it was addressed to the body organized out of the militia and trained by the states in accordance with the previous acts of Congress. Proclamation of April 15, 1861, 12 Stat. 1258. That force being inadequate to meet the situation, an act was passed authorizing the acceptance of 500,000 volunteers by the President to be by him organized into a national army. Act of July 22, 1861, c. 9, 12 Stat. 268. This was soon followed by another act increasing the force of the militia to be organized by the states for the purpose of being drawn upon when trained under the direction of Congress (Act of July 29, 1861, c. 25, 12 Stat. 281), the two acts when considered together presenting in the clearest possible form the distinction between the power of Congress to raise armies and its authority under the militia clause. But it soon became manifest that more men were required. As a result the Act of March 3, 1863 (c. 75, 12 Stat. 731), was adopted entitled "An act for enrolling and calling out the national forces and for other purposes." By that act which was clearly intended to directly exert upon all the citizens of the United States the national power which it had been proposed to exert in 1814 on the recommendation of the then Secretary of War, Mr. Monroe, every male citizen of the United States between the ages of 20 and 45 was made subject by the direct action of Congress to be called by compulsory draft to service in a national army at such time and in such numbers as the President in his discretion might find necessary. In that act, as in the one of 1814, and in this one, the means by which the act was to be enforced were directly federal and the force to be raised as a result of the draft was therefore typically national as distinct from the call into active service of the militia as such. And under the power thus exerted four separate calls for draft were made by the President and enforced, that of July, 1863, of February and March, 1864, of July and December, 1864, producing a force of about a quarter of a million men.[7] It is undoubted that the men thus raised by draft were treated as subject to direct national authority and were used either in filling the gaps occasioned by the vicissitudes of war in the ranks of the existing national forces or for the purpose of organizing such new units as were deemed to be required. It would be childish to deny the value of the added strength which was thus afforded. Indeed in the official report of the Provost Marshal General, just previously referred to in the margin, reviewing the whole subject it was stated that it was the efficient aid resulting from the forces created by the draft at a very critical moment of the civil strife which obviated a disaster which seemed impending and carried that struggle to a complete and successful conclusion.

Brevity prevents doing more than to call attention to the fact that the organized body of militia within the states as trained by the states under the direction of Congress became known as the National Guard. Act of January 21, 1903, c. 196, 32 Stat. 775; National Defense Act of June 5, 1916, c. 134, 39 Stat. 211. And to make further preparation from among the great body of the citizens, an additional number to be determined by the President was directed to be organized and trained by the states as the National Guard Reserve. National Defense Act, supra.

Thus sanctioned as is the act before us by

[6] Upton, Military Policy of the United States, p. 99 et seq.

[7] Historical Report, Enrollment Branch, Provost Marshal General's Bureau, March 17, 1866.

the text of the Constitution, and by its significance as read in the light of the fundamental principles with which the subject is concerned, by the power recognized and carried into effect in many civilized countries, by the authority and practice of the colonies before the Revolution, of the states under *388 the Confederation and of the government since the formation of the Constitution, the want of merit in the contentions that the act in the particulars which we have been previously called upon to consider was beyond the constitutional power of Congress, is manifest. Cogency, however, if possible, is added to the demonstration by pointing out that in the only case to which we have been referred where the constitutionality of the act of 1863 was contemporaneously challenged on grounds akin to, if not absolutely identical with, those here urged, the validity of the act was maintained for reasons not different from those which control our judgment. Kneedler v. Lane, 45 Pa. 238. And as further evidence that the conclusion we reach is but the inevitable consequence of the provisions of the Constitution as effect follows cause, we briefly recur to events in another environment. The seceding states wrote into the Constitution which was adopted to regulate the government which they sought to establish, in identical words the provisions of the Constitution of the United States which we here have under consideration. And when the right to enforce under that instrument a selective draft law which was enacted not differing in principle from the one here in question was challenged, its validity was upheld evidently after great consideration by the courts of Virginia, of Georgia, of Texas, of Alabama, of Mississippi and of North Carolina, the opinions in some of the cases copiously and critically reviewing the whole grounds which we have stated. Burroughs v. Peyton, 16 Grat. (Va.) 470; Jeffers v. Fair, 33 Ga. 347; Daly and Fitzgerald v. Harris, 33 Ga. Supp. 38, 54; Barber v. Irwin, 34 Ga. 27; Parker v. Kaughman, 34 Ga. 136; Ex parte Coupland, 26 Tex. 386; Ex parte Hill, 38 Ala. 429; In re Emerson, 39 Ala. 437; In re Pille, 39 Ala. 459; Simmons v. Miller, 40 Miss. 19; Gatlin v. Walton, 60 N. C. 333, 408.

*389 [4] In reviewing the subject we have hitherto considered*it as it has been argued from the point of view of the Constitution as it stood prior to the adoption of the Fourteenth Amendment. But to avoid all misapprehension we briefly direct attention to that amendment for the purpose of pointing out, as has been frequently done in the past,[8] how completely it broadened the national scope of the government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore operating as it does upon all the powers conferred by the Constitution leaves no possible support for the contentions made if their want of merit was otherwise not so clearly made manifest.

[5-8] It remains only to consider contentions which, while not disputing power, challenge the act because of the repugnancy to the Constitution supposed to result from some of its provisions. First, we are of opinion that the contention that the act is void as a delegation of federal power to state officials because of some of its administrative features is too wanting in merit to require further notice. Second, we think that the contention that the statute is void because vesting administrative officers with legislative discretion has been so completely adversely settled as to require reference only to some of the decided cases. Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; Intermountain Rate Cases, 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. 1408; First National Bank v. Union Trust Co., 244 U. S. 416, 37 Sup. Ct. 734, 61 L. Ed. 1233. A like conclusion also adversely disposes of a similar claim concerning the conferring of judicial power. Buttfield v. Stranahan, 192 U. S. 470, 497, 24 Sup. Ct. 349, 48 L. Ed. 525; West v. Hitchcock, 205 U. S. 80, 27 Sup. Ct. 423, 51 L. Ed. 718; Ocean Navigation Co. v. Stranahan, 214 U. S. 320, 338–340, 29 Sup. Ct. 671, 53 L. Ed. 1013; Zakonaite v. Wolf, 226 U. S. 272, 275, 33 Sup. Ct. 31, 57 L. Ed. 218. And we pass without anything but statement 390 *the proposition that an establishment of a* religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred because we think its unsoundness is too apparent to require us to do more.

[9] Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.

Affirmed.

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[8] Slaughter House Cases, 16 Wall. 36, 72-74, 94, 95, 112, 113, 21 L. Ed. 394; United States v. Cruikshank, 92 U. S. 542, 549, 23 L. Ed. 588; Boyd v. Thayer, 143 U. S. 135, 140, 12 Sup. Ct. 375, 36 L. Ed. 103; McPherson v. Blacker, 146 U. S. 1, 37 13 Sup. Ct. 3, 36 L. Ed. 869.

(245 U. S. 390)

JONES v. PERKINS, Deputy U. S. Marshal, et al.

(Argued Dec. 13, 14, 1917. Decided Jan. 7, 1918.)

No. 738.

HABEAS CORPUS ⊂=21—ARREST ON CRIMINAL CHARGES—ISSUANCE BEFORE TRIAL.

In the absence of exceptional circumstances in criminal cases, the regular judicial procedure should be followed, and habeas corpus should not be granted in advance of a trial.

Appeal from the District Court of the United States for the Southern District of Georgia.

Habeas corpus by Albert Jones against H. W. Perkins, Deputy United States Marshal, and another. From an order denying the petition (243 Fed. 997), the petitioner appeals. Affirmed.

Mr. J. Gordon Jones, of Cordele, Ga., for appellant.

Mr. Solicitor General Davis, of Washington, D. C., for appellees.

*391 *Mr. Chief Justice WHITE delivered the opinion of the Court.

Jones, the appellant, was arrested under a warrant charging him with a failure to register as required by the Act of Congress of May 18, 1917, known as the Selective Draft Law (Public No. 12, 65th Congress, c. 15, 40 Stat. 76), and after a hearing by a United States Commissioner was committed to custody to await the ensuing term of the United States District Court. Alleging that he was illegally restrained because the statute under the assumed authority of which he was held was repugnant to the Constitution of the United States, he petitioned the court below for a writ of habeas corpus. Following a rule to show cause and a hearing on the return thereto the petition was denied on the ground that the statute was constitutional (243 Fed. 997), and to reverse the order so adjudging this direct appeal was prosecuted.

It is well settled that in the absence of exceptional circumstances in criminal cases the regular judicial procedure should be followed and habeas corpus should not be granted *392 in advance of a trial. Riggins v. United States,*199 U. S. 547, 26 Sup. Ct. 147, 50 L. Ed. 303; Glasgow v. Moyer, 225 U. S. 420, 32 Sup. Ct. 753, 56 L. Ed. 1147; Johnson v. Hoy, 227 U. S. 245, 33 Sup. Ct. 240, 57 L. Ed. 497. If that rule applied, therefore, our duty would be to affirm unless this case could be treated as coming within the exceptional class. But we do not deem it necessary to enter into that consideration because even if it were found to be embraced in such class every constitutional question relied upon has been this day in Arver v. United States, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. ——, decided to be without merit. Because of this situation, therefore, without departing from the general principle, we think it suffices in this case to apply the ruling made in the Arver Case and for the reasons stated in the opinion therein, to affirm.

And it is so ordered.

(245 U. S. 471)

GOLDMAN et al. v. UNITED STATES.

(Argued Dec. 13, 14, 1917. Decided Jan. 14, 1918.)

No. 702.

1. COURTS ⊂=385(5) — SUPREME COURT — REVIEW OF DECISIONS OF DISTRICT COURTS.

On a direct writ of error to review a conviction in the District Court, prosecuted on the ground that constitutional questions are involved, though such questions are disposed of adversely to plaintiffs in error, the other questions involved must be considered.

2. CONSPIRACY ⊂=28—OFFENSES—CONSPIRACY TO COMMIT CRIME.

Under Criminal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1916, § 10201), § 37, providing that if two or more persons conspire to commit any offense against the United States, and one or more of them do any act to effect the object of the conspiracy, each of the parties shall be fined or imprisoned, or both, an unlawful conspiracy and the doing of overt acts in furtherance of the conspiracy is of itself inherently and substantively a punishable crime, irrespective of whether the result of the conspiracy has been to accomplish its illegal end.

3. CRIMINAL LAW ⊂=1159(2, 4) — REVIEW — QUESTIONS OF FACT.

The power to review a conviction in a criminal case does not embrace the right to invade the province of the jury, by determining questions of credibility and weight of evidence and from the residuum of the evidence thereby resulting drawing the conclusion that there is no evidence.

In Error to the District Court of the United States for the Southern District of New York.

Emma Goldman and Alexander Berkman were convicted of an offense and they bring error. Affirmed.

Mr. Harry Weinberger, of New York City, for plaintiffs in error.

Mr. Solicitor General Davis, of Washington, D. C., for the United States.

*476 *Mr. Chief Justice WHITE delivered the opinion of the Court.

Because of the constitutional questions involved the plaintiffs in error prosecute this direct writ of error to reverse a criminal conviction and resulting sentence imposed upon them. The indictment upon which the conviction was had charged them with having, in violation of sections 37 and 332 of the Criminal Code (Comp. St. 1916, §§ 10201, 10506), unlawfully conspired together and with others unknown to induce persons who by the Selective Draft Law of May 18, 1917, (Public No. 12, 65th Congress, c. 15, 40 Stat. 76) were under the duty to register, to disobey the law by failing to register. Five specified overt acts were in the indictment charged

to have been committed in furtherance of the alleged illegal conspiracy.

Seven grounds of error were assigned at the time of the allowance of the writ: (1) The refusal of the court at the request of the defendants to dismiss the indictment on the ground that the formation of a conspiracy to induce persons not to register as they were required under the law to do and the performance of overt acts to carry out the conspiracy constituted no offense. (2) The action of the court in refusing to grant a motion in arrest of judgment on the same ground. (3) The refusal to set aside the verdict because the facts proved did not constitute an offense against the United States. (4) The denial of a motion to dismiss the prosecution at the request of the defendants on the ground that the Selective Draft Law upon which the alleged duty to register depended was repugnant to the Constitution and void, there being numerous specifications on this subject involving a challenge of all power in Congress to have enacted the law and moreover upon the assumption of some power an assertion of the repugnancy of the statute to the Constitution resulting from various provisions which the act contained. (5) The denial by the court of a motion made at the close of the case to dismiss the indictment on the ground that it stated no offense as previously insisted and upon the further ground that in any event there was no proof of the alleged conspiracy or the averred overt acts or of any act adequate to show guilt. (6 and 7) The refusal of a motion to set aside the verdict and in arrest of judgment because the verdict was contrary to law and unsupported by evidence upon grounds which had been previously urged and overruled.

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Putting aside the multiplication which results from urging the same ground several times because when once made it was adhered to and reiterated at different stages of the trial, it is clear that the assignments embrace only three propositions: (1) The failure to dismiss the prosecution because of the repugnancy of the Selective Draft Law to the Constitution for the reasons relied upon. (2) The refusal to dismiss because the indictment stated no offense. (3) The refusal to dismiss because there was no proof of conspiracy or of any overt acts adequate to have justified the submission of the case to the jury. Indeed in the elaborate argument at bar all the assignments of error are treated as embraced under the propositions thus stated and we therefore come to dispose of the case from such point of view.

[1] 1. The grounds here made the basis of the charge that the Selective Draft Law is repugnant to the Constitution are so far as they concern the question of registration provided for by that law, identical with those which were urged in Arver v. United States, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. —, and were there adversely disposed of. The ruling in that case therefore also adversely disposes of all the relevant constitutional questions in this. The duty nevertheless remains to consider the other questions. Brolan v. United States, 236 U. S. 216–218, 35 Sup. Ct. 285, 59 L. Ed. 544.

[2] 2. The contention that the indictment stated no offense proceeds upon the assumption reiterated in various forms of statement that no crime results from an unlawful conspiracy to bring about an illegal act joined with the doing of overt acts in furtherance of the conspiracy unless the conspiracy has accomplished its unlawful purpose by causing the illegal act to be committed. This, however, but disregards the settled doctrine that an unlawful conspiracy under section 37 of the Criminal Code to bring about an illegal act and the doing of overt acts in furtherance of such conspiracy is in and of itself inherently and substantively a crime punishable as such irrespective of whether the result of the conspiracy has been to accomplish its illegal end. United States v. Rabinowich, 238 U. S. 78, 85, 86, 35 Sup. Ct. 682, 59 L. Ed. 1211, and authorities there cited.

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[3] 3. Sifting out of the arguments advanced to support the proposition that there was no evidence whatever tending to show guilt, contentions based upon the misconception as to the law of conspiracy which we have just adversely disposed of, and, moreover, contentions concerning an asserted misuse of discretion by the court below in ruling on an application to postpone the trial, which as we have seen, were not even remotely referred to in the assignments of error, we think all the arguments rest upon the assumption that the power to review embraces the right to invade the province of the jury by determining questions of credibility and weight of evidence and from the residuum of evidence resulting from indulging in and applying the results of such erroneous assumption drawing the conclusion as to no evidence relied upon. While this statement suffices to dispose of the case without going further, we nevertheless say without recapitulating the evidence that after a review of the whole record we think the proposition that there was no evidence whatever of guilt to go to the jury is absolutely devoid of merit.

It follows that the judgment below must be and it is

Affirmed.

(245 U. S. 473)

KRAMER et al. v. UNITED STATES.

(Argued Dec. 13 and 14, 1917. Decided Jan. 14, 1918.)

No. 680.

In Error to the District Court of the United States for the Southern District of New York.

Louis Kramer and Morris Becker were convicted of an offense, and they bring error. Affirmed.

Mr. Harry Weinberger, of New York City, for plaintiffs in error.

Mr. Solicitor General Davis, of Washington, D. C., for the United States.

Mr. Chief Justice WHITE delivered the opinion of the Court.

In this case, as in No. 702, Goldman v. United States, 245 U. S. 474, 38 Sup. Ct. 166, 62 L. Ed. —, just previously decided, because of constitutional questions, the case was brought here by direct writ of error, with the object of reviewing and reversing a conviction and sentence under an indictment charging an unlawful conspiracy to induce persons whose duty it was to register under the Selective Draft Law (Act May 18, 1917, c. 15), not to perform that duty and alleging overt acts done for the purpose of carrying out the illegal conspiracy. The defenses were substantially the same as those urged in the previous case and the assignments of error made at the time of the allowance of the writs were identical. In fact at bar the propositions and arguments relied upon in the previous case were stated to be controlling in this. But, therefore, for the fact that there was different evidence in the two cases the considerations which control the one control the other. No distinction, however, results from that difference since we are of opinion in this case as we were in the other after an examination of the entire record that the contention that there was no evidence tending to show guilt and hence the case should have been taken from the jury is without merit.

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As thus any conceivable distinction between the two cases is removed, it follows that for the reasons stated in the Goldman Case, supra, just decided, and in the Arver Case, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. —, as to the constitutional questions, the judgment below in this case must be and it is

Affirmed.

(245 U. S. 480)

RUTHENBERG et al. v. UNITED STATES.

(Argued Dec. 13 and 14, 1917. Decided Jan. 14, 1918.)

No. 656.

1. GRAND JURY ⟸2½—JURY ⟸33(1)—CONSTITUTION OF JURIES—DISCRIMINATION.

Socialists on trial for criminal offenses were denied no constitutional or statutory rights because the grand and trial juries were composed exclusively of members of other political parties and of property owners.

2. JURY ⟸131(8)—EXAMINATION OF JURORS—PERSONAL OPINIONS.

Socialists on trial for violations of the Selective Draft Law (Act May 18, 1917, c. 15), were not entitled, in examining jurors, to inquire whether they distinguished between Socialists and anarchists.

3. JURY ⟸33(3)—CONSTITUTION OF JURIES—SELECTION FROM PART OF DISTRICT.

The drawing of jurors from only one division of a district was not a violation of Const. Amend. 6, providing that accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, especially in view of the contemporary construction placed upon the amendment by Judiciary Act Sept. 24, 1789, c. 20, § 29, 1 Stat. 88 (Comp. St. 1916, § 1254), expressly authorizing the drawing of a jury from a part of the district, and the continuous legislative and judicial practice from the beginning, evidenced by Rev. St. § 802, and Judicial Code (Act March 3, 1911, c. 231) § 277, 36 Stat. 1164 (Comp. St. 1916, § 1254), providing that jurors shall be returned from such parts of the district as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense or unduly burden citizens.

4. INDICTMENT AND INFORMATION ⟸41(2) — NECESSITY OF PRELIMINARY CHARGE.

A sworn charge previously made is not necessary to render an indictment valid.

5. ARMY AND NAVY ⟸40 — COMPULSORY SERVICE AND DRAFTS — CRIMINAL PROSECUTIONS—INDICTMENT.

Under Act May 18, 1917, which in section 5 requires all male persons between the ages of 21 and 30 to register thereunder, but which makes only citizens and persons, not alien enemies, who have declared their intention to become citizens subject to military duty, an indictment for aiding, abetting, counseling, commanding, and inducing a person in failing to register was sufficient, where it alleged that such person was a male person between the designated ages, though it did not allege that he was a citizen or person, not an alien enemy, who had declared his intention of becoming a citizen.

6. INDICTMENT AND INFORMATION ⟸125(4) — DUPLICITY—AIDING AND ABETTING—"PRINCIPAL."

Under Criminal Code (Act March 4, 1909, c. 321) § 332, 35 Stat. 1152 (Comp. St. 1916, § 10506), providing that whoever directly commits any act constituting an offense, or aids, abets, counsels, commands, induces, or procures its commission, is a principal, an indictment charging that defendants did aid, abet, counsel, command, and induce S. in failing to register under Act May 18, 1917, and did procure him to commit the offense involved in so failing to register, did not charge more than one offense, as the only offense charged was the failure to register; defendants being charged as principals in procuring such refusal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Principal.]

7. CRIMINAL LAW ⟸59(5)—PARTIES TO OFFENSES—AIDING AND ABETTING.

Under Criminal Code, § 332, it was an offense to aid, abet, counsel, command, and induce a person in failing to register under Act May 18, 1917, and to procure him to commit such offense, though at common law there could be no accessory to a misdemeanor.

In Error to the District Court of the United States for the Northern District of Ohio.

Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker were convicted of an offense, and they bring error. Affirmed.

Mr. Joseph W. Sharts, of Dayton, Ohio, for plaintiffs in error.

Mr. Solicitor General Davis, of Washington, D. C., for the United States.

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* Mr. Chief Justice WHITE delivered the opinion of the Court.

Schue was indicted for having failed to

register as required by the Act of Congress of May 18, 1917 (Public Act No. 12, 65th Congress, c. 15, 40 Stat. 76), known as the Selective Draft Law, and in the same indictment it was charged that Ruthenberg, Wagenknecht and Baker, the plaintiffs in error "did aid, abet, counsel, command and induce" Schue in failing to register "and procure him to commit the offense involved in his so doing." Schue pleaded guilty and the other three defendants were tried, found guilty and sentenced. Because of objections raised to the constitutionality of the act this direct writ of error was prosecuted.

As every contention made in this case concerning the unconstitutionality of the Selective Draft Law was urged in Arver v. United States, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. ---, and held to be without merit, that subject may be put out of view. The remaining assignments of error are to say the least highly technical and require only the briefest notice.

*182 [1] The want of merit in the proposition that constitutional*or statutory rights were denied the plaintiffs in error, who were Socialists, because the grand and trial juries were composed exclusively of members of other political parties and of property owners, is demonstrated by previous adverse rulings upon similar contentions urged by negro defendants indicted and tried by juries composed of white men. Martin v. Texas, 200 U. S. 316, 320, 321, 26 Sup. Ct. 338, 50 L. Ed. 497; Thomas v. Texas, 212 U. S. 278, 282, 29 Sup. Ct. 393, 53 L. Ed. 512.

[2] A further objection that plaintiffs in error were prejudiced by the refusal of the court below to permit them in examining the jurors to inquire whether they distinguished between socialists and anarchists is likewise disposed of by previous decisions. Spies v. Illinois, 123 U. S. 131, 8 Sup. Ct. 22, 31 L. Ed. 80; Thiede v. Utah Territory, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. Ed. 237; Holt v. United States, 218 U. S. 245, 248, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138.

[3] It is contended that plaintiffs in error were not tried by a jury of the state and district in which the crime was committed, in violation of the Sixth Amendment, because the jurors were drawn not from the entire district but only from one division thereof. The proposition disregards the plain text of the Sixth Amendment, the contemporary construction placed upon it by the Judiciary Act of 1789 (1 Stat. 73, 88, c. 20, § 29) expressly authorizing the drawing of a jury from a part of the district, and the continuous legislative and judicial practice from the beginning. Section 802, Revised Statutes; section 277, Judicial Code (Comp. St. 1916, § 1254); Agnew v. United States, 165 U. S. 36, 43, 17 Sup. Ct. 235, 41 L. Ed. 624; United States v. Wan Lee (D. C.) 44 Fed. 707; United States v. Ayres (D. C.) 46 Fed. 651; United States v. Peuschel (D. C.) 116 Fed. 642, 646; Clement v. United States, 149 Fed. 305, 79 C. C. A. 243; Spencer v. United States, 169 Fed. 562, 565, 566, 95 C. C. A. 60; United States v. Merchants', etc., Co. (C. C.) 187 Fed. 355, 359, 362.

[4] It is argued that the court below erred in refusing to quash the indictment on the ground that it had been found "without a sworn charge previously made." It is settled* that such a charge is unnecessary.* Frisbie v. United States, 157 U. S. 160, 163, 15 Sup. Ct. 586, 39 L. Ed. 657; Hale v. Henkel, 201 U. S. 43, 59, 60, 26 Sup. Ct. 370, 50 L. Ed. 652. *183

[5] Further, it is said, the indictment was insufficient because it did not allege that Schue, who it was charged refused to register, was a citizen of the United States or was a person not an alien enemy who had declared his intention to become such citizen. But this overlooks the fact that although only the persons described were subject to military duty under the terms of the act, by section 5 "all male persons between the ages of 21 and 30 both inclusive" (with certain exceptions not here material) were required to register. It was sufficient to charge, therefore, as the indictment did, that Schue was a male person between the designated ages.

[6, 7] The contention that more than one offense was charged in the same indictment is without merit. Section 332 of the Criminal Code provides that:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

The indictment, therefore, charged but one offense—the refusal of Schue to register—plaintiffs in error being charged as principals in procuring such refusal. And this also disposes of a further contention based upon the same misconception that as at common law there could be no accessory to a misdemeanor, no offense was charged in the indictment.

Other errors are assigned but we do not expressly notice them, some because they are not urged in argument, others because they are so unsubstantial as not to require even statement, and we content ourselves with saying that after a careful examination of the whole record we find no error and the judgment is

Affirmed.

(245 U. S. 493)

ILLINOIS CENT. R. CO. v. PUBLIC UTILITIES COMMISSION OF ILLINOIS et al.

PUBLIC UTILITIES COMMISSION OF ILLINOIS et al. v. UNITED STATES et al.

(Argued Oct. 8 and 9, 1917. Decided Jan. 14, 1918.)

Nos. 416, 448.

1. COURTS ⊂=268 — FEDERAL COURTS — DISTRICT IN WHICH SUIT MUST BE BROUGHT — "SUIT TO ENFORCE, SUSPEND OR SET ASIDE ORDER OF INTERSTATE COMMERCE COMMISSION."

Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384, as amended by Act June 18, 1910, c. 309, § 13, 36 Stat. 554 (Comp. St. 1916, § 8584), provides that, if an order of the Interstate Commerce Commission respecting transportation be not obeyed by the carrier, it may be enforced at the suit of the Commission, an injured party, or the United States, by an appropriate writ or process restraining further disobedience and enjoining due compliance with the order. Act Oct. 22, 1913, c. 32, 38 Stat. 219,[1] provides, that suits to enforce, suspend, or set aside in whole or in part an order of the Commission relating to transportation, and made upon petition, may be brought only in the district in which the petitioners or one of them resides. *Held*, that where the Commission on petition of residents of Missouri ordered carriers to cease discriminating between St. Louis, Mo., Keokuk, Iowa, and Illinois points respecting rates between such points and other Illinois points, and the carriers thereupon raised the Illinois intrastate rates and sued to enjoin the state authorities from interfering with the establishment and maintenance of the increased rates, the suit was not one to enforce, suspend, or set aside an order of the Commission, and might be brought in the Northern district of Illinois.

2. COMMERCE ⊂=92 — ACTIONS TO ENFORCE ORDERS—JURISDICTION.

Such action properly came within the provisions of Act June 18, 1910, c. 309, § 1, 36 Stat. 539, repeated in Judicial Code (Act March 3, 1911, c. 231) § 207, 36 Stat. 1148 (Comp. St. 1916, § 993), which, in defining the jurisdiction of the Commerce Court, preserved and continued the general jurisdiction of the District Courts over cases and proceedings not therein enumerated.

3. COMMERCE ⊂=93 — ENFORCEMENT OF ORDERS—PARTIES.

There being no statute making the United States or the Interstate Commerce Commission a necessary party to such suit, and the relief sought not being such as rendered their presence essential under the rules applicable to suits in equity, they were not necessary parties.

4. COURTS ⊂=268 — INTERSTATE COMMERCE COMMISSION—SETTING ASIDE ORDERS—JURISDICTION.

Under Act Oct. 22, 1913, requiring suits to enforce, suspend, or set aside an order of the Interstate Commerce Commission made upon petition to be brought in the district of the residence of the parties upon whose petition the order was made, and Judicial Code, §§ 208, 211 (Comp. St. 1916, §§ 997, 1004), requiring such suits to be brought against the United States, a suit to set aside an order of the Interstate Commerce Commission made on the petition of residents of Missouri could not be maintained in the Northern district of Illinois, as the United States, being suable only by its consent, could not be sued in a district not within the consent given.

5. COURTS ⊂=268 — INTERSTATE COMMERCE COMMISSION—SETTING ASIDE ORDERS—JURISDICTION.

A cross-bill to set aside such an order could not be filed in a suit pending in a district other than that of the residence of the petitioners, since, while in some cases a cross-bill against an ordinary suitor may be considered and dealt with by virtue of the jurisdiction over the principal suit, even though an original bill could not be entertained, it is otherwise where the cross-bill is against the United States, as no suit against it can be brought without its consent given by law, and its immunity from suit recognizes no distinction between cross-bills and original bills, or between ancillary suits and original suits, but extends to suits of every class.

6. COMMERCE ⊂=93 — INTERSTATE COMMERCE COMMISSION—SETTING ASIDE ORDERS—PARTIES.

A cross-bill to set aside an order of the Interstate Commerce Commission could not be retained as to other defendants after its dismissal as to the United States, since under Judicial Code, §§ 208, 211, the United States is made a necessary party to such a suit.

7. COMMERCE ⊂=85 — INTERSTATE COMMERCE COMMISSION—POWERS.

The Interstate Commerce Commission had power to deal with discrimination in rates arising out of a disparity in interstate and intrastate rates, and to authorize or require the removal of such discrimination by increasing the intrastate rates.

8. COMMERCE ⊂=88 — INTERSTATE COMMERCE COMMISSION—ORDERS.

The Interstate Commerce Commission filed a report in which it found that the maintenance of passenger rates between East St. Louis, Hamilton, and other points on the east bank of the Mississippi river, on the one hand, and other points in Illinois, on the other, on a lower basis than those maintained between St. Louis and Keokuk, Iowa, and such points in Illinois, subjected St. Louis and Keokuk and interstate passenger traffic to and from those cities to an unreasonable disadvantage, and in which it also found that a certain rate per mile would be reasonable between the points in question. It then made an order forbidding the charging of rates between St. Louis and Keokuk and such Illinois points upon a basis higher than the rates found reasonable, or higher than the rates contemporaneously charged between East St. Louis and Hamilton and such Illinois points, or fares upon a higher basis per mile than those charged between intermediate points and points in Illinois, or between Chicago and points in Illinois, and required that rates be put in effect not higher than those charged between St. Louis, Hamilton, and intermediate points, and points in Illinois, or between Chicago and points in Illinois. It also ordered the carriers to abstain from the undue preferences and disadvantages found in the report to result from the contemporaneous maintenance between Illinois points of passenger fares which, in combination with other fares required or permitted thereby, would produce the discrimination or undue preferences condemned in its report. *Held*, that the order was not intended to require or authorize a readjustment of all intrastate rates, but only to command the removal of the discrimination against St. Louis and Keokuk, and it was so indefinite and uncertain as to the territory or points to and from which the intrastate rates must or might be adjusted as to render it inoperative and of no effect as to intrastate rates established and maintained under a law of the state.

Appeals from the District Court of the United States for the Northern District of Illinois.

[1] Comp. St. 1916, § 994.

Suit by the Illinois Central Railroad Company against the Public Utilities Commission of Illinois and others, in which the Public Utilities Commission of Illinois and others filed a cross-bill against the United States and others. From a decree dismissing the bill, complainant appeals; and from a decree dismissing the cross-bill, the Public Utilities Commission and others appeal. Affirmed.

*494 *These cross-appeals present a controversy over the validity, scope and effect of an order of the Interstate Commerce Commission dealing with discrimination found to result from a disparity in interstate and intrastate passenger rates. The facts and proceedings to be considered are these: The Mississippi river forms the boundary between the states of Missouri and Iowa on the west and the state of Illinois on the east. East St. Louis, in southwestern Illinois, is directly across the river from St. Louis, Mo., and Hamilton, in western Illinois, is directly across the river from Keokuk, Iowa. At both places the river is spanned by railroad bridges whereby the lines of railroad on one side are connected with those on the other. For some years prior to December 1, 1914, interstate passenger rates between St. Louis and Keokuk on the one hand and points in *495 Illinois on the other were on a *substantial parity with intrastate rates between East St. Louis and Hamilton, respectively, and points in Illinois. All were on a basis of 2 cents per mile, save that the rates to and from St. Louis and Keokuk included a bridge toll over the river. All other rates between points in Illinois were also on the same basis, any intrastate rate in excess of 2 cents per mile being prohibited by a statute of that state. On December 1, 1914, the rates between St. Louis and Keokuk, respectively, and points in Illinois were increased by the carriers to 2½ cents per mile, plus bridge tolls, the parity theretofore existing being thereby broken. Following this increase the Business Men's League of St. Louis, a corporate body of that city engaged in fostering its interests, filed with the Interstate Commerce Commission a petition against the carriers charging that the rates between St. Louis and points in Illinois were unreasonable in themselves, and, in connection with the lower intrastate rates, worked an unreasonable discrimination against St. Louis and in favor of Illinois cities, particularly East St. Louis and Chicago, and a like discrimination against interstate passenger traffic to and from St. Louis and in favor of intrastate passenger traffic to and from East St. Louis and Chicago. An association representing interests in Keokuk, Iowa, intervened and urged that any relief granted with respect to St. Louis be extended to Keokuk, so the former would not have an undue advantage over the latter. The state of Illinois, the Public Utilities Commission of that state, an association representing interests in Chicago and another association representing interests in East St. Louis, also intervened and opposed any action contemplating or requiring an increase in intrastate rates. After a hearing, in which all the parties and intervenors participated, the Interstate Commerce Commission filed a report (41 Interst. Com. Com'n R. 13) finding that the existing bridge tolls at St. Louis and Keokuk were *496 unobjectionable, that rates between *either* of those cities and points in Illinois were reasonable when not in excess of 2.4 cents per mile, plus bridge tolls, and that the service, equipment and accommodations provided for intrastate passengers to and from East St. Louis, Hamilton, and Chicago, were the same as those provided for interstate passengers to and from St. Louis and Keokuk. In that report the Commission also found that the contemporaneous maintenance between East St. Louis[1] and Hamilton[2] respectively, and other points in Illinois, of rates on a lower basis than those maintained via the same routes between St. Louis and Keokuk, respectively, and the same points in Illinois, bridge tolls excepted, gave an undue preference to East St. Louis and Hamilton and to intrastate passenger traffic to and from the latter points and subjected St. Louis and Keokuk and interstate passenger traffic to and from those cities to an unreasonable disadvantage; that the existing disparity in interstate and intrastate rates worked an unjust discrimination against St. Louis and in favor of Chicago in so far as the rates between St. Louis and points in Illinois approximately equidistant from those cities exceeded, by more than the bridge toll, the rates between Chicago and the same points; that the disparity worked a like discrimination against Keokuk and in favor of Chicago; and that the existence on the reasonably direct lines of the carriers in the territory between Chicago on the one hand and St. Louis and Keokuk on the other of intrastate rates on a lower basis per mile than the rates between that territory and St. Louis and Keokuk, bridge tolls excepted, operated to subject interstate traffic to an unreasonable disadvantage.

*497 * The Commission then made an order intended to result in the installation of rates not exceeding 2.4 cents per mile between St. Louis and Keokuk, respectively, and points in Illinois and to remove the discrimination shown in the report; but shortly thereafter the Commission recalled that order and filed a supplemental report (41 Interst. Com. Com'n R. 503) indicating that lawful inter-

[1] The report similarly speaks of other towns across the river from St. Louis, East St. Louis being here mentioned as representative of all.

[2] The report refers to a plurality of points opposite Keokuk, but it suffices here to mention Hamilton.

state rates between St. Louis and Keokuk on the one hand and Illinois points on the other could be defeated by the use of two tickets, one purchased at the interstate rate for a part of the journey and the other at the lower intrastate rate for the remainder, and therefore that the order should be so framed as to cover the rates between the intermediate points. In this connection it was said that the discrimination against interstate traffic resulting from the lower intrastate rates "would not be removed merely by an increase in the intrastate fares to and from the east bank points," and that "any contemporaneous adjustments of fares between St. Louis or Keokuk and points in Illinois, and generally within Illinois, which would permit the defeat of the St. Louis, Keokuk, East St. Louis, or any other east side city fares by methods such as described above, and which would thereby permit the continuance of the undue prejudice which we have found is suffered by St. Louis and Keokuk, and continue to burden interstate commerce," would not comply with the order about to be entered. An order was then made, which is copied in the margin.[3]

*In obedience to that order the carriers—of *498
whom there were 29—took the requisite steps to establish and put in force interstate rates on a basis of 2.4 cents per mile between St. Louis and Keokuk, respectively, and points in Illinois, and those rates became effective. *499
Then,* believing the order required all intra- *
state rates in Illinois to be on a level with those interstate rates, bridge tolls excepted, the carriers proceeded to establish and put in force new rates between all points in that state on a basis of 2.4 cents per mile. This *500
met with* opposition on the part of the state * authorities and the carriers severally brought suits against them, in the District Court for the Northern District of Illinois, to enjoin them from interfering, by civil or criminal proceedings, or otherwise, with the establishment and maintenance of such intrastate *501
rates under the Commission's order.* The * suits were consolidated and the present appeals are from decrees dismissing the bills for want of equity and dismissing cross-bills of the state authorities for want of jurisdiction.

Messrs. Silas H. Strawn, Robert Bruce Scott, Andrew P. Humburg, W. S. Horton,

[3] The order is dated October 17, 1916, and, omitting the caption, reads as follows:

"It appearing, that on July 12, 1916, the Commission entered its report and order in this proceeding, and on the date hereof a supplemental report, which reports are hereby referred to and made a part hereof:

"It is ordered, that the said order of July 12, 1916, be, and it is hereby, vacated, and that the following be substituted therefor.

"It is further ordered, that the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before January 15, 1917, and thereafter to abstain, from publishing, demanding, or collecting passenger fares between St. Louis, Mo., and points in Illinois upon a basis higher than 2.4 cents per mile, bridge tolls excepted, which basis was found reasonable in said report, or higher than the fares contemporaneously exacted for the transportation of passengers between East St. Louis, Ill., and the same Illinois points, by more than a reasonable bridge toll; or fares constructed upon a higher basis per mile, bridge tolls excepted, than fares contemporaneously maintained between Illinois points intermediate between St. Louis, Mo., and points in Illinois, as such fares have been found in said report to be unlawfully discriminatory.

"It is further ordered, that the above defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before January 15, 1917, and thereafter to abstain, from publishing, demanding, or collecting fares for the transportation of passengers between St. Louis, Mo., and points in Illinois, the basis of which per mile, bridge tolls excepted, is higher than the basis per mile for fares contemporaneously maintained between Chicago and the same Illinois points, as such fares have been found in said report to be unlawfully discriminatory.

"It is further ordered, that the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before January 15, 1917, and thereafter to abstain, from publishing, demanding, or collecting passenger fares between Keokuk, Iowa, and points in Illinois upon a basis higher than 2.4 cents per mile, bridge tolls excepted, which basis was found reasonable in said report, or higher per mile than the fares contemporaneously exacted for the transportation of passengers between Illinois points, directly opposite Keokuk and the same Illinois points, by more than a reasonable bridge toll; or fares constructed upon a higher basis per mile, bridge tolls excepted, than fares contemporaneously maintained between Illinois points intermediate between Keokuk, Iowa, and points in Illinois, as such fares have been found in said report to be unlawfully discriminatory.

"It is further ordered, that the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before January 15, 1917, and thereafter to abstain, from publishing, demanding, or collecting fares for the transportation of passengers between Keokuk, Iowa, and points in Illinois, the basis of which per mile, bridge tolls excepted, is higher than the basis per mile for fares contemporaneously maintained between Chicago and the same Illinois points, as such fares have been found in said report to be unlawfully discriminatory.

"It is further ordered, that the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish and put in force on or before January 15, 1917, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Act to Regulate Commerce [Comp. St. 1916, § 8569] and thereafter to maintain and apply to the transportation of passengers between St. Louis and points in Illinois fares upon a basis not in excess of the fares between East St. Louis, Ill., and the same points by more than a reasonable bridge toll; nor upon a higher basis per mile, bridge tolls excepted, than fares contemporaneously maintained between Illinois points intermediate between St. Louis and points in Illinois, as such fares have been found in said report to be unlawfully discriminatory.

"It is further ordered, that the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified

and John Barton Payne, all of Chicago, Ill., for Railroad Cos.

Messrs. George T. Buckingham, James H. Wilkerson, and Edward J. Brundage, all of Chicago, Ill., for State Public Utilities Commission.

Mr. Joseph W. Folk, of Washington, D. C., for Interstate Commerce Commission.

Mr. Solicitor General Davis, of Washington, D. C., for the United States.

*502 * Mr. Justice VAN DEVANTER, after making the foregoing statement, delivered the opinion of the Court.

[1] The questions to which attention is first invited relate to the power of the District Court in the Northern District of Illinois to entertain the suits and the cross-bills, in view of the jurisdictional provision in the Act of October 22, 1913, c. 32, 38 Stat. 219, that a suit "to enforce, suspend or set aside, in whole or in part," an order of the Commission relating to transportation and made upon petition may be brought only in the district "wherein is the residence of the party or any of the parties upon whose petition the order was made."

It was objected in the District Court that the suits were brought to enforce the Commission's order and therefore could be entertained only in the Eastern district of Missouri, which embraces the residence of the party upon whose petition the order was made. But the court sustained its jurisdiction, ruling that the suits were not of the nature indicated by the objection.

In common acceptation a suit to enforce an order of the Commission is one which seeks to compel the carrier to whom the order is directed to yield obedience to its command. Nothing in the jurisdictional provision suggests that this is not what is intended, and that it is shown by the provision in section 16 of the Act to Regulate Commerce, as amended by Act June 18, 1910, c. 309, 36 Stat. 554, that, if an order respecting transportation be not obeyed by the carrier, the same may be enforced at the suit of the Commission, an injured party, or the United States, by an appropriate writ of process restraining the carrier from further disobedience and enjoining upon it due compliance with the order. A reading of both provisions leaves no room to doubt that the suit to enforce so clearly outlined in one is the suit intended by the other.

*503 * [2] But these were not suits of that type. They were begun by the carriers, not against them, and proceeded upon the theory, not that the carriers were in default, but that they were proceeding to obey the order. What was alleged and sought to be enjoined was threatened action on the part of the defendants, the state authorities, whereby obedience on the part of the carriers would be obstructed and made the occasion for subjecting them to divers criminal proceedings, suits for penalties and the like. In other words, the suits were brought to prevent complete obedience by the carriers from being wrongfully obstructed and embarrassed, but not to enforce the order in the sense of the jurisdictional provision. Therefore that provision was not applicable to them. They properly came within the provision in section 1 of the Act of June 18, 1910, c. 309, 36 Stat. 539, repeated in Judicial Code, § 207, which preserves and continues the general jurisdiction of the District Courts over cases and proceedings not therein enumerated.

[3] At this point it will be convenient to

and required to establish and put in force on or before January 15, 1917, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Act to Regulate Commerce, and thereafter to maintain and apply to the transportation of passengers between St. Louis, Mo., and points in Illinois fares, the basis of which per mile, bridge tolls excepted, is not higher than the basis per mile for fares contemporaneously maintained between Chicago and those same Illinois points.

"It is further ordered, that the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish and put in force on or before January 15, 1917, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Act to Regulate Commerce, and thereafter to maintain and apply to the transportation of passengers between Keokuk, Iowa, and points in Illinois fares upon a basis not in excess of 2.4 cents per mile, bridge tolls excepted, which basis has been found reasonable in the said report, nor in excess per mile of the fares between points in Illinois directly opposite to Keokuk and the same points by more than a reasonable bridge toll; nor upon a higher basis per mile, bridge tolls excepted, than fares contemporaneously effective between Illinois points intermediate between Keokuk, Iowa, and points in Illinois.

"It is further ordered, that the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish and put in force on or before January 15, 1917, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Act to Regulate Commerce, and thereafter to maintain and apply to the transportation of passengers between Keokuk, Iowa, and points in Illinois fares, the basis of which per mile, bridge tolls excepted, is not higher than the basis per mile for fares contemporaneously maintained between Chicago and those same Illinois points.

"It is further ordered, that said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before January 15, 1917, and thereafter to abstain, from the undue preferences and the undue and unreasonable prejudices and disadvantages found in said report to result from the contemporaneous maintenance between Illinois points of passenger fares, which fares, in combination with other fares required or permitted by this order, would produce the discrimination against interstate commerce and the undue preferences in favor of intrastate commerce condemned in the report of the Commission.

"And it is further ordered, that this order shall continue in force for a period of not less than two years from the date when it shall take effect."

dispose of another objection relating to the principal suits, but not turning on the jurisdictional provision. Shortly after the carriers' bills were filed the court, acting upon a motion of the defendants, ruled that the United States and the Commission were necessary parties, ordered that they be made defendants, and directed the issue of process against them. After they were thus brought in, the matter was considered again and the bills were dismissed as to them for want of jurisdiction. The defendants now say that after this dismissal the court did not have before it the requisite parties to enable it to entertain the bills. But the point is not tenable. There was no statute making the United States or the Commission a necessary party to bills of that nature, nor was the relief sought such as to render the presence of either essential under the rules applicable to suits in equity. * It well may be that either or both, if desiring to intervene, would have been permitted to do so, but there is no warrant for thinking that without their presence the bills could not be entertained.

*504

[4, 5] The cross-bills assailed the validity of the Commission's order on various grounds and concluded with a prayer that it be set aside and annulled and that the United States and the Commission be enjoined from enforcing it and the carriers from complying with it. Passing the fact that they were presented as cross-bills, it is apparent that in subject-matter and purpose they were suits to set aside the order. By statute such suits are required to be brought against the United States (Judicial Code, §§ 208, 211, 38 Stat. 219, 220, c. 32), and the jurisdictional provision before mentioned permits them to be brought only in designated districts. Here the Eastern district of Missouri was the one designated, the order being one that was made upon the petition of a resident of that district. The United States had consented to be sued there, but not elsewhere, and, being suitable only by its consent, could not be sued in a district not within the consent given. See Finn v. United States, 123 U. S. 227, 232, 233, 8 Sup. Ct. 82, 31 L. Ed. 128; Schillinger v. United States, 155 U. S. 163, 166, 15 Sup. Ct. 85, 39 L. Ed. 108. It therefore is certain that the cross-bills could not be entertained in the Northern district of Illinois, unless in this regard there be, as is asserted, a valid distinction between a cross-bill and an original bill. No doubt there are situations in which a cross-bill against an ordinary suitor may be considered and dealt with in virtue of the jurisdiction over the principal suit, even though as an original bill it could not be entertained (see Denver v. New York Trust Co., 229 U. S. 123, 135, 33 Sup. Ct. 657, 57 L. Ed. 1101, and cases cited); but it is otherwise where the cross-bill is against the United States, for no suit against it can be brought without its consent given by law. Its immunity recognizes no distinction between * cross-bills and original bills, or between ancillary suits and original suits, but extends to suits of every class. United States v. McLemore, 4 How. 286, 11 L. Ed. 977; Hill v. United States, 9 How. 386, 13 L. Ed. 185; Reeside v. Walker, 11 How. 272, 290, 13 L. Ed. 693; De Groot v. United States, 5 Wall. 419, 431–433, 18 L. Ed. 700; Carr v. United States, 98 U. S. 433, 437, 25 L. Ed. 209; Belknap v. Schild, 161 U. S. 10, 16, 16 Sup. Ct. 443, 40 L. Ed. 599. Thus the cross-bills as such had no better standing than they would have had as original bills.

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[6] The claim is made that in any event the cross-bills should have been retained as to the defendants therein other than the United States. But this is not an admissible view. As before indicated, the United States is made by statute a necessary party to a suit to set aside an order of the Commission, and this means that it is to stand in judgment as representing the public. If the state authorities thought the order should be set aside and wished to test their right to affirmative relief along that line they should have resorted to the court empowered by law to entertain a suit of that nature.

It follows that the District Court rightly disposed of the jurisdictional questions by entertaining the principal suits and declining to entertain the cross-bills.

[7] Whether the suits by the carriers were rightly dismissed on the merits is the principal question, and its solution turns on the power of the Commission to deal with discrimination arising out of a disparity in interstate and intrastate rates, and on the scope and effect of the order made.

In their answers the state authorities took the position that in so far as the order purports to authorize or require a removal of the discrimination found to exist by a change in intrastate rates it is in excess of any power that has been or can be conferred on the Commission, and therefore neither relieves the carriers from full compliance with the state rate law nor prevents that law from being fully enforced against them. If * the premise were sound the conclusion doubtless would follow, for where the Commission makes an order which it has no power to make the order is necessarily void, not merely voidable. But that the premise is not sound is settled by the Shreveport case (Houston, East & West Texas Ry. Co. v. United States) 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341. Upon full consideration it there was held:

*506

1. Under the commerce clause of the Constitution Congress has ample power to prevent the common instrumentalities of interstate and intrastate commerce, such as the railroads, from being used in their intrastate operations in such manner as to affect injuriously traffic which is interstate.

2. Where unjust discrimination against interstate commerce arises out of the relation of intrastate to interstate rates this power may be exerted to remove the discrimination,

and this whether the intrastate rates are maintained under a local statute or by the voluntary act of the carrier.

3. In correcting such discrimination Congress is not restricted to an adjustment or reduction of the interstate rates, but may prescribe a reasonable standard to which they shall conform and require the carrier to adjust the intrastate rates in such way as to remove the discrimination; for where the interstate and intrastate transactions of carriers are so related that the effective regulation of one involves control of the other, it is Congress, and not the state, that is entitled to prescribe the dominant rule.

4. It is admissible for Congress to provide for the execution of this power through a subordinate body such as the Interstate Commerce Commission, and this it has done by the Act to Regulate Commerce.

5. Where in the exercise of its delegated authority the Commission not only finds that *507 a disparity in the two classes of rates is resulting in unjust discrimination against interstate commerce but also determines what are reasonable rates for the interstate traffic, and then directs the removal of the discrimination, the carrier not only is entitled to put in force the interstate rates found reasonable but is free to remove the forbidden discrimination by bringing the intrastate rates to the same level.

Upon further consideration that decision was approved and followed in American Express Co. v. Caldwell, 244 U. S. 617, 37 Sup. Ct. 656, 61 L. Ed. 1352.

[8] The parties differ widely about the scope of the order. The carriers assert that it covers every intrastate passenger rate in Illinois, is addressed to the removal of discrimination found to be state-wide, and gives ample authority for increasing all rates between points in Illinois from 2 cents to 2.4 cents per mile. On the other hand, the state authorities assert that it is not state-wide and that the extent to which it is intended to affect the state-made rates is so indefinitely and vaguely stated as to make it inoperative and of no effect as to them. Of course, the Commission could adjust the remedy to the evil and make the order as broad as the wrongful discrimination; and not improbably it would intend to go that far and no farther. But the extent of the discrimination found and of the remedy applied must be gathered from the reports and order of the Commission, for they constitute the only authoritative evidence of its action. The reports show that the only discrimination found relates to the passenger traffic between Illinois and two cities outside that state—St. Louis and Keokuk. There is no finding that this traffic extends in appreciable volume to all sections of Illinois. As to some sections its volume may be very large and as to others almost or quite negligible. At best the reports leave the matter uncertain. Obviously this traffic is only a small part of the interstate passenger traffic moving over the railroads in Illinois, and yet the *508 finding is merely that there was discrimination against this part. Had the Commission regarded the discrimination as state-wide it is but reasonable to believe that it would have said so in its findings. And had it intended to require or authorize a state-wide readjustment of the intrastate rates it doubtless would have given direct expression to that purpose, which easily could have been done in a few lines. But neither in any part nor as a whole does the order plainly manifest such a purpose. In harmony with the reports it deals with the intrastate rates in so far only as they result in discrimination against interstate traffic to and from St. Louis and Keokuk. Its most comprehensive paragraph—the next to the last—declares that the carriers must "abstain from the undue preferences and the undue and unreasonable prejudices and disadvantages found in said report to result from the contemporaneous maintenance between Illinois points of passenger fares, which fares, in combination with other fares required or permitted by this order, would produce the discrimination against interstate commerce and the undue preference in favor of intrastate commerce condemned in the report of the Commission." But even here the general terms are so far restrained by the reference to the reports as to show that nothing more is intended than to command the removal of the discrimination to which the traffic to and from St. Louis and Keokuk is subjected. Besides, this paragraph evidently proceeds upon the theory that some of the intrastate rates are not affected by the other paragraphs, and ought not to be disturbed save where their use in connection with rates sanctioned by the order will be productive of the discrimination which it is intended to correct.

But while the order shows that it is not *509 intended to require or authorize a readjustment of all the intrastate rates, the description of those to which it applies is at best indefinite. There may be less uncertainty in some parts of the order than in others, but when each is read in the light of the rest and all in the light of the reports it is apparent that none has a certain or definite field of operation. The uncertainty arises out of a failure to designate with appropriate precision the territory or points to and from which the intrastate rates must or may be readjusted, and this omission accords with the absence from the reports of any finding showing definitely the territory or points where those rates operate prejudicially against the interstate traffic which the order is intended to protect.

To be effective in respect of intrastate rates established and maintained under state authority an order of the Commission of the kind now under consideration must have a

definite field of operation and not leave the territory or points to which it applies uncertain. Upon this point we said in American Express Co. v. Caldwell, supra, 244 U. S. 625, 37 Sup. Ct. 660, 61 L. Ed. 1352:

"Where a proceeding to remove unjust discrimination presents solely the question whether the carrier has improperly exercised its authority to initiate rates, the Commission may legally order, in general terms, the removal of the discrimination shown, leaving upon the carrier the burden of determining also the points to and from which rates must be changed, in order to effect a removal of the discrimination. But where, as here, there is a conflict between the federal and the state authorities, the Commission's order cannot serve as a justification for disregarding a regulation or order issued under state authority, unless, and except so far as, it is definite as to the territory or points to which it applies. For the power of the Commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic."

*510 *In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. Reid v. Colorado, 187 U. S. 137, 148, 23 Sup. Ct. 92, 47 L. Ed. 108; Cummings v. Chicago, 188 U. S. 410, 430, 23 Sup. Ct. 472, 47 L. Ed. 525; Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182; Missouri, Kansas & Texas Ry. Co. v. Harris, 234 U. S. 412, 419, 34 Sup. Ct. 790, 58 L. Ed. 1377, L. R. A. 1915E, 942. This being true of an act of Congress, it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty.

We conclude that the uncertainty in this order is such as to render it inoperative and of no effect as to the intrastate rates, established and maintained under a law of the state, and therefore that the suits by the carriers were rightly dismissed on the merits.

Decrees affirmed.

Mr. Justice HOLMES took no part in the consideration or decision of this case.

(245 U. S. 513)

MARTIN v. COMMERCIAL NAT. BANK OF MACON, GA.

(Argued Dec. 19, 20, 1917. Decided Jan. 14, 1918.)

No. 100.

BANKRUPTCY ⟸184(2) — PREFERENCES AND TRANSFERS—FAILURE TO RECORD.

Bankr. Act July 1, 1898, c. 541, § 60, subd. "b," 30 Stat. 562 (Comp. St. 1916, § 9644), as amended by Act June 25, 1910, c. 412, 36 Stat. 838, provides that, if a bankrupt shall have made a transfer of any of his property, and if at the time of the transfer or of the recording or registering thereof, if by law recording or registering is required, and being within four months before the filing of the petition, the bankrupt be insolvent, etc., it shall be voidable by the trustee. Section 47, subd. "a" (Comp. St. 1916, § 9631), provides that trustees, as to all property coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings. Civ. Code Ga. 1910, § 3260, provides that mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained or purchases made prior to the actual record of the mortgage, unless the purchaser or junior lienholder had notice of the mortgage. *Held*, that a chattel mortgage recorded before bankruptcy proceedings were instituted and before any creditor interested in the estate had acquired superior rights was valid as against the trustee, though recorded within four months before bankruptcy, as the Georgia statute imposes the requirement of registration only in favor of a creditor who fixes a lien on the property before the recording takes place, and the trustee acquired his lien after the recording.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

In the matter of J. H. Virgin, bankrupt. An order allowing the claim of the Commercial National Bank of Macon, Ga., as a secured claim, but denying it priority over certain claims, was affirmed in part and reversed in part by the Circuit Court of Appeals for the Fifth Circuit (228 Fed. 651, 143 C. C. A. 173), and W. E. Martin, Jr., trustee in bankruptcy, brings certiorari. Affirmed.

Messrs. R. Douglas Feagin and Rudolph S. Wimberly, both of Macon, Ga., for petitioner.

Messrs. Orville A. Park and George S. Jones, both of Macon, Ga., for respondent.

*514 *Mr. Justice McREYNOLDS delivered the opinion of the court.

As security for money presently loaned to him in good faith by the Commercial National Bank, one Virgin executed and delivered a mortgage upon his stock of merchandise at Macon, Ga., February 16, 1914. It was recorded August 20, 1914, when the bank knew of his insolvency. The next day involuntary bankruptcy *proceedings were instituted and *515 in due time he was adjudged bankrupt and a trustee appointed. Recordation of the mortgage was not fraudulently delayed and prior thereto no other liens were fixed upon the property. Both trustee and other creditors objected to the bank's claim as one entitled to priority "on the ground that the mortgage was recorded within the four months period preceding bankruptcy, at a time when the mortgagor was insolvent, and when the mortgagee knew that he was insolvent, and the recording of the mortgage would effect a preference, and that the transfer arising from the recording of the instrument was nonoperative, and that the instrument must be held as not recorded." Their contention here is thus stated:

"The trustee does not say in this case that his lien is older than the bank's and therefore he comes ahead of the bank, but he says that the bank's lien is invalid and inoperative, because recorded while the bankrupt was insolvent, etc., and that, being a subsequent lienholder, the trustee is in the proper position to attack the bank's lien. The bank's lien is invalid only by the positive inhibition of the statute, section 60b. It is for this reason invalid just as a transfer made (instead of recorded) within this four months' period is invalid by reason of the inhibition of the Bankruptcy Law." "The record of an instrument is required as to any particular person if the instrument must be recorded to be good against him. If the subsequent lienor is entitled to priority unless the antecedent mortgage is recorded, such mortgage is required to be recorded as to him. The trustee is a subsequent lienor. Unless the mortgage is recorded he, the trustee, is entitled to priority. It is therefore 'required' to be recorded as to him."

The referee allowed the claim as preferred and the Circuit Court of Appeals approved his action. 228 Fed. 651, 143 C. C. A. 173.

*516 * * It is provided by section 60b, Bankruptcy Act, as amended June 25, 1910, c. 412, 36 Stat. 838, 842 (Comp. St. 1916, § 9644):

"If a bankrupt shall * * * have made a transfer of any of his property, and if, at the time of the transfer, * * * or of * * * the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

Section 47a of the Bankruptcy Act (Comp. St. 1916, § 9631) provides:

"Trustees shall respectively: * * * (2) Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. * * *"

Section 3260, Georgia Code of 1910, declares that:

"Mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained, or purchases made prior to the actual record of the mortgage. If, however, the younger lien is created by contract, and the party receiving it has notice of the prior unrecorded mortgage, or the purchaser has the like notice, then the lien of the older mortgage shall be held good against them."

*517

Construing this section, in Hawes v. Glover, 126 Ga. 305, 317, 55 S. E. 62, 67, the Supreme Court held:

"A mortgage is perfectly valid as between the parties thereto, though never recorded. Hardaway v. Semmes, 24 Ga. 305; Gardiner v. Moore, 51 Ga. 268; Myers v. Picquet, 61 Ga. 260; Civil Code, § 2727 (Park's Ann. Code, § 3260). If it is not recorded, or, as in this case, is illegally recorded, the only effect is to postpone it to purchases made, or liens procured by contract, without notice of its existence or to liens obtained by operation of law."

Section 60b, Bankruptcy Act, has been specially considered by us in two recent cases—Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275, and Carey v. Donohue, 240 U. S. 430, 36 Sup. Ct. 386, 60 L. Ed. 726, L. R. A. 1917A, 295. In the first the company installed an ice machine for Grant Bros. at Horton, Kan., during February, under a conditional sale contract of earlier date and recorded May 15th following, when the purchasers were known to be insolvent; July 11th they became bankrupt. Such a contract is valid under the laws of Kansas as between the parties whether recorded or not, but void as against a creditor of the vendee who fastens a lien upon the property by execution, attachment or like process prior to recording. The vendors demanded the machine. The trustee maintained section 47a, Bankruptcy Act, gave him the status of a lienholder prior to recordation and that the contract, having been put to record within four months, operated as a preference voidable under section 60b. We held the trustee occupied the status of a creditor with a lien fixed as of the date when the bankruptcy proceedings commenced and that he could not assail the contract under the state law; further, that section 60b refers to an act whereby the bankrupt surrenders or incumbers his property for the benefit of a particular creditor, thereby diminishing the estate which should be applied to all; the contract in question did not operate as a preferential transfer; the property was not the bankrupts', but the vendor's; the former were not to become owners until the condition was performed; and there was no diminution of the estate.

*518

In Carey v. Donohue the trustee sought to set aside a real estate transfer executed more than four months before bankruptcy, but recorded within that time. Under the Ohio Statute conveyances of land until filed for record are deemed fraudulent as to subsequent bona fide purchasers without knowledge, but recording is not essential to their validity as against any creditor, whether general creditor, lien creditor, or judgment creditor with execution returned unsatisfied, that is, as against any class of persons represented by a trustee in bankruptcy or with whose rights, remedies, and powers he is deemed to be vested. We denied the trustee's contention and, among other things, declared:

"Required" has regard to persons in whose favor the requirement is imposed. "Congress did not undertake in section 60 to hit all preferential transfers, otherwise valid, merely because they were not disclosed, either by record or possession, more than four months before the bankruptcy proceedings." "It is plain that the words are not limited to cases where recording

is required for the purpose of giving validity to the transaction as between the parties. For that purpose, no amendment of the original act was needed, as in such a case there could be no giving of a preference without recording." "In dealing with a transfer, as defined, which, though valid as between the parties, was one which was 'required' to be recorded, the reference was necessarily to a requirement in the interest of others who were in the contemplation of Congress in enacting the provision." "The intended meaning was to embrace those cases in which recording was necessary in order to make the transfer valid as against those concerned in the distribution of the insolvent estate; that is, as against creditors, including those whose position the trustee was entitled to take."

The word "required" in section 60b refers directly to statutes in many states relating to recording which through various forms of expression seek to protect creditors by providing that their rights shall be superior to transfers while off the record. Recognizing the beneficial results of these enactments and intending that rights based thereon might be utilized for the advantage of bankrupt estates, Congress inserted (amendment of 1910) the clause "or of the recording or registering of the transfer if by law recording or registering thereof is required." In Carey v. Donohue we pointed out that purchasers are not of those in whose favor registration is "required," but that the reference is to persons concerned in the distribution of the estate, i. e., "creditors including those whose position the trustee was entitled to take." And we think it properly follows that before a trustee may avoid a transfer because of the provision in question he must in fact represent or be entitled to take the place of some creditor whose claim actually stood in a superior position to the challenged transfer while unrecorded and within the specified period.

The Georgia statute imposes the requirement of registration only in favor of a creditor who fixes a lien on the property before recording takes place. Here there is no such person; the trustee occupies the status of one who acquired a lien after that event. No one concerned in the distribution of the estate actually held rights superior to the mortgage while off the record.

The judgment of the court below is correct, and must be

Affirmed.

(245 U. S. 484)

MISSOURI, K. & T. RY. CO. OF TEXAS et al. v. STATE OF TEXAS.

(Submitted Jan. 2, 1918. Decided Jan. 14, 1918.)

No. 113.

COMMERCE ⇐58—REGULATION OF INTERSTATE COMMERCE—OPERATION OF TRAINS.

An order of a State Railroad Commission requiring passenger trains to start from their point of origin and from stations on the line in accordance with the advertised schedule, with certain allowances for connections with trains on other lines, was an unlawful interference with interstate commerce as applied to an interstate train received by defendant from a connecting line at a point near the State line and coming into defendants' hands too late for compliance with the schedule, as compliance with the order could not be secured, as suggested, by running an extra train if the regular one was not on time, since defendant had a right to advertise the interstate train, and offering another train would not free itself from liability.

In Error to the Court of Civil Appeals, Third Supreme Judicial District, of Texas.

Suit by the State of Texas against the Missouri, Kansas & Texas Railway Company of Texas and others. A judgment for plaintiff was affirmed by the Court of Civil Appeals and the Supreme Court of Texas (167 S. W. 822; 107 Tex. 540, 181 S. W. 721), and defendants bring error. Reversed.

Mr. Alexander H. McKnight, of Dallas, Tex., Mr. C. S. Burg and Mr. Joseph M. Bryson, both of St. Louis, Mo., and Mr. Alexander Britton and Mr. Evans Browne, both of Washington, D. C., for plaintiffs in error.

Mr. B. F. Looney and Mr. Luther Nickels, both of Austin, Tex., for the State of Texas.

* Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit brought by the State of Texas to recover penalties for violation of an order of the State Railroad Commission. This order required passenger trains in Texas to start from their point of origin and from stations on the line in accordance with advertised schedule, allowing them not exceeding thirty minutes at origin or points of junction with other lines to make connection with trains on such other lines, and not exceeding ten minutes more if at the end of the thirty minutes the connecting trains were in sight. There were some other qualifications not necessary to be stated. The defendant's passenger trains concerned were numbers 9 and 209, and were parts of a train, also numbered 9, of the Missouri, Kansas & Texas Railway, a different corporation, taken charge of by the defendant at Denison, Texas, about five miles south of the Texas and Oklahoma State line, under a contract with the Missouri, Kansas & Texas. In pursuance of this contract they were forwarded via Dallas and Fort Worth to Hillsboro, thence as one train to Granger and there again divided, the two parts going respectively to Galveston and San Antonio. There were similar arrangements for trains to the north. The cars received by the defendant came from St. Louis and Kansas City, Missouri, uniting at Parsons, Kansas, and thence proceeding south to Denison. The Court of Civil Appeals at first held that the movement must be regarded as a continuous one from Kansas City and St. Louis, and that the order did not apply to the train; but on a rehearing (167 S. W. 822) decided that as the defendant took control at

Denison with new crews and engines, and as the defendant could not go beyond the State line, the movement so far as the defendant was concerned was wholly within the State. *488 Breaches of the order having been proved, it affirmed a judgment imposing a fine. A writ of error was refused by the Supreme Court of the State.

The Supreme Court gave up the manifestly untenable ground taken by the Court of Civil Appeals and recognized that the defendant's trains were instruments of commerce among the States, but it construed the order as applying to them none the less and held it valid as so applied. The only question with which we have to deal is whether the State Commission could intermeddle in this way, especially when there was sufficient accommodation for local traffic independent of the through trains. The defendant in error attempts to open this last matter, because the opinion of the Court of Civil Appeals in which the fact was stated was reversed by it for a different reason, and that of the Court of first instance was the other way. But we regard the decision of the intermediate and the Supreme Court as proceeding upon the assumption that we have stated and that we see no reason to disturb. Again, the question is not what the State Commission might require of a road deriving its powers from the State, with regard to local business (Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262, 283, 30 Sup. Ct. 330, 54 L. Ed. 472), but whether the order if applied to this case would not unlawfully interfere with commerce among the States.

On its face the order as applied was an interference with such commerce. It undertook to fix the time allowed for stops in the course of interstate transit. It was a serious interference, for it made the defendant liable for an interstate train not starting on schedule time, when the train did not come into the defendant's hands, from another company in another State, until too late. This, as we understand the facts, was the train to which the advertised schedule applied, and if so, the mere statement of the result is enough to show that the burden imposed not only was serious but was unwarranted as well as unjust. *489 The suggestion that compliance with the order could have been secured by having an extra train ready to run if the regular one was not on time hardly is practical, and is not an adequate answer, even in form. For the defendant advertised, or at least had the right to advertise, the interstate train, and, if it did so, would not free itself from liability for a delay on the part of that train by offering another. We think it plain that this order was applied in a way that was beyond the power of the Commission and Courts of the State. Seaboard Air Line Ry. v. Blackwell, 244 U. S. 310, 37 Sup. Ct. 640, 61 L. Ed. 1160; Chicago, Burlington & Quincy R. R. Co. v. Railroad Commission of Wisconsin, 237 U. S. 220, 226, 35 Sup. Ct. 560, 59 L. Ed. 926; South Covington & Cincinnati Street Ry. Co v. Covington, 235 U. S. 537, 548, 35 Sup. Ct. 158, 59 L. Ed. 350, L. R. A. 1915F, 792.

Judgment reversed.

(245 U. S. 510)

KETCHAM v. BURR et al.

(Submitted Jan. 2, 1918. Decided Jan. 14, 1918.)

No. 114.

COURTS ⊂=385(5)—SUPREME COURT—REVIEW OF DECISIONS OF DISTRICT COURTS.

Plaintiff, after being committed to an insane asylum by a Michigan probate court and escaping therefrom, filed a bill in the District Court against the corporation owning and operating the asylum, its medical director and chief guard, the present and a former judge, and the present and a former register, of the probate court, the examining physicians who certified that he was insane, and the attorney who represented the petitioner therein, praying that they be required to give an account of and restore to him all writings, letters, documents, and papers placed in their hands in connection with the inquisition, and that the judge and register be required to set aside the pretended inquisition and make adequate entry accordingly on the record. *Held*, that the bill did not involve the construction or application of the federal Constitution, so as to authorize a direct appeal to the Supreme Court from a decree dismissing the bill, under Judicial Code (Act March 3, 1911, c. 231) § 238, 36 Stat. 1157 (Comp. St. 1916, § 1215), authorizing appeals and writs of error from the District Courts direct to the Supreme Court in any case that involves the construction or application of the Constitution of the United States.

Appeal from the District Court of the United States for the Eastern District of Michigan.

Suit by John L. Ketcham, Jr., against Col. Bell Burr, David S. Frackelton, James C. McGregor, and others. From a decree dismissing the bill, complainant appeals. Appeal dismissed.

Mr. William D. Williams, of New York City, for appellant.

Mr. John J. Carton, of Flint, Mich., for appellees.

*511 Mr. Justice McREYNOLDS delivered the opinion of the Court.

Having heard the cause upon bill, answer and replication, the District Court dismissed the bill. In support of this direct appeal it is said that the construction or application of the federal Constitution is involved. Judicial Code, § 238.

The defendants are the corporation which owns and operates Oak Grove asylum in Genesee county, Michigan; the medical director and chief guard of that institution; the present and a former judge, and also the present and a former register of the probate court of Genesee county; two examining physicians who upon an inquest held before that court certified complainant's insanity; and the attorney who represented the petitioner therein.

The bill is a nebulous recital of grievances

against defendants and many others—all alleged to have been wicked conspirators seeking to deprive appellant of his liberty and money. It appears that the appellant, a citizen of Indiana, having effected his escape from an insane asylum in Wisconsin was taken by his family and friends to Oak Grove for medical care and treatment in May, 1906; and that directly thereafter a petition asking an inquisition concerning his sanity was duly presented to the probate court by the superintendent of that institution as provided by a state statute. After a hearing he was adjudged insane and committed for treatment; the right to appeal was not exercised. In October, 1906, he escaped, and this bill was filed May 11, 1912, without prior application for relief to any court of the state. It prays (1) that defendants be required to give an account of and restore to complainant all writings, letters, documents and papers placed in their hands in connection with the inquisition, and (2) that the judge and register of the probate court be required to set aside and hold for naught the pretended inquisition in insanity and make adequate entry accordingly on the record.

All equities of the bill are fully denied in the answer; and the claim that the cause really involves construction or application of the federal Constitution is without foundation.

We have no jurisdiction to entertain the appeal and it must be

Dismissed.

(245 U. S. 489)

GEORGE A. FULLER CO. v. OTIS ELEVATOR CO.

(Argued Jan. 3, 1918. Decided Jan. 14, 1918.)

No. 128.

1. INDEMNITY ⟸13(1) — RIGHT TO RECOVER AGAINST PARTY PRIMARILY LIABLE.

A building contractor on paying a judgment against it for an injury sustained by a subcontractor's employé through the negligence of the operator of an elevator installed by defendant, who also furnished the operator, may recover indemnity if the operator remained the servant of defendant.

2. JUDGMENT ⟸704—CONCLUSIVENESS BETWEEN COPARTIES.

An action for indemnity for a judgment paid by plaintiff is not barred, though plaintiff and defendant were joined in the former action, where verdict therein was directed for defendant, and he was dismissed from the action before the present plaintiff's evidence was heard, and such verdict, even if on the same issue as that raised in the present case, would not conclude plaintiff in favor of defendant.

3. JUDGMENT ⟸704 — CONCLUSIVENESS BETWEEN COPARTIES.

Where, in an action for indemnity for a judgment paid by plaintiff, there was evidence making it impossible to say as a matter of law that defendant did not retain control of the servant from whose negligence the liability arose, the former judgment was not conclusive, as it only decided that plaintiff was liable as between him and plaintiff in the former action, and if it had decided anything more it would have been res inter alios as an adjudication.

4. COURTS ⟸388—FEDERAL SUPREME COURT —REVIEW OF DECISIONS OF COURTS OF DISTRICT OF COLUMBIA.

Under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1159 [Comp. St. 1916, § 1228]) § 251, providing that in any case in which the judgment or decree of the Court of Appeals of the District of Columbia is made final by the section preceding it shall be competent for the Supreme Court to require by certiorari or otherwise any such case to be certified to it for review "with the same power and authority in the case as if it had been carried by writ of error or appeal to said Supreme Court," the writ of certiorari is not limited to cases in which final judgment has been entered, but only to cases in which the judgment when entered is final, as the quoted phrase expresses the character of the power, and not its conditions.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

Action by the George A. Fuller Company against the Otis Elevator Company. A judgment for plaintiff was set aside by the Court of Appeals of the District of Columbia (44 App. D. C. 287), and plaintiff brings certiorari. Reversed, and judgment of the trial court affirmed.

Mr. Edward S. Duvall, of Washington, D. C., for petitioner.

Messrs. John S. Flannery and Frederic D. McKenney, both of Washington, D. C., for respondent.

Mr. Justice HOLMES delivered the opinion of the court.

[1] This is a suit brought by the petitioner to recover indemnity for a judgment that it had to pay in pursuance of the decision of this court in George A. Fuller Co. v. McCloskey, 228 U. S. 194, 33 Sup. Ct. 471, 57 L. Ed. 795. McCloskey, the plaintiff in the former suit, was injured upon an elevator through the negligence of Locke, the man in charge of it. He was at work for the Mackay Company, which was doing some painting under a subcontract with the defendant, the present petitioner, which, it was held, as between the parties then concerned, made the defendant answerable for Locke. The petitioner had constructed an office building under an agreement with the owner, Hibbs. The Otis Elevator Company had put in the elevators, also under an agreement with Hibbs, and furnished the man Locke upon a somewhat vague understanding with the petitioner, which, the latter contends, left Locke the servant of the Elevator Company as between the parties now before this court. If the petitioner is right and the primary duty rested on the Elevator Company it may recover in the present suit, unless the former proceedings constitute a bar. Washington Gas Light Co. v. District of Columbia, 161 U. S. 316, 328, 16 Sup. Ct. 564, 40 L. Ed. 712.

[2] There was evidence fully sufficient to show that the respondent retained its control at the time of the accident, and the jury

found a verdict for the plaintiff, but the judgment was set aside by the Court of Appeals on the ground that although the former judgment did not make the matter res judicata it concluded the case:

"In view of the adjudicated facts which were not open to the consideration of a second jury there was no such primary liability on the part of the Otis Company as will support an action for indemnity."

But there were no facts, whether adjudicated in the former case or not, that were not open to the consideration of the jury in this. The Otis Company was joined as a party defendant, it is true, in the former action, and a verdict was directed in its favor. But even if the former verdict against the petitioner had gone on the same issue that was tried in the present case, which was not the fact, it could not have concluded the petitioner in favor of the Otis Company, for the reason, if for no other, that the Otis Company was dismissed from the suit before the petitioner's evidence was heard.

[3] The former judgment did not decide that the evidence in the present case showed as matter of law that Locke, who was in the general service of the Otis Company, was transferred for the moment to the petitioner. It did decide as matter of law that as between the Mackay Company and the petitioner their agreement left the petitioner responsible. It had no occasion to decide and did not purport to decide more. Even if it had gone farther it would have been res inter alios as an adjudication and it would not have been a precedent because the evidence in the present case had additional details which, if meagre, still made it impossible to say as matter of law that the Otis Company did not retain control. *492

[4] It is objected to the writ of certiorari in this case that there was no final judgment; but the writ when issued to the Court of Appeals is not limited to cases in which final judgment has been entered, but only to cases in which the judgment when entered is final. Judicial Code, § 251 (Comp. St. 1916, § 1228). The words "with the same power and authority in the case as if it had been carried by writ of error or appeal to said Supreme Court" express the character of the power, not its conditions, as the power is granted only when a writ of error or appeal does not lie. See Judicial Code, § 240 (Comp. St. 1916, § 1217). Denver v. New York Trust Co., 229 U. S. 123, 133, 33 Sup. Ct. 657, 57 L. Ed. 1101. The decision in Bruce v. Tobin, 245 U. S. 18, 38 Sup. Ct. 7, 62 L. Ed. —, cited for the respondent, is concerned with the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. 1916, § 1214), which requires a final judgment in terms.

Judgment reversed.

Judgment of Supreme Court affirmed.

(245 U. S. 520)

BATES v. BODIE.

(Argued Jan. 4, 1918. Decided Jan. 21, 1918.)

No. 120.

1. COURTS ⟸394(14) — SUPREME COURT — REVIEW OF DECISIONS OF STATE COURTS—DISMISSAL.

Where the decision of the Supreme Court of a state is challenged for not according to the decree of another state the credit to which it is entitled, a motion to dismiss will not lie on the ground that the decree was given the value given it by the statutes of the state in which it was rendered, as whether it was given such value is the question in controversy.

2. DIVORCE ⟸255—ALLOWANCE OF ALIMONY—CONCLUSIVENESS OF ADJUDICATION.

Whether the right to alimony be litigated in the suit for divorce or in a subsequent suit, the principle is applicable that what is once adjudicated cannot be tried again.

3. JUDGMENT ⟸713(2)—MATTERS CONCLUDED—MATTERS WHICH MIGHT HAVE BEEN LITIGATED.

If a second action is upon the same claim or demand as that on which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided, but of what might have been decided, but if the second action is upon a different claim or demand, the judgment is an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered.

4. JUDGMENT ⟸713(2) — MATTERS CONCLUDED—MATTERS WHICH MIGHT HAVE BEEN LITIGATED.

An estoppel by judgment extends not only to every matter which was offered or received to sustain or defeat the claim or demand, but any other admissible matter which might have been offered for that purpose.

5. DIVORCE ⟸331—FOREIGN DIVORCE—JURISDICTION—SITUATION OF REAL PROPERTY.

Though an Arkansas court rendering a decree of divorce had no jurisdiction of Nebraska lands so as to deal with them specifically, it had jurisdiction of the controversy between the parties, and all that pertained to it, and jurisdiction to determine the extent of the property resources of the husband and what part of them should be awarded to the wife, and was not limited to any particular sum, if it had jurisdiction to render a money judgment at all.

6. DIVORCE ⟸331 — FOREIGN DIVORCE — CONCLUSIVENESS OF ADJUDICATION — EVIDENCE.

In an action by a wife granted a decree of divorce with a money judgment for alimony in Arkansas, to obtain additional alimony from land in Nebraska, evidence *held* to show that the Nebraska land was not excluded from consideration by the Arkansas court, and that the Arkansas judgment was rendered by consent so as to give jurisdiction to that court to render a money judgment.

In Error to the Supreme Court of the State of Nebraska.

Suit by Lucie Bodie against Edward Bates. Judgment for plaintiff was affirmed by the Supreme Court of Nebraska (99 Neb. 253, 156 N. W. 8), and defendant brings error. Reversed and remanded.

*521 Plaintiff in error, Bates, filed a complaint in divorce against defendant in error in the chancery court of Benton county, state of Arkansas, alleging cruelty and praying for an absolute divorce.

Defendant in error filed an answer denying the charge against her and a cross-complaint accusing him of cruelty.

In the cross-complaint she alleged that Bates was the owner of real and personal property of the fair value of $75,000, consisting of 320 acres of land in York county, Neb., which she described, and alleged further that she was the owner in her own right of $3,000, $2,500 of which she loaned to Bates, taking his note therefor bearing interest at 8 per cent. per annum.

She prayed for an absolute divorce, for the restoration of the money borrowed from her, and "that the court award her such alimony as the facts and law warrant, and all other proper and necessary relief." The court, after hearing, dismissed Bates' complaint for want of equity and granted her a divorce, and alimony was decreed her as follows:

"It is ordered, adjudged, and decreed by the court that the defendant Lucie Bates have and recover of and from the defendant [plaintiff] Edward Bates the sum of $5,111.00 in full of alimony and all other demands set forth in cross-bill which judgment is rendered by the consent of the plaintiff on condition that no appeal be taken by the defendant from the judgment and decree herein rendered."

Certain personal property, consisting of silverware and household furniture, was adjudged to her and a lien was declared on a lot in the city of Siloam Springs, state of Arkansas, and certain notes and mortgages amounting to the sum of $2,801.06 were required to be deposited with the clerk of the court as additional security. He, however, was given the power to sell the same, but required to deposit the proceeds of the sale with the clerk until the sum awarded her be paid, for which no execution was to issue for six months. It was also decreed: *522

"That she be restored to her maiden name, * * * and that the bonds of matrimony entered into" between her and Bates "be dissolved, set aside, and held for naught."

She subsequently brought this suit against him in a Nebraska state court repeating the charges of cruelty against him and the proceedings in Arkansas resulting in a decree for divorce and alimony as stated above, and—"that the court of chancery did not have any jurisdiction of or over the property of complainant which was situated outside of the state of Arkansas, and that in consequence of that fact in determining the amount of alimony to be granted the defendant in that suit, he was limited and prohibited from taking into account the above-mentioned property situated in York county, Neb. Said court was limited by the laws of Arkansas from taking into consideration said property lying in York county, Neb., in determining the amount of alimony that should be granted to defendant in that suit, who is plaintiff herein."

The laws of the state of Arkansas further provide, she alleged, that:

"Where the divorce is granted to the wife each party is restored to all property not dis-

posed of at the commencement of the action, which either party obtains from or through the other during the marriage, and in consideration or by reason thereof; and the wife so granted a divorce from the husband shall be entitled to one-third of all lands of which her husband is seised of an estate of inheritance, at any time during the marriage, for her life, unless the same shall have been released by her in legal form."

She further alleged that the land in Nebraska was worth the sum of $48,000; that the amount of alimony allowed her by the Arkansas decree was largely inadequate for her support and was not such a fair proportion of the property of Bates owned by him *523 at the date of *the decree as she then was and is entitled to in view of the circumstances. She prayed that a reasonable sum be adjudged her out of the York county property in addition to the amount allowed her by the Arkansas decree. A copy of the decree was attached to the complaint.

Bates demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and, she declining to plead further, the cause was dismissed for want of equity. The judgment was reversed by the Supreme Court.

On the return of the case to the trial court Bates answered. He set up the proceedings in Arkansas, and pleaded the decree and alleged that it was made upon full consideration of the evidence and the issues, and that the court took into consideration the value of the land in York county, Neb., in determining the amount of alimony to be awarded to plaintiff; that the decree remained "in full force and effect, except that the amount of alimony awarded therein has been fully paid" by him; that the Arkansas court in awarding the alimony "took into consideration all of the property owned by" him, "which decree, so far as it relates to alimony, having been fully satisfied, has become a full and complete bar to further proceedings on the part of the plaintiff in this suit, defendant in that, to recover additional alimony under the laws of Arkansas"; and that, further, under the Constitution of the United States, the findings and decree are entitled to full faith and credit in the courts of Nebraska, and constitute a full and complete bar to plaintiff's right to recover additional alimony under the laws of the state of Nebraska.

It was adjudged and decreed that plaintiff (defendant in error here) have and re- *524 cover from the defendant (plaintiff in error here) the "sum of $10,000, being the amount found due her as alimony." The judgment was affirmed by the Supreme Court, to review which this writ of error was prosecuted.

Messrs. A. C. Ricketts and A. W. Field, both of Lincoln, Neb., for plaintiff in error.

Mr. Samuel P. Davidson, of Tecumseh, Neb., for defendant in error.

Mr. Justice McKENNA, after stating the case as above, delivered the opinion of the court.

[1] A motion is made to dismiss on the ground, as contended, that the decision of the Supreme Court of Nebraska was based upon a construction of the statutes of Arkansas and concluded therefrom that the District Court of Arkansas "had no jurisdiction to take the Nebraska lands of this plaintiff in error into consideration in fixing the amount of allowance to this defendant in error, and as a matter of fact did not do so"; that his conclusion was reached "by reason of the peculiar statute of Arkansas which governs and controls the courts of that state in fixing the allowance of alimony to a wife, *in all cases* in which the divorce *is granted on her petition*" (italics counsel's) and the court "was limited and controlled by that statute." It is hence contended that the full faith and credit which the Constitution of the United States requires to be given to the judicial proceedings of another state was not denied to the Arkansas decree, but that the Supreme Court of Nebraska, considering the statutes of Arkansas, gave to the decree the value those statutes gave to it.

But this is the question in controversy. The decision of the Supreme Court of Nebraska is challenged for not according to the *525 decree the credit it is entitled *to and it is no answer to the challenge to say that the Supreme Court committed no error in responding to it, and that, therefore, there is no federal question for review. Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366. The motion to dismiss is denied.

The decision of the Supreme Court affirming the subsequent judgment of the District Court on the merits was by a divided court and the opinion and dissenting opinion were well-reasoned and elaborate. The ultimate propositions decided were that the courts of Nebraska would entertain a suit for alimony out of real estate situated in that state after a decree for absolute divorce in another state, the latter state having no jurisdiction of the land, notwithstanding the decree awarding alimony, the decree not appearing to have been rendered by consent or not having taken such land into account; and that besides the Arkansas court had no jurisdiction to render a money judgment for alimony.

The propositions were supported and opposed by able discussion, some of which was occupied in reconciling a conflict of decision in Nebraska, a later decision made to give away to an earlier one. We are not called upon to trace or consider the reasoning of the opinion further than to determine the correctness of its elements, and this determination can be made by reference to the divorce proceedings in Arkansas and the decree of the court rendered therein.

[2, 3] The case is not in broad compass and depends upon the application of the quite familiar principle that determines the estoppel of judgments, and the principle would seem to have special application to a judgment for divorce and alimony. They are usually concomitants in the same suit—some cases say must be—or, rather, that as alimony is an incident of divorce, it must be awarded by the same decree that grants the separation. And it is the practice to unite them, as alimony necessarily depends upon a variety of circumstances more adequately determined in the suit for divorce, not only the right to it, but the measure of it, all circumstances upon which it depends then naturally brought under the view and judgment of the court. Whether, however, the right to it should be litigated in the suit for divorce, or may be sought subsequently in another, the principle is applicable that what is once adjudged cannot be tried again. And this court has established a test of the thing adjudged and the extent of its estoppel. It is: If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided, but of what might have been decided. If the second action was upon a different claim or demand, then the judgment is an estoppel "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." Cromwell v. County of Sac, 94 U. S. 351, 353, 24 L. Ed. 195; Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 30 Sup. Ct. 78, 54 L. Ed. 179; Troxell v. Del., Lack. & Western R. R. Co., 227 U. S. 434, 33 Sup. Ct. 274, 57 L. Ed. 586; Radford v. Myers, 231 U. S. 725, 34 Sup. Ct. 249, 58 L. Ed. 454; Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, 37 Sup. Ct. 506, 61 L. Ed. 1148.

[4] But how find the matters in issue or the points controverted upon the determination of which the judgment was rendered? The obvious answer would seem to be that for the issues we must go to the pleadings; for the response to them and their determination, to the judgment; and each may furnish a definition of the other. National Foundry, etc., Co. v. Oconto Water Supply Co., 183 U. S. 216, 234, 22 Sup. Ct. 111, 46 L. Ed. 157. If there be generality and uncertainty, to what extent there may be specification and limitation by evidence aliunde there is some conflict in the cases. But we are not called upon to review or reconcile them. Our rule is that an estoppel by judgment is "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." Cromwell v. County of Sac, supra, 94 U. S. 352, 24 L. Ed. 195. Is the rule applicable to the instant case?

We have set forth the proceedings in divorce in which, we have seen, there were charges of cruelty, and countercharges. There was display of property, prayers for divorce and a prayer in addition, on the part of defendant in error, that her husband, Bates, be required to restore a sum borrowed from her, "and that the court award her such alimony as the facts and law warrant, and all other proper and necessary relief."

Responding to the issues thus made and the relief thus prayed, the court adjudged plaintiff in error guilty of cruelty, granted defendant in error a divorce, and awarded her the sum of "$5,111.00 in full of alimony and all other items set forth in the cross-bill."

There were then presented the issues of divorce and alimony; the first was made absolute, the second in a specified sum "in full," and the sum adjudged to her was made a lien on his property in the state (Arkansas). We may remark that she was awarded other property. It would seem, therefore, that there is no uncertainty upon the face of the record and that it is clear as to the issues submitted and clear as to the decision upon them.

But it is answered that: (1) The court had no jurisdiction of the Nebraska lands; and (2) that besides it did not take them into account in its judgment.

[5] 1. Counsel make too much of this point. It may be that the Arkansas court had no jurisdiction of the Nebraska lands so as to deal with them specifically, but it had jurisdiction over plaintiff in error to require him to perform any order it might make. But even this power need not be urged. The court had jurisdiction of the controversy between the parties and all that pertained to it, jurisdiction to determine the extent of the property resources of plaintiff in error and what part of them should be awarded to defendant in error. It was not limited to any particular sum if it had jurisdiction to render a money judgment at all.

But such jurisdiction does not exist, the Supreme Court of Nebraska decides and counsel urges. The argument to sustain this is that the Arkansas statute[1] (section 2684, Kirby's Digest) provides that when a divorce is granted to the wife the only power the court possesses is to restore to the parties respectively the property one may have obtained from the other during the marriage

[1] "And where the divorce is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and the wife so granted a divorce against the husband shall be entitled to one-third of the husband's personal property absolutely, and one-third of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form." Kirby's Digest, § 2684.

and adjudge to the wife one-third of her husband's personal property absolutely and one-third of all the lands whereof he was seised of an estate of inheritance at any time during the marriage for her life unless she shall have relinquished the same in legal form. In other words, against a guilty husband the courts of Arkansas were without power to render a money judgment for alimony, but were confined to an allotment of his personal property and real estate in the proportions stated. But the court was confronted with the question of the relation of that section to section 2681 of the Digest, which provides that:

"When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable."

*529

In answer to the question the court decided that the latter section is applicable only when a divorce is granted for the fault of the wife.

Plaintiff in error contests the conclusion and strong argument may be made against it to show that the sections are reconcilable and each applicable to particular conditions. And such was the view of the dissenting members of the court. However, we are not called upon for a definitive decision on account of the view we entertain of proposition 2 and the reason which, we think, induced the court to render a money judgment.

[6] 2. This proposition is based on the record, which, the Supreme Court said, "shows that the court [Arkansas court] did not in fact make any allowance on account of the Nebraska lands," and resort is had to parol testimony for the purpose of limiting the decree. But we cannot give the testimony such strength. It is conflicting. It consists of the impressions of opposing counsel and of the parties of the opinion of the court orally delivered in direction for the decree.

The Bodie version is supported by the clerk of the court, whose recollection was that the court did not take into consideration "the land outside of Benton county." But he further testified:

That there was testimony of the rental value of the Nebraska lands and that "the chancellor announced that, while he did not have jurisdiction over the lands in Nebraska, he did have jurisdiction over the person of Bates, as he was personally present in court. The court required Bates to deposit security for the payment of the alimony awarded. * * * As I recollect it, the decree rendered was on the consent of Bates on condition that Bodie would not appeal."

On the Bates side is the evidence of the chancellor, whose opinion was the subject of the testimony of the others. He was specific and direct, and the following, in summary, is his testimony: Depositions were introduced showing the value of and rental income from the Nebraska lands, which were supposed to be in the name of Bates' children or in his name as trustee for his children. The decree for alimony was a lump sum of $5,111 "in lieu of any interest that she might have or claim she might have for any sum." (It does not appear from what this is a quotation—probably from the witness' opinion.) He, the witness, intimated what he would do in the way of a property finding and the parties agreed upon a lump sum as a final settlement, from which no appeal was to be taken. His view was that the court had jurisdiction of the parties, and held it had not of the land in Nebraska, but it did have jurisdiction to consider its value in determining the amount of alimony. Knowing, as he testified, the law, he did not think he stated that there was no law justifying the court to take into consideration the Nebraska lands. It was not the first time the proposition had been raised before him.

*530

He remembered that Bodie claimed $2,500 as borrowed money, but the money had merged in Bates' estate. He did not understand that it entered in the decree. It was a lump sum agreement provided cash could be got to end the controversy both as to divorce and as to property rights. Counsel adjusted it on the outside, for he was quite sure that it was not the amount the court indicated it would allow. The court understood that counsel on both sides agreed to the amount; that the judgment was a complete and amicable settlement between the parties of all property rights involved.

We must ascribe to the representation of the decree the same judicial impartiality that induced its rendition and the representation was circumstantial, without material qualification, doubt, or hesitation. It accords besides with the issues in the case and the decree. As we have seen, the amount it awarded was "in full of alimony and all other demands set forth in the cross-bill." It also recited that it was rendered by consent of plaintiff on condition that no appeal be taken by defendant from the judgment and decree. The amount was secured, as the chancellor declared he would secure it; it was paid as it was required to be paid.

*531

The evidence, therefore, confirms the face of the decree and that it was rendered by consent of the parties. It is admitted that consent would give jurisdiction to the court to render a money judgment for alimony.

We think, therefore, that due faith and credit required by the Constitution of the United States was not given to the decree.

The judgment of the Supreme Court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

(245 U. S. 531)

SOUTHERN PAC. CO. et al. v. DARNELL-TAENZER LUMBER CO. et al.

(Argued Jan. 8 and 9, 1918. Decided Jan. 21, 1918.)

No. 132.

CARRIERS ⊂⊃202—OVERCHARGES—REPARATION—PERSONS ENTITLED TO RECOVER.

Where the Interstate Commerce Commission found a rate charged on lumber excessive and ordered it reduced, and also ordered reparation to the extent of the excess, parties who made the overpayment were entitled to recover it, though they were able to pass on the damage sustained in the first instance by collecting the amount from purchasers, as the tendency of the law in regard to damages is not to go beyond the first step, and a defendant is liable if, proximately, plaintiff has suffered a loss, especially as there was no privity between the purchasers and the carriers, entitling them to recover the overpayments.

In Error to the United States Circuit Court of Appeals for the Sixth Circuit.

Suit by the Darnell-Taenzer Lumber Company and others against the Southern Pacific Company and others. A judgment for plaintiff was affirmed by the Circuit Court of Appeals for the Sixth Circuit (229 Fed. 1022, 143 C. C. A. 663), and defendants bring error. Affirmed.

Messrs. Charles N. Burch and H. D. Minor, both of Memphis, Tenn., for plaintiffs in error.

Messrs. Francis B. James, of Washington, D. C., and Allen Hughes, of Memphis, Tenn., for defendants in error.

*533 *Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit brought by the defendants in error to recover reparation from the railroads for charging a rate on hardwood lumber, alleged to be excessive. The Interstate Commerce Commission had found the rate to be excessive and had made an order for reduction from 85 to 75 cents, which was obeyed, and also one for reparation to the extent of the excess, which was not obeyed. 13 Interst. Com. Com'n, 668. A demurrer to the declaration was sustained by the Circuit Court on the ground that it was not alleged that the plaintiffs had paid the excessive rates or that they were damaged thereby. 190 Fed. 659. The declaration was amended, but at the trial the judge directed a verdict for the defendants, presumably on the ground argued here, that it did not appear that the plaintiffs were damaged. The judgment was reversed by the Circuit Court of Appeals. 221 Fed. 890, 137 C. C. A. 460. At a new trial the jury were instructed that if they found the rate charged unreasonable and that prescribed by the Interstate Commerce Commission reasonable, they should find for the plaintiffs in accordance with the Commission's award. The jury found for the plaintiffs and this judgment was affirmed by the Circuit Court of Appeals. 229 Fed. 1022, 143 C. C. A. 663.

The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately *the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. Olds v. Mapes-Reeve Construction Co., 177 Mass. 41, 44, 58 N. E. 478. Perhaps strictly the securing of such an indemnity as the present might be regarded as not differing in principle from the recovery of insurance, as res inter alios, with which the defendants were not concerned. If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier. State v. Central Vermont Ry. Co., 81 Vt. 459, 71 Atl. 193, 21 L. R. A. (N. S.) 949. See Nicola, Stone & Myers Co. v. Louisville & Nashville R. R. Co., 14 Interst. Com. Com'n, 199, 207–209; Baker Manufacturing Co. v. Chicago Northwestern Ry. Co., 21 Interst. Com. Com'n, 605. The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. New York, New Haven & Hartford R. R. Co. v. Ballou & Wright, 242 Fed. 862, 155 C. C. A. 450. Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result. 13 Interst. Com. Com'n, 680. Probably in the end the public pays the damages in most cases of compensated torts.

*534

The cases like Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations. But here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss. See Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412, 429, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691; Mills v. Lehigh Valley R. R. Co., 238 U. S. 473, 35 Sup. Ct. 888, 59 L. Ed. 1414.

*535

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

An objection is taken to the jurisdiction of this Court upon writ of error. An application is made for a certiorari in case the objection is held good, and as we should grant the latter writ in that event the question has no importance here except as a precedent. We are inclined to take the course followed sub silentio in Mills v. Lehigh Valley R. R. Co., and to treat cases brought under section 16 of the act to regulate commerce (Comp. St. 1916, § 8584) which authorizes the joinder of all plaintiffs and all defendants as standing on a peculiar ground.

Judgment affirmed.

(245 U. S. 535)

UNION PAC. R. CO. v. HUXOLL.

(Argued Dec. 21, 1917. Decided Jan. 21, 1918.)
No. 104.

1. COURTS ⟸394(24)—SUPREME COURT—REVIEW OF DECISIONS OF STATE COURTS — MATTERS REVIEWABLE.

On writ of error to review a judgment of a state court in an action for the death of an employé struck by an engine, the Supreme Court must examine the evidence to determine the validity of the claim that there was no substantial evidence that a defect in the power brake on the engine contributed in whole or in part to the death, as this presents a federal question of law.

2. MASTER AND SERVANT ⟸204(2), 228(2)—NEGLIGENCE ⟸101—ASSUMPTION OF RISK — CONTRIBUTORY NEGLIGENCE — DIMINISHING DAMAGES.

Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1916, §§ 8657–8665), provides that in actions thereunder contributory negligence shall not bar a recovery, but that the damages shall be diminished in proportion to the amount of negligence attributable to the employer, provided that no employé shall be held to have been guilty of contributory negligence where the violation by the carrier of any statute enacted for the safety of employés contributed to his injury or death, and that the employé shall not be held to have assumed the risks where any such violation contributed to the injury or death. Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (Comp. St. 1916, §§ 8605–8612), forbids the use of locomotive engines not equipped with a power driving wheel brake and appliances for operating the train brake system. *Held* that, if the failure to have the power brake of a railroad engine in working order contributed in whole or in part to the death of an employé, neither contributory negligence nor assumption of risk could avail the company as a defense or in diminishing the damages.

3. MASTER AND SERVANT ⟸285(7)—ACTIONS FOR DEATH—QUESTIONS FOR JURY—CAUSE OF DEATH.

In an action for the death of an employé struck by a railroad engine, where the evidence was conflicting, but that least favorable to defendant tended to show that while the engineer did not see deceased struck he was notified almost instantly, and that if the power brake had been working he could have stopped the engine almost instantly, but that in fact it ran for approximately 135 feet, with deceased's body under the engine or tender, and so entangled in the low-hanging attachments of the tender and the rods of the driving wheel brakes that it required 45 minutes to release him, it was a question for the jury whether the defect in the power brake contributed to the death, which occurred after he was released.

In Error to the Supreme Court of the State of Nebraska.

Action by Ella Huxoll, administratrix of Fred J. Huxoll, deceased, against the Union Pacific Railroad Company. A judgment for plaintiff was affirmed by the Supreme Court of Nebraska (99 Neb. 170, 155 N. W. 900), and defendant brings error. Affirmed.

Messrs. Nelson H. Loomis, of Omaha, Neb., and C. A. Magaw, of Topeka, Kan., for plaintiff in error.

Messrs. Halleck F. Rose, of Omaha, Neb., and Walter V. Hoagland, of North Platte, Neb., for defendant in error.

*536 * Mr. Justice CLARKE delivered the opinion of the Court.

Fred J. Huxoll, a locomotive engineer in the employ of the plaintiff in error, was run down by a switching engine, about 11 o'clock in the morning, in a switching yard of the company at a division point in Nebraska, and subsequently died of the injuries which he received.

The weather was very cold, with a high wind blowing and a cloud of steam and smoke, from engines standing nearby the scene of the accident and from a roundhouse farther away, had settled down upon the tracks, and it was while passing through this that the deceased was struck by the engine. This cloud of steam and smoke is described by one witness as extending 300 or 400 feet along *the tracks, and by another *537 for about 100 to 200 feet. It varied in density and shifted with the wind, so that at times one could see considerable distances through it while at other times it was so dense that it was possible to see only a very short distance. Huxoll was walking eastward through this cloud of smoke and steam and was between the rails of one of the tracks when an engine backing toward the west struck him in such a manner that the tender passed over him, and when the engine was stopped he was opposite the main driving wheel, with his right wrist under the wheel on the rail.

Judgment was rendered by the trial court on a verdict in favor of the plaintiff, which was affirmed by the Supreme Court of Nebraska, and, the case being one to which the federal Employers' Liability Act is applicable, it is now here on writ of error.

There are many claims of negligence in the petition, but the court submitted only three of them to the jury, and of these we need consider but one instruction, viz.:

Was the power brake on the engine in working order at the time of the accident, and if it was not, did this defect contribute "in whole or in part" to cause the death of Huxoll?

The oral argument of counsel for the plaintiff in error was practically confined to the

proposition that the trial court committed reversible error in submitting these questions to the jury, for the reason that, even if it be assumed (as it must be for there is sharp conflict on the point) that the power brake was not in working order, there was no substantial evidence in the case that this failure contributed "in whole or in part" to cause the death of Huxoll.

The engineer did not see the deceased at the moment he was struck, and it is argued that there is no substantial evidence to show how much farther the engine ran after he was notified of the accident than it would have run if the power brake had been properly applied, or that the running of the engine such distance, whatever it may have been, added anything to the injuries of the deceased and so contributed to cause his death.

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[1] It is necessary for us to examine the evidence in the record to determine the validity of this claim for the reason that it presents a federal question, not of fact but of law (Creswell v. Knights of Pythias, 225 U. S. 246, 261, 32 Sup. Ct. 822, 56 L. Ed. 1074; Seaboard Air Line v. Padgett, 236 U. S. 668, 673, 35 Sup. Ct. 481, 59 L. Ed. 777), and it relates to the only negligence claimed in the case which, if proved, would relieve the defendant in error, as the charge of the court in the instruction we are considering relieved her, from the necessity of having her recovery diminished by the jury in proportion to the amount of negligence attributable to her decedent, who was obviously guilty of contributory negligence in walking on the track under the conditions shown.

[2] The federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65, c. 149; Comp. St. 1916, §§ 8657–8665) is confessedly applicable to the case and the rule of liability prescribed by this and the Safety Appliance Act of March 2, 1893 (27 Stat. L. 531, c. 196; Comp. St. 1916, §§ 8605–8612), is, as the trial court charged, that if the failure to have the power brake in working order contributed "in whole or in part" to cause the death of deceased, the plaintiff in error would be liable in damages and neither contributory negligence nor assumption of risk could avail the company as a defense or in diminishing the damages.

[3] There is conflict in the evidence; as to the speed at which the engine was moving when it entered the cloud of steam and smoke, the estimates vary from 3 miles to 10 miles an hour; as to the distance within which the engine with the power brake properly working could have been stopped under the conditions which existed at the time of the accident, the estimates vary from "almost instantly"—8 to 10 feet—to 40 feet; as to when the engineer received notice that the deceased had been struck, the statements vary, from almost the instant the man was struck, to considerably later; as to the distance which the engine ran after striking the deceased, the estimates vary from 30 to about 135 feet; as to the distance which the engine ran after the engineer had notice of the accident, the engineer testified at one time that he thought it did not exceed 40 feet, while other testimony tended to show that it must have been considerably more than 100 feet; and as to the lookout which the engineer was keeping when the accident occurred.

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The first wheel to actually strike the deceased was the "main" driving wheel—the middle one of the three—and this was standing on his right wrist when the engine was stopped, so that the entire tender and quite one-half of the engine proper, including the fire box, passed over his body which was found so wedged beneath the engine that it was necessary to remove the brakerods to release him.

The deceased was not instantly killed but was conscious and talked some during the forty-five minutes which elapsed before he was released from under the engine and also later in the day while on the way to the hospital at Cheyenne, and he did not die until 2 o'clock the next morning. The injuries which caused his death are not described beyond the bare statement that the driving wheel rested on the wrist of his right arm, that that arm was found afterwards to be torn from the shoulder and that his scalp was badly cut.

Considering this conflicting testimony in the aspect of it least favorable to the company, as we must on this review, it results that there is evidence tending to show, that while the engineer did not see the man struck, he was notified almost instantly by a call to stop from the one witness who says he saw him struck, and that if the power brake had been working the engineer could have stopped his engine, running 3 or 4 miles an hour, "almost instantly," "in 8 to 10 feet," but that in fact it ran for approximately 135 feet after striking the deceased, with his body under the tender or engine almost the entire time.

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Demonstration is not required in such a case as we have here but responsibility for the accident must be determined upon the reasonable conclusions to be drawn from the evidence, and it is impossible for us to conclude that the conflict which we have thus described does not present evidence sufficient to justify the submitting of the case to the jury for its determination as to whether the deceased, who survived the accident for 15 hours, received injuries which contributed in part, at least, to the fatal result, during the time that the engine was being negligently run for a distance which there is evidence tending to show was at least 100 feet, with his body all the time being dragged and crushed between the frozen ballast of the track, the low-hanging attachments of the tender and the rods of the driving wheel brakes with which his body was found so entangled that it required 45 minutes to release him from his desperate situation. It is significant that the men who were there, with all of the conditions before their eyes, thought that further movement, even the slightest, of the engine, would result in further injury to the deceased and that, for this reason, they would not permit it to be moved at all, but thought it necessary to remove the brakerods in order to release him, even though this required that he be exposed to the cold in much below zero weather for 45 minutes.

The judgment of the Supreme Court of Nebraska must be

Affirmed.

MEMORANDUM DECISIONS

Disposed of at October Term, 1917

No. 676. U. S. FIDELITY & GUARANTY COMPANY, plaintiff in error, v. STATE OF MISSISSIPPI et al. Dec. 10, 1917. In error to the Supreme Court of the State of Mississippi. For opinion below, see 76 South. 744. Dismissed, with costs, on motion of counsel for the plaintiff in error.

No. 151. Beekman WINTHROP et al., appellants, v. Grant FELLOWS, as Attorney General of the State of Michigan, et al. Dec. 19, 1917. Appeal from the District Court of the United States for the Eastern District of Michigan. For opinion below, see 230 Fed. 702. Messrs. Henry W. Taft and Edwin P. Grosvenor, both of New York City, for appellants. Dismissed with costs, per stipulation.

No. 90. ATCHISON, TOPEKA & SANTA FÉ RAILWAY COMPANY, appellant, v. BOARD OF COUNTY COMMISSIONERS OF COUNTY OF DOUGLAS, STATE OF COLORADO, et al. Jan. 7, 1918. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 225 Fed. 978, 141 C. C. A. 100. Messrs. Gardiner Lathrop and S. T. Bledsoe, both of Chicago, Ill., Henry T. Rogers, of Denver, Colo., and Alex. Britton and Evans Browne, both of Washington, D. C., for appellant.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Phillips v. Negley, 117 U. S. 665, 671, 6 Sup. Ct. 901, 29 L. Ed. 1013; Covington v. First National Bank, 185 U. S. 270, 22 Sup. Ct. 645, 46 L. Ed. 906; Macfarland v. Byrnes, 187 U. S. 246, 23 Sup. Ct. 107, 47 L. Ed. 162; United States v. Beatty, 232 U. S. 463, 34 Sup. Ct. 392, 58 L. Ed. 686. The petition for a writ of certiorari is denied.

No. 112. GULF, COLORADO & SANTA FÉ RAILWAY COMPANY, plaintiff in error, v. W. E. VASBINDER. Jan. 7, 1918. In error to the Court of Civil Appeals, Fourth Supreme Judicial District, State of Texas. For opinion below, see 172 S. W. 763. Messrs. J. W. Terry, of Galveston, Tex., Gardiner Lathrop, of Chicago, Ill., A. H. Culwell, of Galveston, Tex., and Alex. Britton and Evans Browne, both of Washington, D. C., for plaintiff in error.

PER CURIAM. Judgment reversed with costs upon the authority of Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Atchison, Topeka & Santa Fé Ry. Co. v. Robinson, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901; St. Louis, Iron Mountain & Southern Ry. Co. v. Starbird, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. Ed. 917; American Express Co. v. United States Horse Shoe Company, 244 U. S. 58, 37 Sup. Ct. 595, 61 L. Ed. 990.

No. 550. Henry W. BOERNER, petitioner, v. William Hale THOMPSON, Mayor, etc., et al. Jan. 7, 1918. For opinion below, see 278 Ill. 153, 115 N. E. 866. Mr. James R. Ward, of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied.

No. 607. STATE OF MISSOURI on the relation of the AMERICAN MANUFACTURING COMPANY, plaintiff in error, v. George D. REYNOLDS, Albert D. Nortoni, and William H. Allen, Judges of the St. Louis Court of Appeals, and Louis Alt. Jan. 7, 1918. In error to the Supreme Court of the State of Missouri. For opinion below, see 270 Mo. 589, 194 S. W. 878. Mr. Shepard Barclay, of St. Louis, Mo., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by Act Sept. 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. 1916, § 1214); Prairie Oil & Gas Co. v. Carter, 244 U. S. 646, 37 Sup. Ct. 652, 61 L. Ed. 1369; Midland Valley R. R. Co. v. Griffith, 245 U. S. 633, 38 Sup. Ct. 133, 62 L. Ed. — (petition for a writ of certiorari denied October 15, 1917, 245 U. S. 653, 38 Sup. Ct. 12, 62 L. Ed. —).

No. 644. Minnie Evvia STADELMAN et al., plaintiffs in error, v. W. H. MUNER et al. Jan. 7, 1918. On Petition for Rehearing, March 18, 1918. In error to the Supreme Court of the State of Oregon. For opinion below, see 83 Or. 348, 163 Pac. 585, 983, 155 Pac. 708. Messrs. John M. Gearin, of Portland, Or., and Harry G. Hoy, of Spokane, Wash., for plaintiffs in error. Mr. Guy C. H. Corliss, of Portland, Or., for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Haire v. Rice, 204 U. S. 291, 301, 27 Sup. Ct. 281, 51 L. Ed. 490; Thomas v. Iowa, 209 U. S. 258, 263, 28 Sup. Ct. 487, 52 L. Ed. 782; Appleby v. Buffalo, 221 U. S. 524, 529, 31 Sup. Ct. 699, 55 L. Ed. 838; Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123, 134, 34 Sup. Ct. 874, 58 L. Ed. 1245.

On Petition for Rehearing.

Memorandum opinion by direction of the Court, by Mr. Chief Justice WHITE.

There being nothing in the record to establish that the federal question relied upon was raised, considered or decided below, and indeed it appearing so far as the record is concerned that the federal question was for the first time stated in the assignments made for the purpose of the writ of error to this court, the case was dismissed for want of jurisdiction upon authorities cited. 245 U. S. 636, 38 Sup. Ct. 189, 62 L. Ed. —. On this application it is stated that in a previous hearing of the case in the court below the federal question relied upon in this court was pressed and moreover was expressly decided, reference being made to the opinion so showing reported in 83 Or. 351, 155 Pac. 708, 163 Pac. 585, 983. The application for leave prays that the clerk below be directed to certify the opinion as part of the record and thus correct the inadvertence in not having previously included it and the oversight of counsel in not having referred to it in their briefs or arguments as affording in this court the basis of authority to review.

As the opinion referred to establishes that the federal question was considered and decided and as that opinion should have properly been included in the record, it follows that if the mistake of the parties in failing to include or refer

to it be overlooked and corrected, which we think should be done, it would result also that the ground upon which the order of dismissal was made would be without foundation and therefore should be set aside. To that end leave to file the petition is granted and acting upon it as filed, our former judgment of dismissal will be set aside and the case will stand for consideration under the prior submission. Moreover, for the purpose of disposing of the cause, the opinion of the court below rendered on the previous hearing will be considered as part of the record without further formal order to the court below to supply the same.

And it is so ordered.

No. 771. NG CHOY FONG, petitioner, v. UNITED STATES of America. Jan. 7, 1918. For opinion below, see 245 Fed. 305. Mr. Philip S. Ehrlich, of San Francisco, Cal. (Messrs. George J. Hatfield and Edwin H. Williams, both of San Francisco, Cal., of counsel), for petitioner. Mr. John W. Davis, Sol. Gen., of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 773. SOUTHERN PACIFIC COMPANY, petitioner, v. Henry L. BOGART et al., executors, etc., et al. Jan. 7, 1918. For opinion below, see 244 Fed. 61. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

No. 781. GULF OIL CORP., petitioner, v. C. G. LLEWELLYN, Collector of Internal Revenue, etc. Jan. 7, 1918. For opinion below, see 245 Fed. 1. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

No. 782. Edward W. MORRISON, petitioner, v. Charles S. RIEMAN. Jan. 7, 1918. Messrs. James R. Ward and Frank H. Culver, both of Chicago, Ill., for petitioner. Messrs. James Rosenthal and Colin C. H. Fyffe, both of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 11. HITCHMAN COAL & COKE COMPANY, petitioner, v. John MITCHELL, etc., et al. Jan. 14, 1918. See, also, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. —. Messrs. George R. E. Gilchrist, of Wheeling, W. Va., and Hannis Taylor, of Washington, D. C., for petitioner. Messrs. Charles E. Hogg, of Point Pleasant, W. Va., and Charles J. Hogg, of Charleston, W. Va., opposed. Upon consideration of the motion filed by the Hitchman Coal & Coke Company November 23, 1917, ordered that the mandate in this case be stayed until the further order of this court, and that a rule issue, returnable March 4, 1918, against Frank J. Hayes, individually and as president of the United Mine Workers of America; John L. Lewis, individually and as vice president of the United Mine Workers of America; William Green, individually and as secretary-treasurer of the United Mine Workers of America; John Moore, individually and as president of district 6, United Mine Workers of America; William Roy, individually and as president of subdistrict 5 of district 6, United Mine Workers of America; Joe Kreamer, individually and as president of the Hitchman Local Union, No. 3250, United Mine Workers of America, McMechen, W. Va.; D. W. Lewis, individually and as secretary-treasurer of said local union; Pete Bartoric, Mike Stefanski, and Steve Kachinski, to show cause why they should not be adjudged guilty of a contempt of this court and of its authority and punished accordingly. Further ordered that the motion of said Hitchman Coal & Coke Company for a rule to show cause against Jacob Semarkovich, individually and as president of the Glendale Local Union, No. 3536, United Mine Workers of America, Glendale, W. Va.; C. M. McCabe, individually and as secretary-treasurer of said local union; Tom Bowes, Orgie Freeman, Jim Murray, and Jim Barton, be denied without prejudice.

No. 108. Harry SUSMAN, appellant, v. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF PITTSBURGH. Jan. 14, 1918. Appeal from the District Court of the United States for the Western District of Pennsylvania. For opinion below, see 228 Fed. 217. Mr. James M. Beck, of New York City, for appellant.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of: (1) Witherspoon v. Duncan, 4 Wall. 210, 217, 18 L. Ed. 339; Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; Soliah v. Heskin, 222 U. S. 522, 32 Sup. Ct. 103, 56 L. Ed. 294. (2) Deming v. Carlisle Packing Co., 226 U. S. 102, 105, 33 Sup. Ct. 80, 57 L. Ed. 140; Consolidated Turnpike v. Norfolk, etc., Ry. Co., 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; Ennis Waterworks v. City of Ennis, 233 U. S. 652, 658, 34 Sup. Ct. 767, 58 L. Ed. 1139; Stewart v. Kansas City, 239 U. S. 14, 36 Sup. Ct. 15, 60 L. Ed. 120.

No. 123. Nannie C. GIBSON, plaintiff in error, v. John J. LENTZ. Jan. 14, 1918. In error to the Court of Appeals for the Second Judicial District of the State of Ohio. Messrs. Smith W. Bennett, of Columbus, Ohio, and W. J. Geer, of Galion, Ohio, for plaintiff in error. Mr. John D. Karns, of Columbus, Ohio, for defendant in error. Dismissed with costs per stipulation.

No. 125. Archibald E. BRIGHTMAN, plaintiff in error, v. LAKE ERIE & WESTERN RAILROAD COMPANY. Jan. 14, 1918. In error to the District Court of the United States for the District of Indiana. Mr. William V. Rooker, of Indianapolis, Ind., for plaintiff in error. Messrs. John B. Cockrum, W. H. H. Miller, W. H. Thompson and Samuel D. Miller, all of Indianapolis, Ind., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of: (1) Hannis Distilling Co. v. Baltimore, 216 U. S. 285, 30 Sup. Ct. 326, 54 L. Ed. 482; Fay v. Crozer, 217 U. S. 455, 30 Sup. Ct. 568, 54 L. Ed. 837; Hendricks v. United States, 223 U. S. 178, 184, 32 Sup. Ct. 313, 56 L. Ed. 394. (2) St. Louis & San Francisco Ry. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; Southern Ry. Co. v. Allison, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078; Sun Printing & Publishing Association v. Edwards, 194 U. S. 377, 381, 24 Sup. Ct. 696, 48 L. Ed. 1027; Missouri Pacific Ry. Co. v. Castle, 224 U. S. 541, 546, 32 Sup. Ct. 606, 56 L. Ed. 875.

No. 432. AMERICAN STEEL FOUNDRIES, petitioner, v. TRI-CITY CENTRAL TRADES COUNCIL et al. Jan. 14, 1918. For opinion below, see 238 Fed. 728, 151 C. C. A. 578. Mr. Max Pam, of Chicago, Ill., for

petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted.

No. 785. ATLANTIC COAST LINE RAILROAD COMPANY, petitioner, v. Leath E. TREADWAY, administratrix, etc. Jan. 14, 1918. For opinion below, see 93 S. E. 560. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied.

No. 787. Lee A. WHITEHEAD et al., petitioners, v. UNITED STATES of America. Jan. 14, 1918. For opinion below, see 245 Fed. 385. Mr. Benjamin C. Bachrach, of Chicago, Ill., for petitioners. Messrs. John W. Davis, Sol. Gen., of Washington, D. C., and William C. Fitts, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 790. PHILADELPHIA & READING RAILWAY COMPANY, petitioner, v. Catherine MARLAND, administratrix, etc. Jan. 14, 1918. For opinion below, see 246 Fed. 91. Messrs. Wm. Clarke Mason and Charles Heebner, both of Philadelphia, Pa., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

No. 791. WASHINGTON POST COMPANY, petitioner, v. John Armstrong CHALONER. Jan. 14, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted.

No. 792. PENNSYLVANIA RAILROAD COMPANY, petitioner, v. Mary PRICE, administratrix, etc. Jan. 14, 1918. Petition for a writ of certiorari to the Court of Appeals of Cuyahoga County, State of Ohio, denied.

No. 796. Charles H. MOYER, as trustee, etc., et al., petitioners, v. BUTTE MINERS' UNION. Jan. 14, 1918. For opinion below, see 246 Fed. 657. Mr. Horace N. Hawkins, of Denver, Colo. (Messrs. Canning & Geagan and E. P. Kelly, both of Butte, Mont., O. N. Hilton, Caesar A. Roberts and Leslie M. Roberts, all of Denver, Colo., and Dudley D. Sales, of San Francisco, Cal., of counsel), for petitioners. Mr. Peter Breen, of Butte, Mont. (A. C. McDaniel, of Butte, Mont., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 800. PORT GRAHAM COAL COMPANY, petitioner, v. Orren G. STAPLES. Jan. 14, 1918. Messrs. Samuel Herrick, Joseph W. Cox and Rufus S. Day, all of Washington, D. C., Mr. Richard Saxe Jones, of Seattle, Wash. (Mr. C. F. Riddell, of Seattle, Wash., of counsel), for petitioner. Mr. Bynum E. Hinton, of Washington, D. C., for respondent. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

No. 23, Original. STATE OF GEORGIA, complainant, v. TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY et al. Jan. 21, 1918. Ordered that Edward L. Gilmore, Esq., of Atlanta, Ga., be appointed examiner to take and return the testimony in this cause, and that the testimony be taken as provided by the stipulation of counsel for the respective parties.

No. 116. POLICE JURY OF PARISH OF ACADIA, plaintiff in error, v. CITY OF CROWLEY. Jan. 21, 1918. In error to the Supreme Court of the State of Louisiana. For opinion below, see 138 La. 488, 70 South. 487. Mr. P. J. Chappuis, of Crowley, La., for plaintiff in error. Mr. Philip S. Pugh, of Crowley, La., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Braxton County Court v. West Virginia, 208 U. S. 192, 28 Sup. Ct. 275, 52 L. Ed. 450; McCandless v. Pratt, 211 U. S. 437, 29 Sup. Ct. 144, 53 L. Ed. 271; Marshall v. Dye, 231 U. S. 250, 34 Sup. Ct. 92, 58 L. Ed. 206; Stewart v. Kansas City, 239 U. S. 14, 36 Sup. Ct. 15, 60 L. Ed. 120.

No. 195. IDORA HILL MINING COMPANY, plaintiff in error, v. Harry OLSON et al. Jan. 21, 1918. In error to the Supreme Court of the State of Idaho. For opinion below, see 28 Idaho, 504, 155 Pac. 291. Mr. Burton A. French, of Minneapolis, Minn., for plaintiff in error. Dismissed with costs and 5 per cent damages for failure to print the record.

No. 202. ATLANTIC COAST LINE RAILROAD COMPANY, plaintiff in error, v. Ella DUTTON, as administratrix of the estate of Lee Dutton, deceased. Jan. 21, 1918. In error to the Supreme Court of the State of South Carolina. For opinion below, see 104 S. C. 16, 88 S. E. 263. Mr. P. A. Willcox, of Florence, S. C., for plaintiff in error. Mr. L. D. Jennings, of Sumter, S. C., for defendant in error.

PER CURIAM. Judgment affirmed with costs upon the authority of Chicago Junction Railway Co. v. King, 222 U. S. 222, 32 Sup. Ct. 79, 56 L. Ed. 173; Seaboard Air Line Ry. v. Padgett, 236 U. S. 668, 35 Sup. Ct. 481, 59 L. Ed. 777; Great Northern Ry. Co. v. Knapp, 240 U. S. 464, 36 Sup. Ct. 399, 60 L. Ed. 745; Baltimore & Ohio R. R. Co. v. Whitacre, 242 U. S. 169, 37 Sup. Ct. 33, 61 L. Ed. 228; Southern Railway Co. v. Puckett, 244 U. S. 571, 574, 37 Sup. Ct. 703, 61 L. Ed. 1321.

No. 391. RAILROAD COMMISSION OF STATE OF CALIFORNIA, plaintiff in error, v. ATCHISON, TOPEKA & SANTA FÉ RAILWAY COMPANY. Jan. 21, 1918. In error to the Supreme Court of the State of California. For opinion below, see 173 Cal. 577, 160 Pac. 828. Mr. Max Thelen, of San Francisco, Cal., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of: (1) Waters Pierce Oil Co. v. Texas, 212 U. S. 112, 116, 29 Sup. Ct. 227, 53 L. Ed. 431; Leathe v. Thomas, 207 U. S. 93, 28 Sup. Ct. 30, 52 L. Ed. 118; Holden Land Co. v. Inter-State Trading Co., 233 U. S. 536, 541, 34 Sup. Ct. 661, 58 L. Ed. 1083; Mellon Co. v. McCafferty, 239 U. S. 134, 36 Sup. Ct. 94, 60 L. Ed. 181. (2) Section 237, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by Act Sept. 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. 1916, § 1214); Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245 U. S. 162, 38 Sup. Ct. 58, 62 L. Ed. —.

No. 525. Carey W. STONE, guardian of Thomas S. Stone, plaintiff in error, v. Emmett P. STONE, next friend of Thomas S. Stone. Jan. 21, 1918. In error to the Supreme Court of the State of North Carolina. For opinion below, see In re Stone, 91 S. E. 852. Mr. Murray Allen, of Raleigh, N. C., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by Act Sept. 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. 1916, § 1214) Prairie Oil & Gas Co. v. Carter, 244 U. S. 646, 37 Sup. Ct. 652, 61 L. Ed. 1369; Midland Valley R. R. Co. v. Griffith, 245 U. S. 633, 38 Sup. Ct. 133, 62 L. Ed. —.

No. 534. PEOPLE OF PORTO RICO et al., appellants, v. Carlos TAPIA. Jan. 21, 1918. Appeal from the District Court of the United States for the District of Porto Rico. Mr. Samuel T. Ansell, of Washington, D. C., for appellants.

PER CURIAM. Judgment reversed upon the authority of Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; Hawaii v. Mankichi, 190 U. S. 197, 23 Sup. Ct. 787, 47 L. Ed. 1016; Dorr v. United States, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697; Rassmussen v. United States, 197 U. S. 516, 25 Sup. Ct. 514, 49 L. Ed. 862; Kopel v. Bingham, 211 U. S. 468, 29 Sup. Ct. 190, 53 L. Ed. 286; Dowdell v. United States, 221 U. S. 325, 31 Sup. Ct. 590, 55 L. Ed. 753; Porto Rico v. Rosaly, 227 U. S. 270, 274, 33 Sup. Ct. 352, 57 L. Ed. 507; Ocampo v. United States, 234 U. S. 91, 98, 34 Sup. Ct. 712, 58 L. Ed. 1231.

No. 647. PEOPLE OF PORTO RICO et al., plaintiffs in error, v. Jose MURATTI. Jan. 21, 1918. In error to the Supreme Court of Porto Rico.

PER CURIAM. Judgment reversed upon the authority of People of Porto Rico v. Tapia, 245 U. S. 639, 38 Sup. Ct. 192, 62 L. Ed. —, just decided, and authorities therein cited.

No. 678. Kate P. McNAUGHTON, appellant. v. W. D. STEPHENS, Governor of the State of California, et al. Jan. 21, 1918. Appeal from the District Court of the United States for the Southern District of California.

PER CURIAM. Judgment affirmed with costs upon the authority of McNaughton v. Johnson, 242 U. S. 344, 37 Sup. Ct. 178, 61 L. Ed. 352, Ann. Cas. 1917B, 801.

No. 679. L. E. NICKELL and Robert J. Burke, appellants, v. W. D. STEPHENS, governor of the State of California, et al. Jan. 21, 1918. Appeal from the District Court of the United States for the Southern District of California.

PER CURIAM. Judgment affirmed with costs upon the authority of Crane v. Johnson, 242 U. S. 339, 37 Sup. Ct. 176, 61 L. Ed. 348, Ann. Cas. 1917B, 796.

No. 750. Aurelia P. BERNAL, petitioner, v. UNITED STATES of America. Jan. 21, 1918. For opinion below, see 241 Fed. 339, 154 C. C. A. 219. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 803. DESCHUTES RAILROAD COMPANY, petitioner, v. EASTERN OREGON LAND COMPANY. Jan. 21, 1918. For opinion below, see 246 Fed. 400. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 815. NORFOLK COUNTY WATER COMPANY, petitioner, v. CITY OF NORFOLK, VIRGINIA, et al. Jan. 21, 1918. For opinion below, see 246 Fed. 650. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(245 U. S. 563)

UNITED STATES v. SWEET.

(Argued Dec. 19, 1917. Decided Jan. 28, 1918.)

No. 99.

1. MINES AND MINERALS ⟹2 — PUBLIC LANDS—"MINERAL LAND."

Land valuable for coal is "mineral land" within the meaning of the public land laws.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mineral Land.]

2. PUBLIC LANDS ⟹52—STATUTES ⟹225—SCHOOL LAND GRANTS—LANDS INCLUDED—CONSTRUCTION IN CONNECTION WITH OTHER STATUTES.

Act July 16, 1894, c. 138, § 6, 28 Stat. 109, granting to the state of Utah certain sections in every township for the support of common schools, must be read in the light of the mining laws, the school land indemnity law (Act Feb. 28, 1891, c. 384, 26 Stat. 796 [Comp. St. 1916, §§ 4860, 4861]) providing for the selection of equal acreage where sections 16 or 36 are mineral lands and the settled public policy to dispose of mineral lands in a particular mode and to except and reserve them from all other grants and modes of disposal, and, when so read, the grant does not include mineral lands, especially in view of the construction placed upon the act by the committees of Congress upon whose recommendation it was passed, the Land Department, and Congress, which, in Act May 3, 1902, c. 683, 32 Stat. 188 (Comp. St. 1916, §§ 4866, 4867), declared that as to the state of Utah all the provisions of the school land indemnity law should apply to sections 2 and 32, as well as sections 16 and 36.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States against Frederick A. Sweet, administrator of Arthur A. Sweet, deceased. A decree for the United States was reversed by the Circuit Court of Appeals for the Eighth Circuit (228 Fed. 421, 143 C. C. A. 3), and the government appeals. Reversed, and decree of the District Court affirmed.

Mr. Assistant Attorney General Kearful, for the United States.

Messrs. A. C. Ellis, Jr., W. H. Dickson, and Albert R. Barnes, all of Salt Lake City, Utah, for appellee.

*566 *Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit by the United States to quiet the title to section 32 of a designated township in Carbon county, Utah, the suit being specially directed against a claim asserted by the defendant, as an assignee of the state, under the school land grant to the latter. Whether this tract passed to the state under that grant or was reserved to the United States as mineral land is the matter in controversy. In the District Court the United States prevailed as to all but 40 acres, but in the Circuit Court of Appeals that decree was reversed and one for the defendant was directed. 228 Fed. 421, 143 C. C. A. 3.

[1] The evidence shows that the entire section, excepting 40 acres, is valuable for coal and has been known to be so since before Utah became a state. Land valuable for coal is mineral land within the meaning of the public land laws. Thus the ultimate question for decision is whether the school land grant to Utah embraces mineral land. The grant is found in section 6 of the act of Congress of July 16, 1894, c. 138, 28 Stat. 107, and *567 is copied in the margin[1] with another closely related section of the same act. It neither expressly includes mineral lands nor expressly excludes them. If it did either, it would be conclusive of the will of Congress upon the point. But, as it makes no mention of such lands, it is permissible—indeed, is essential—to inquire whether the congressional will is otherwise made manifest, that is to say, whether the general words of the grant are to be read in the light of other statutes and a settled public policy in respect of mineral lands.

In the legislation concerning the public lands it has been the practice of Congress to make a distinction between mineral lands and other lands, to deal with them along different lines, and to withhold mineral lands from disposal save under laws specially including them. This practice began with the ordinance of May 20, 1785, 10 Journals of *568 Congress (Folwell's Ed.) 118, and was observed* with such persistency in the early land* laws[2] as to lead this court to say in United

[1] Sec. 6. That upon the admission of said state into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed state, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said state for the support of common schools, such indemnity lands to be selected within said state in such manner as the Legislature may provide, with the approval of the Secretary of the Interior: Provided, that the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain. * * *

Sec. 10. That the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools, and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed for school purposes only.

[2] Acts May 18, 1796, c. 29, § 2, 1 Stat. 465 (Comp. St. 1916, § 4803); March 3, 1807, c. 46, § 2, 2 Stat. 445; March 3, 1807, c. 49, § 5, 2 Stat. 449; February 15, 1811, c. 14, § 10, 2 Stat. 620; March 3, 1811, c. 46, § 10, 2 Stat. 665; May 6, 1812, c. 77, § 1, 2 Stat. 723; February 17, 1815, c. 45, § 1, 3 Stat. 211; March 25, 1816, c. 35, § 1, 3 Stat. 260; April 29, 1816, c. 164, 3 Stat. 332; March 3, 1829, c. 55, 4 Stat. 364; September 4, 1841, c. 16, § 10, 5 Stat. 455; July 11, 1846, c. 36, 9 Stat. 37; March 1, 1847, c. 32, 9 Stat. 146; March 3, 1847, c. 54, 9 Stat. 179; September

States v. Gratiot, 14 Pet. 526, 10 L. Ed. 573, "It has been the policy of the government, at all times, in disposing of the public lands, to reserve the mines for the use of the United States," and also to hold in United States v. Gear, 3 How. 120, 11 L. Ed. 523, 838, that an act making no mention of lead-mine lands and providing generally for the sale of "all the lands" in certain new land districts, "reserving only" designated tracts, "any law of Congress heretofore existing to the contrary notwithstanding," could not be regarded as disclosing a purpose on the part of Congress to depart from "the policy which had governed its legislation in respect to lead-mine lands," and so did not embrace them. A like practice prevailed in respect of saline lands, and in Morton v. Nebraska, 21 Wall. 660, 22 L. Ed. 639, where a disposal of such lands under an act providing generally for the sale of lands in certain territories was drawn in question, this court said that it could not be supposed "without an express declaration to that effect" that Congress intended by such an act to permit the sale of saline lands and thus to depart from "a long-established policy by which it had been governed in similar cases."

While the early land laws occasionally and specially provided for the sale of mineral lands, they very generally evinced a purpose to reserve such lands for future disposal; and this purpose was given particular emphasis following the discovery of gold in California in 1848, as is shown in the Oregon Donation *569 Act, the Homestead Act (which* adopted the mineral land reservation of the Pre-emption Act of 1841), the grant to the several states for the benefit of agricultural colleges, the railroad land grants and other land acts of that period.[3] Noticeable among those acts is one which, in dealing with grants to Nevada and surveys in that state, declared, "in all cases lands valuable for mines of gold, silver, quicksilver, or copper shall be reserved from sale," chapter 166, § 5, 14 Stat. 86, and another declaring, "no act passed at the first session of the Thirty-Eighth Congress, granting lands to states or corporations, to aid in the construction of roads or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant." 13 Stat. 567. Although applied in one instance to lands in Nevada and in the other to grants made at a particular session of Congress, these declarations were but expressive of the will of Congress that every grant of public lands, whether to a state or otherwise, should be taken as reserving and excluding mineral lands in the absence of an expressed purpose to include them; and upon this theory both declarations were carried into the Revised Statutes as being general and *permanent in their nature— *570 the first in enlarged terms as section 2318 (Comp. St. 1916, § 4613)[4] and the other as section 2346 (section 4658).

By the act of March 3, 1853, c. 145, 10 Stat. 244, Congress granted to the state of California sections 16 and 36 in each township for school purposes and large quantities of lands for other purposes. Mineral lands were neither expressly excepted from nor expressly included in the grant of the school sections, but were specially excepted from the other grants. This difference led to a controversy over the true meaning of the school grant, the state authorities taking the view that it did, and the land officers of the United States that it did not, include mineral lands. Ultimately the controversy came before this court in Mining Co. v. Consolidated Mining Co., 102 U. S. 167, 26 L. Ed. 126, and the position taken by the land officers of the United States was sustained, the court saying (102 U. S. 174, 26 L. Ed. 126):

"Taking into consideration what is well known to have been the hesitation and difficulty in the minds of Congressmen in dealing with these mineral lands, the manner in which the question was suddenly forced upon them, the uniform reservation of them from survey, from sale, from pre-emption, and above all from grants, whether for railroads, public buildings, or other purposes, and looking to the fact that from all the grants made in this act they are reserved, one of which is for school purposes besides the sixteenth and thirty-sixth sections, we are forced to the conclusion that Congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the state.

"It follows from the finding of the court and the undisputed facts of the case, that the land in controversy being mineral land, and well known to be so when the surveys of it were made, did not pass to the state under the school-section grant."

* That ruling was reaffirmed and followed *571 in Mullan v. United States, 118 U. S. 271, 6 Sup. Ct. 1041, 30 L. Ed. 170, where valuable coal lands, known to be such, were held not to be open to selection by the state as indemnity school lands.

The conditions ensuing from the discovery of gold and other minerals in the western states and territories resulted in a general

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26, 1850, c. 72, 9 Stat. 472; Public Domain (Donaldson) 306.

[3] Acts September 27, 1850, c. 76, §§ 5, 14, 9 Stat. 498, 500; February 14, 1853, c. 69, § 7, 10 Stat. 159; July 22, 1854, c. 103, § 4, 10 Stat. 308; May 20, 1862, c. 75, § 1, 12 Stat. 392 (Comp. St. 1916, § 4530); May 30, 1862, c. 86, §§ 7, 10, 12 Stat. 410; July 1, 1862, c. 120, § 3, 12 Stat. 492; July 2, 1862, c. 129, § 3, 12 Stat. 503; July 2, 1862, c. 130, 12 Stat. 503; July 2, 1864, c. 216, §§ 4, 19, 13 Stat. 358, 364; July 2, 1864, c. 217, § 3, 13 Stat. 367; June 21, 1866, c. 127, § 1, 14 Stat. 66; July 4, 1866, c. 166, § 5, 14 Stat. 86; July 23, 1866, c. 219, § 1, 14 Stat. 218 (Comp. St. 1916, § 4878); July 25, 1866, c. 242, §§ 2, 10, 14 Stat. 239, 241; July 27, 1866, c. 278, § 3, 14 Stat. 294; July 28, 1866, c. 300, § 1, 14 Stat. 338; June 21, 1860, c. 167, § 6, 12 Stat. 72; July 4, 1866, c. 165, 14 Stat. 83; May 4, 1870, c. 69, 16 Stat. 94; March 3, 1871, c. 122, § 9, 16 Stat. 576; Lindley on Mines (3d Ed.) § 47.

[4] Sec. 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

demand for a system of laws expressly opening the mineral lands to exploration, occupation and acquisition, and Congress, responding to this demand, adopted from 1864 to 1873 a series of acts dealing with practically every phase of the subject and covering all classes of mineral lands, including coal lands.[5] These acts, with some before noticed, were carried into a chapter of the Revised Statutes entitled "Mineral Lands and Mining Resources." Taken collectively they constitute a special code upon that subject and show that they are intended not only to establish a particular mode of disposing of mineral lands, but also to except and reserve them from all other grants and modes of disposal where there is no express provision for their inclusion. Thus the policy of disposing of mineral lands only under laws specially including them became even more firmly established than before, and this is recognized in our decisions. Mining Co. v. Consolidated Mining Co., supra, 102 U. S. 174, 26 L. Ed. 126; Deffeback v. Hawke, 115 U. S. 392, 402, 6 Sup. Ct. 95, 29 L. Ed. 423; Davis v. Weibbold, 139 U. S. 507, 516, 11 Sup. Ct. 628, 35 L. Ed. 238. And while the mineral-land laws are not applicable to all the public land states, some being specially excepted,[6] there has been no time since their enactment when they were not applicable to Utah.

*572 *Another statute indicative of the policy of Congress and pertinent to the present inquiry is the act of February 28, 1891, c. 384, 26 Stat. 796 (Comp. St. 1916, §§ 4860, 4861), which defines the indemnity to which a state or territory is entitled in respect of its school grant. In addition to dealing with deficiencies occurring in other ways, it provides, "And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory where sections sixteen or thirty-six are mineral lands." In this there is a plain implication that where those sections are mineral—known to be so when the grant takes effect—they do not pass under the grant. And it does not militate against this implication that under another provision the state may surrender those sections and take other lands in lieu of them where, although not known to be mineral when the grant takes effect, they are afterwards discovered to be so. See California v. Deseret Oil Co., 243 U. S. 415, 37 Sup. Ct. 394, 61 L. Ed. 821.

[2] What has been said demonstrates that the school grant to Utah must be read in the light of the mining laws, the school land indemnity law and the settled public policy respecting mineral lands, and not as though it constituted the sole evidence of the legislative will. United States v. Barnes, 222 U. S. 513, 520, 32 Sup. Ct. 117, 56 L. Ed. 291. When it is so read it does not, in our opinion, disclose a purpose to include mineral lands. Although couched in general terms adequate to embrace such lands if there were no statute or settled policy to the contrary, it contains no language which explicitly or clearly withdraws the designated sections, where known to be mineral in character, from the operation of the mining laws, or which certainly shows that Congress intended to depart from its long prevailing policy of disposing of mineral lands only under laws specially including them. It *therefore* must be taken as neither curtailing those laws nor departing from that policy. *573

This conclusion is fortified by other considerations. When the grant was made Utah was known to be rich in minerals and salines. Besides this grant the act contains others aggregating 1,570,080 acres. In none is there any mention of mineral lands. As to 110,000 acres there is an express inclusion of saline lands. This silence as to mineral lands, when contrasted with the special inclusion of saline lands, indicates that the former are not included. See Montello Salt Co. v. Utah, 221 U. S. 452, 466, 31 Sup. Ct. 706, 55 L. Ed. 810, Ann. Cas. 1912D, 633. The committees of Congress, upon whose recommendation the act was passed, construed it as not embracing mineral lands, for in their reports[7] they stated that "All mineral lands are exempt from any grant made under the act." The land department has uniformly placed the same construction upon it.[8] And Congress acted upon that construction when, by the act of May 3, 1902, c. 683, 32 Stat. 188 (Comp. St. 1916, §§ 4866, 4867), it declared that as to the state of Utah "all the provisions" of the school land indemnity law of February 28, 1891, before noticed, should apply to sections 2 and 32 as well as to sections 16 and 36—the grant to that state covering all of these sections instead of the latter two as in other Western states.

The case of Cooper v. Roberts, 18 How. 173, 15 L. Ed. 338, is relied upon as making for a different conclusion. Part of a school section in Michigan known to be mineral was there in controversy and was held to have passed to the state under its school grant. At the time the section was surveyed, which

[5] Acts July 1, 1864, c. 205, § 1, 13 Stat. 343; March 3, 1865, c. 107, § 1, 13 Stat. 529; July 26, 1866, c. 262, 14 Stat. 251; July 9, 1870, c. 235, 16 Stat. 217; May 10, 1872, c. 152, 17 Stat. 91; March 3, 1873, c. 279, 17 Stat. 607 (Comp. St. 1916, §§ 4659-4664).

[6] Michigan, Wisconsin, Minnesota, Missouri, Kansas, Alabama and Oklahoma have been wholly or partly excepted. Acts February 18, 1873, c. 159, 17 Stat. 465 (Comp. St. 1916, § 4653); May 5, 1876, c. 91, 19 Stat. 52 (Comp. St. 1916, § 4654); March 3, 1883, c. 118, 22 Stat. 487 (Comp. St. 1916, § 4655); March 3, 1891, c. 543, 26 Stat. 1026; June 6, 1900, c. 813, 31 Stat. 680.

[7] House Report No. 162, 53d Cong., 1st Sess., p. 18; Senate Report No. 414, 53d Cong, 2d Sess., p. 19.

[8] Utah v. Allen, 27 Land Dec. 53; Richter v. Utah, 27 Land Dec. 95; State of Utah, 29 Land Dec. 69; State of Utah, 32 Land Dec. 117; Mahoganey No. 2 Lode Claim, 33 Land Dec. 37; Charles L. Ostenfeldt, 41 Land Dec. 265.

was the date when the grant was to take *574 effect, there was a statute which in a single section provided for the sale of mineral lands, and also of other lands, and concluded with a reservation of the school sections "from such sales." The real question was whether those sections were reserved from both classes of sales, and this the court answered in the affirmative. Some observations in the opinion are not in accord with our present conclusion. These were relied upon in Mining Co. v. Consolidated Mining Co., supra, as our records show, and were in effect disapproved. Besides, when they were made the public policy respecting mineral lands had not been expressed in general and permanent laws, such as were afterwards enacted and carried into the Revised Statutes. See Lindley on Mines (3d Ed.) § 136. The case, therefore, is neither controlling nor persuasive here.

It results that the decree of the Circuit Court of Appeals must be reversed and that of the District Court affirmed.

It is so ordered.

Mr. Justice McREYNOLDS did not participate in the consideration or decision of this case.

(245 U. S. 574)

NORTHERN OHIO TRACTION & LIGHT CO. et al. v. STATE OF OHIO ex rel. PONTIUS, Pros. Atty.

(Argued Oct. 18 and 19, 1917. Decided Jan. 28, 1918.)

No. 60.

1. CONSTITUTIONAL LAW ⟸115 — STREET RAILROADS ⟸24(13) — REVOCATION OF FRANCHISE — IMPAIRING OBLIGATION OF CONTRACTS—WHAT CONSTITUTES STATE ACTION.

A resolution of a board of county commissioners which, as construed by the Supreme Court of the state, terminated a valid franchise to construct and maintain a street railroad granted in 1892, amounted to action by the state within Const. art. 1, § 10, providing that no state shall pass any law impairing the obligation of contracts.

2. COURTS ⟸399(1) — REVIEW OF DECISIONS OF STATE COURTS—SCOPE OF REVIEW.

On writ of error to review a final judgment of the Supreme Court of Ohio recognizing a street railway franchise as valid and existing in 1913, but declaring it ended by a resolution adopted by the board of county commissioners in that year without discussing the subject of limitation, it is unnecessary to consider the question whether the franchise has since expired by reason of the want of power on the part of county commissioners to grant franchises for more than 25 years.

3. HIGHWAYS ⟸95(1)—USE FOR RAILWAY—POWER TO GRANT FRANCHISES.

Under the Constitution and statutes of Ohio, county commissioners in 1892 had power to grant franchises for railways over public roads valid for 25 years if not perpetually.

4. CONSTITUTIONAL LAW ⟸134—IMPAIRING OBLIGATION OF "CONTRACT"—STREET RAILWAY FRANCHISE.

Where a resolution of a board of county commissioners granted to a person therein named and his successors the right to construct, maintain, and operate an electric railroad along a specified state road without specifying any limit of time, the grant was not a mere revocable right, but a "contract" not subject to annulment by a resolution of the board of county commissioners, declaring it terminated in view of Const. art. 1, § 10, prohibiting the impairment of the obligation of contracts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contract.]

Mr. Justice Clarke and Mr. Justice Brandeis, dissenting.

In Error to the Supreme Court of the State of Ohio.

Suit by the State of Ohio on the relation of Hubert C. Pontius, Prosecuting Attorney of Stark County, Ohio, against the Northern Ohio Traction & Light Company and another. Judgment was rendered in favor of plaintiff by the Supreme Court of Ohio (93 Ohio St. 466, 114 N. E. 53), and defendants bring error. Reversed and remanded.

Messrs. John C. Welty, of Canton, Ohio, Joseph S. Clark, of Philadelphia, Pa., Virgil P. Kline, of Cleveland, Ohio, John C. Weadock, of New York City, and W. T. Holliday, of Cleveland, Ohio, for plaintiffs in error.

Messrs. Frank N. Sweitzer, Hubert C. Pontius, and A. Talmage Snyder, all of Canton, Ohio, for defendant in error.

*575 * Mr. Justice McREYNOLDS delivered the opinion of the Court.

The Northern Ohio Traction & Light Company through successive assignments from William A. Lynch acquired the interurban electric railroad between Canton and Massillon, Ohio, October, 1906; the Cleveland Trust Company is trustee under a mortgage *576 on the road intended to secure an issue of bonds. The line was constructed under resolution by the board of county commissioners, Stark county, passed February 22, 1892, which granted to William A. Lynch, and such railroad corporation as he might cause to be incorporated for that purpose, the right to locate, construct, maintain and operate an electric railroad along the state highway without specifying any limit of time. This resolution is copied in the margin.[1]

[1] "Resolution for Right of Way for Electric Railway.

"Resolved, that the right is hereby granted to William A. Lynch and to such railroad corporation as he may cause to be incorporated for that purpose to locate, construct, maintain and operate an electric railroad along either side of the state road running between Canton and Massillon, between the line of the Canton Street Railway and the corporate limits of the city of Massillon, said road to be constructed of ties and rails in the customary manner with the necessary poles and wires for an electric railroad. The ties shall not be laid nearer to the center line of said road than nine feet, ex-

*577 *A disagreement concerning rates having arisen, by resolution of March 27, 1912, the commissioners declared the original grant to Lynch not a perpetual franchise but subject to termination by either party and that the passenger rate was excessive and should be reduced. It continued:

"Therefore, be it resolved, that unless said Northern Ohio Traction & Light Company comply with the above-mentioned matters of reduction of amount of fare charged for transporting people between the cities of Canton and Massillon and from intermediate points, together with the transfer on the city lines of Canton and Massillon, on or before the 27th day of April, 1912, the said grant given to said William A. Lynch on February 22, 1892, to operate an electric railroad between the said cities of Canton and Massillon is hereby declared terminated and the prosecuting attorney of this county is *578 hereby instructed to take such legal proceedings as may be necessary to have said grant made null and void and the said electric railway removed from said public highway between the said cities of Canton and Massillon."

April 26, 1912, the commissioners returning to the matter resolved:

"In the event that demands are not met by the said company on or before the time mentioned in the said resolution of March 27th, 1912, the prosecuting attorney of this county be and he is hereby instructed to immediately proceed to have injunction proceedings filed against said Northern Ohio Traction & Light Company restraining said company from operating said electric railway on the public highways between the cities of Canton and Massillon or running cars thereon and to further compel said Northern Ohio Traction & Light Company to remove said electric railway from said public highway, and, be it further resolved, that this resolution be contingent upon and in accordance with the conditions of the said resolution passed by this board on March 27th, 1912. * * *"

Accordingly, August 13, 1912, Charles Krichbaum, prosecuting attorney, instituted quo warranto proceedings in the circuit court asking that plaintiff in error Traction & Light Company be ousted from exercising the franchise to operate a railroad along the Canton-Massillon highway, and be compelled to remove its tracks and switches. A demurrer was sustained because (1) the petition did not state facts sufficient to constitute a cause of action; (2) it did not state facts sufficient to justify relief prayed; (5) plaintiff had no legal power to try or bring the action. No appeal was taken from a final judgment entered June 3, 1913.

February 19, 1913, the commissioners adopted another resolution which, after referring to the one of 1892 and the construction and operation of the railroad, stated that the grant continued from day to day so long as both parties consented and could be terminated at will, and then *declared "that said *579 term of said grant and conveyance be terminated on this date." It is in the margin.[2]

cept where switches are constructed, at which places the present traveled driveway may be slightly changed from its location to allow for the construction of such switches. Wherever cutting or filling may be necessary in order to establish a suitable grade for said railroad, and such cutting or filling encroaches upon the traveled portion of said road, or nearer than nine feet from the center of the road or wherever the cut or fill would interfere with the usefulness or safety of the road, at all such places the grade of the road shall be changed and its bed shall be regraveled so as to restore it to its present state of usefulness, instead of locating said railroad on one side of the center line as above provided, the same may be located, along the center line of said road, along the whole or any portion thereof provided that in such case wherever so located said railroad company, or the property owners along the road shall cause a good and sufficient roadway to be graded on each side of said railroad, each of said roadways to be not less than sixteen feet wide in cuts and not less than eighteen feet wide on fills, and each roadway shall be graveled to a width of ten feet and eight inches in thickness and put in condition for public travel without unreasonable delay. In case the railroad is built upon the side of the road, crossings shall be constructed of plank or other suitable materials, at all public highway crossings or intersections and in front of all private driveways on the side of the road on which said railroad may be located. If the railroad be constructed in the center of the road, the track shall be laid so that the ties shall not be above the level of the highway on either side at the ends of the ties, materially, or so as to prevent the crossing of teams and vehicles over said railroad with reasonable convenience. All work that may be done under this resolution upon and along said state road shall be done under the supervision and subject to the control and to the approval and acceptance of the commissioners, they reserving the right to make such minor changes in location and the plans and methods of grading the highway as the public interests may require. It being understood and agreed that said Wm. A. Lynch or the railroad company, before commencing any part of said work shall enter into a bond in the sum of ten thousand dollars for the faithful performance of the conditions enjoined upon them by this resolution. This resolution to be of no binding effect until such bond is duly executed and accepted. It being further understood and agreed that said Wm. A. Lynch or the railroad company before commencing any part of said work shall enter into a bond in the sum of ($5,000) five thousand dollars conditional that said Wm. A. Lynch or said railroad company shall keep said county and said board perfectly harmless from any and all liability to abutting property owners growing out of the construction of said road."

[2] Resolution of the County Commissioners of Stark County, Ohio.

Whereas, the county commissioners of Stark County, Ohio, on the 22d day of February, 1892, passed a resolution appearing on pages 17, 18, and 19 of volume 8, Commissioners' Journal, Stark County, Ohio, and said resolution is as follows: [Here follows a copy of the resolution granting a right of way to Lynch above set out.] and,

Whereas, an electric interurban railway, some time after the passage of said resolution, was built and constructed from Canton, Ohio, to Massillon, Ohio, upon the state road between said cities, the course described in the aforesaid resolution, and

Whereas, cars are now being operated upon said interurban electric railway and have been so operated for some years, by persons or companies, claiming to derive their rights and title from the said William A. Lynch, and claiming that their said title, right and interest emanate from the aforesaid resolution, and

Whereas, the Northern Ohio Traction & Light Company, a corporation, is now and has been, for several years last past, operating the interurban electric cars over said railway and carrying passengers over said interurban electric railway between the cities of Canton and Massillon, Ohio, and

Whereas, the said the Northern Ohio Traction & Light Company claims its rights, interests and privileges for the conducting of said business as assignee, transferee and successors of the said William A. Lynch, and his assigns or successors, based

*580 *Obeying this last resolution, Hubert C. Pontius, prosecuting attorney, instituted the proceeding under review in the Supreme Court of Ohio. The petition alleged control of the railway by the Traction & Light Company; set up resolutions of 1892 and 1913 authorizing its contruction and directing removal; and declared the company continued operations "which said conduct plaintiff avers is without warrant or authority of law." It concluded:

*581 "Wherefore, because of the premises and matters herein*set forth, the plaintiff prays the advice of the court, and that the defendant, to wit, the Northern Ohio Traction & Light Company be compelled to answer by what warrant it claims to have the use and to enjoy the rights, privileges and franchises aforesaid, in the operation of its said interurban electric railroad between the cities of Canton and Massillon, Ohio, in said county and state; and that it be ousted from exercising the same and be compelled to remove its tracks and switches from the said Canton-Massillon road between the corporate limits of the said cities of Canton and Massillon, and plaintiff further prays that such other and further relief be granted in the premises as *582 to the court may seem just and proper."

*The answer relied upon final judgment in proceedings instituted by Krichbaum as an adjudication of the grant's validity; also a resolution by the county commissioners May 3, 1909, providing for double-tracking as recognition and continuation of original franchise. And further:

"This defendant says that said resolution of February 22, 1892, and said amending resolution of May 3, 1909, by the acceptance thereof by this defendant and its predecessors in title, constitute a contract between the board of county commissioners of Stark County, Ohio, and this defendant, and that any ouster of this defendant from its use and operation of said electric railroad between Canton and Massillon would be an impairment of the obligation of this defendant's contract, and a taking of the defendant's property without due process of law, and would also be a denial to this defendant of the equal protection of the law, all in violation of the Constitutions of Ohio and of the United States."

Without opinion or other explanation the Supreme Court pronounced the following decree October 19, 1915:

"This cause came on to be heard on the pleadings and the evidence and was argued by counsel. On consideration whereof, the court finds upon the issues joined in favor of the plaintiff on the authority of Gas Co. v. City of Akron, 81 Ohio St. 33, 90 N. E. 40, 26 L. R. A. (N. S.) 92, 18 Ann. Cas. 332. It is, therefore, ordered and adjudged that the said defendant be ousted from the exercise and use of the rights, privileges, and franchises described in the petition of the plaintiff in the operation of the interurban electric railroad therein described, and it is hereby ordered to remove its tracks and switches

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and founded upon the aforesaid resolution passed by the county commissioners of Stark county, Ohio, on the 22d day of February, 1892, and recorded on pages 17, 18 and 19 of volume 8, Commissioners' Journal, Stark county, Ohio, and

Whereas, the commissioners of the county of Stark and state of Ohio contend,

First. That the said William A. Lynch, at the time of the enactment of said resolution of the commissioners of Stark county, was not an incorporated company and was not entitled to the privileges of which a company incorporated in Ohio for the purpose of owning and operating an interurban electric line, was not such an entity that he could accept the interests, rights and titles granted by the county commissioners of Stark county in the aforesaid resolution.

Second. That whatever right, title, interest and privilege, if any, were conveyed by the aforesaid resolution to the said William A. Lynch were conveyed and granted to the said William A. Lynch and to him alone, said grant and conveyance being a personal one.

Third. That the term of the grant included in the aforesaid resolution of the county commissioners, passed by the county commissioners on the 22d day of February, 1892, as aforesaid is an indeterminate one, continuing from day to day and that said term extends and continues only so long as both parties to said grant and conveyance, to wit: Stark county, Ohio, through its board of county commissioners, the grantor, and William A. Lynch, or any company he might organize and incorporate, or any successor of the said William A. Lynch or the said company he might organize, the grantee, agree and consent, and that said grant and conveyance can be terminated at any time by either party to said grant or conveyance, or those claiming to hold or holding under said grant.

Now, therefore, be it resolved by the board of commissioners of Stark county, Ohio, assembled in session, that said term of said grant and conveyance be terminated on this date, to take effect on this date, and that the board of commissioners of Stark county, Ohio, refuse to extend to the Northern Ohio Traction & Light Company, which company claims to hold, title, right and interest as the successor, assignee and transferee of the aforesaid William A. Lynch and his successors and assignees, or either of them, the term for the operation of the aforesaid interurban electric railroad beyond this date.

Be it resolved that the Northern Ohio Traction & Light Company be notified that the commissioners of Stark county, Ohio, have on this date terminated the term of said grant and conveyance, under which said grant the Northern Ohio Traction & Light Company claim the right and privilege of operating said interurban electric railroad between Canton and Massillon, Ohio, and that the county of Stark and state of Ohio and the board of commissioners of Stark county, Ohio, will regard and do regard the operation of an interurban electric railroad between Canton and Massillon, Ohio, on said state road running between Canton and Massillon, Ohio, from this date forward a usurpation and infringement upon the rights of said Stark county, Ohio, and said board of commissioners of said Stark county, Ohio.

Be it resolved that the prosecuting attorney of Stark county, Ohio, be directed and is hereby directed to take whatever steps he may deem necessary and advisable to prohibit and prevent the Northern Ohio Traction & Light Company or any other person, individual, corporation or company from continuing to operate an interurban electric railroad between the cities of Massillon and Canton, Ohio, on the state road, running between said cities by virtue of any rights, title or interest the said the Northern Ohio Traction & Light Company or any other person, individual, corporation or company may claim as resulting from the aforesaid resolution, enacted by the county commissioners of Stark county, Ohio, on February 22, 1892.

Be it resolved that the said the Northern Ohio Traction & Light Company be directed and is hereby directed to remove all its property, equipment and belongings from the right of way described by the aforesaid resolution, herein referred to as having been passed by the county commissioners of Stark county, Ohio, on February 22, 1892, and now occupied by the said the Northern Ohio Traction & Light Company, at once.

Be it resolved that a copy of this resolution be sent or delivered, and the auditor of Stark county, Ohio, is hereby directed to send or deliver to the Northern Ohio Traction & Light Company a copy of this resolution.

from the said Canton and Massillon road between the corporate limits of the said cities of Canton and Massillon within ninety days from this date. It is further ordered and adjudged that the plaintiff recover of the defendant its costs herein, taxed at $———."

*553 Dissenting, three members declared:

"The sole*question in this case as presented is whether the board of county commissioners can revoke and annul a franchise granted by the state without having the power so to do delegated to it by the sovereign authority." 93 Ohio St. 466, 114 N. E. 53.

Plaintiffs in error maintain that the commissioners' resolution dated February 19, 1913, was an exercise of state authority repugnant to the federal Constitution, because it impaired their contract, took their property without due process of law, and denied them equal protection of the laws.

In East Ohio Gas Co. v. City of Akron (decided October, 1909) 81 Ohio St. 33, 90 N. E. 40, 26 L. R. A. (N. S.) 92, 18 Ann. Cas. 332, relied upon to support the judgment below, a city ordinance, without specifying anything as to duration, provided "that the East Ohio Gas Company, its successors and assigns, are hereby granted the right to enter upon the streets, alleys and public grounds of the city of Akron, Ohio, * * * to maintain, operate, repair and remove mains and pipes * * * together with the right to construct and maintain, repair and remove all necessary regulators," etc. And the court said (81 Ohio St. pp. 52, 53, 90 N. E. 40, 42 [26 L. R. A. (N. S.) 92, 18 Ann. Cas. 332]):

"It is true that the ordinance grants the right to enter and occupy the streets, but in respect to the time when it shall terminate its occupancy and withdraw, the ordinance is silent. May we infer from this silence that the gas company has a perpetual franchise in the streets? We are not now prepared to hold that the company has thus acquired such a perpetual franchise. * * * It comes then to this, that in the absence of limitations as to time, the termination of the franchise is indefinite and, to preserve mutuality in the contract, the franchise can continue only so long as both parties are consenting thereto."

[1] The Supreme Court determined, in effect, that a valid franchise to construct and maintain the railroad granted to Lynch and his successors in 1892 was terminated by resolution of 1913. Accepting this ruling, is *584 the latter resolution inoperative and void because in conflict with*article 1, § 10, of the federal Constitution? Manifestly it amounted to action by the state. St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 148, 21 Sup. Ct. 575, 45 L. Ed. 788; Ross v. Oregon, 227 U. S. 150, 163, 33 Sup. Ct. 220, 57 L. Ed. 458, Ann. Cas. 1914C, 224.

[2] It is suggested that in 1892 Ohio statutes only empowered county commissioners to grant franchises not exceeding twenty-five years in duration, and the present one accordingly expired in February, 1917. But by its final judgment (1915) the Supreme Court recognized a valid franchise existing in 1913 and declared it ended by the resolution of that year without discussing the subject of limitation. Consideration of the point is therefore unnecessary—our concern is with rights struck by the resolution. We express no opinion as to whether those have now expired. Neither are we concerned with the General Assembly's reserved power to revoke or repeal privileges; it has taken no action. Ohio Constitution (1851) art. 1, § 2, and article 13, § 2.

[3] Beyond serious doubt, under constitution and statutes of Ohio in 1892 county commissioners had power to grant franchises over public roads valid for twenty-five years, if not perpetually. Nothing said by the state courts prior to Gas Co. v. Akron (1909) is cited which intimates that grants, without specified limit of time, were revocable at will. Evidently this was not the settled view in 1903 when the circuit court distinctly adjudged that accepted ordinances by a city between 1861 and 1873, authorizing construction and operation of street railways, silent as to time, created perpetual rights, subject however to revocation by the General Assembly. State ex rel. v. Columbus Ry. Co. (1903) 1 Ohio Cir. Ct. R. (N. S.) 145. This judgment was affirmed in 1905, 73 Ohio St. 363, 78 N. E. 1139, "on the sole ground that the defendant had present right to occupy the streets at the time of the commencement of this action"—a result hardly intelligible upon the theory that the grants were revocable at will. *Apparently the doc-* trine announced in Gas Co. v. Akron, was not suggested in either court.

[4] The circumstances surrounding the grant of 1892 shows no intention either to give or accept a mere revocable right. It would be against common experience to conclude that rational men wittingly invested large sums of money in building a railroad subject to destruction at any moment by mere resolution of county commissioners. Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, 384, 22 Sup. Ct. 410, 46 L. Ed. 592.

Where there are no controlling provisions in state Constitution or statutes and no prior adjudication by its courts to the contrary, we have distinctly held that franchises like the one under consideration are contracts not subject to annulment as here undertaken. Louisville v Cumberland Telephone Co., 224 U. S. 649, 664, 32 Sup. Ct. 572, 56 L. Ed. 934; Grand Trunk Western Ry. v. South Bend, 227 U. S. 544, 556, 33 Sup. Ct. 303, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405; Owensboro v. Cumberland Telephone Co., 230 U. S. 58, 73, 33 Sup. Ct. 988, 57 L. Ed. 1389; Old Colony Trust Co. v. Omaha, 230 U. S. 100, 117, 33 Sup. Ct. 967, 57 L. Ed. 1410.

As construed by the Supreme Court of Ohio the resolution of 1913 impaired a valid contract, upon which plaintiffs in error properly relied. It was accordingly invalid and without effect.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice DAY took no part in the consideration or decision of this cause.

Mr. Justice CLARKE, dissenting.

The parties to this suit are a board of commissioners of an Ohio county and two corporations organized under the law of the same state, and the jurisdiction of this court, if it exists at all, must be found in the claim that the resolution of the county commissioners of February 19, 1913, is a law of the state of Ohio which impairs the*obligation of the grant by the commissioners of February 22, 1892, within the meaning of the Constitution of the United States. This resolution, printed in the margin of the court's opinion, declares that the commissioners "contend" that the term of the grant of February 22, 1892, "is an indeterminate one, continuing from day to day, and that said term extends and continues only so long as both parties to said grant * * * agree and consent" and that it may be terminated at any time by either party to it. The resolution then declares the grant terminated as of the date of the resolution and that the prosecuting attorney of the county be, and he is, directed to take such steps as he may deem necessary to prevent further operation of the railroad on the highway, as provided for by the grant.

The effect of the decision by the Supreme Court of Ohio is that this "contention" of the county commissioners that the grant is one determinable at the will of either party to it, is sound and that the commissioners having elected to terminate it the rights of the railway company were at an end. This court reverses this decision of the State Supreme Court and holds that the grant of 1892 was not revocable at will by the county commissioners, that the resolution of February 19, 1913, in terms revoking it is invalid and void, and without deciding whether the power of the commissioners was limited to the granting of such a franchise for twenty-five years and if so whether the grant has expired the court returns the case to the state courts for further proceedings not inconsistent with its opinion.

It is impossible for me to concur in the conclusion thus arrived at by the court and my reasons for dissenting will be briefly stated.

The resolution of February 19, 1913, is in terms simply an expression of the "contention" of the county commissioners as to the legal effect of the grant of 1892, coupled with notice of their election to terminate the same agreeably to their interpretation of it and with direction and authority given to the prosecuting attorney of the county to test in the courts the validity of the position asserted by the board.

That such a resolution to apply to the courts of the country to establish an asserted legal right, is not a law impairing the obligation of a contract is expressly decided, it seems to me, in Des Moines v. Des Moines City Railway Co., 214 U. S. 179, 29 Sup. Ct. 553, 53 L. Ed. 958, and in principle in Defiance Water Co. v. Defiance, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140. A resolution such as was passed here is the only form in which the board of county commissioners could assert, in advance of litigation, its contention as to its rights under the contract and it is not different in effect from what it would have been if the same contention had been expressed in another form, such as by way of an answer filed in behalf of the commissioners in a suit brought by the companies to enforce what they considered to be their rights under the grant. The decision of this court that the obligation of the contract was thus impaired amounts to holding "that whenever it is asserted on the one hand that a municipality (county) is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract, thereby an impairment of the contract arises in violation of the Constitution of the United States, but this amounts to the contention that every case involving a controversy concerning a municipal contract is one of federal cognizance, determinable ultimately in this court." This court in the language quoted has declared such a conclusion to be obvious error in St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 149, 21 Sup. Ct. 575, 45 L. Ed. 788.

These three clear and well-reasoned cases seem to me to correctly decide that the court is without jurisdiction to consider this case and that it should be dismissed.

* But even if we should assume that this court has jurisdiction to decide the case, it, nevertheless, would be impossible for me to concur in the conclusion arrived at.

The resolution of the county commissioners under discussion does not, in words, define the term for which the franchise to operate a railroad on the public highway is to continue. The Supreme Court of Ohio holds that it results from this failure to define "in express terms," "in plain terms," the duration of the grant that it should be considered an indeterminate one, but this court holds that this failure to clearly define the duration of the grant results in its being a perpetual one, unless it be otherwise limited by constitution or statute.

The rule for the construction of grants such as we have here will nowhere be found more clearly or imperatively stated than in the decisions of this court.

In Blair v. Chicago, 201 U. S. 400, 463, 26 Sup. Ct. 427, 50 L. Ed. 801, a decision obviously rendered upon "great consideration,"

it is declared that a corporation which would successfully assert a private right in a public street must come prepared to show that it has been conferred "in plain terms," "in express terms," and that any ambiguity in the terms of the grant must be resolved in favor of the public and against the corporation, "which can claim nothing which is not clearly given." The sound reason given for this rule is that "grants of this character are usually prepared by those interested in them," and that "it serves to defeat any purpose, concealed by the skillful use of terms, to accomplish something not apparent on the face of the act." This is declared to be "sound doctrine which should be vigilantly observed and enforced."

The Supreme Court of Ohio is not less definite in adopting the same rule of construction, saying, in Railroad Co. v. Defiance, 52 Ohio St. 262, 40 N. E. 89:

*589 "Every grant in derogation of the right of the public in the free and unobstructed use of the streets * * * will be construed strictly against the grantee and liberally in favor of the public and never extended beyond its express terms when not indispensable to give effect to the grant."

What results from the application of this rule to the grant we are considering?

The fact that two such courts as this one and the Supreme Court of Ohio differ so widely that the one holds the grant on its face to be perpetual, and the other holds it to be determinable at will, is, to me, convincing evidence that a perpetual grant is not conferred "in plain terms," "in express terms," that it is "something not apparent on the face of the grant," and that, therefore, to give such a construction to the resolution is to find in it a most vital and important provision which "those interested" in obtaining the grant would have been eager to incorporate into it had they thought it possible to obtain consent to it. It is impossible for me to doubt that a proposal to the county commissioners to make the resolution read "Resolved, that the right is hereby granted * * * to construct, maintain and operate perpetually an electric railroad * * * on the state road between Canton and Massillon" would have been summarily rejected by the commissioners. The public indignation which the making of such a grant would have excited was sufficient protection against its being made "in plain terms" and the rule we have quoted, in my judgment, should be the protection of the public against such a result being accomplished by construction.

The Supreme Court of Ohio may have been influenced in its decision of this case by the fact that from the time when the development of the state became such as to make of public importance the terms of grants of street railway rights in the streets and public roads of that state, the General Assembly of the state limited to twenty-five years the term for which such rights might be granted, either by county commissioners or by municipal corporations. It is difficult for a man living in such a legal atmosphere with respect to such grants to think in terms of perpetual franchises. An attempt to remove this restriction from grants by county commissioners was declared unconstitutional by the Supreme Court in Railway Co. v. Railway Co., 5 Ohio Cir. Ct. R. (N. S.) 583, affirmed 73 Ohio St. 364, 78 N. E. 1122.

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The decision of this case by the Supreme Court of Ohio is without written opinion, but it is rested by the court upon its previous decision in the East Ohio Gas Co. v. Akron, 81 Ohio St. 33, 90 N. E. 40, 26 L. R. A. (N. S.) 92, 18 Ann. Cas. 332. In that case the city of Akron contended that the franchise granted to the Gas Company, in terms unrestricted as to time, was perpetual, and the Gas Company contended that it was determinable at the will of either party. After having the case under advisement for six months, and as the court says in its opinion "on account of its great importance to the public as well as to all public service corporations" having given unusual consideration to the case, the contention of the Gas Company was sustained and the grant was held "simply determinable, existing only so long as the parties mutually agree thereto." Paragraph three of the syllabus of the case, which in Ohio has the approval of the entire court, reads:

"While much regard will be given to the clear intention of the parties, yet where the contract is entirely silent as to a particular matter, the courts will exercise great caution not to include in the contract by construction, something which was intended to be excluded."

This decision was rendered in 1909 by a unanimous court, and six years later it was made authority for the decision of this case. There is no Supreme Court authority in Ohio to the contrary. The judgment by an inferior court (State ex rel. Taylor v. Columbus R. Co., 1 Ohio Cir. Ct. R. [N. S.] 145), cited in the majority opinion, that street railway grants made before the statutory limit of twenty-five years was imposed and silent as to duration were perpetual, was promptly discountenanced when the case reached the Supreme Court. Id., 73 Ohio St. 363, 78 N. E. 1139.

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A decision by a state Supreme Court, repeated after the lapse of six years, of a question involving the construction of local laws is, in my judgment, entitled to very great weight.

There was no question raised in the Ohio court but that a contract was created by the passing and accepting of the resolution of 1892, and the record shows that the sole question for decision, and which was decided, was, whether the grant was an indeterminate or a perpetual one. If the grant had contained an express provision that it was revocable at will, it would have been impossible, having any regard to the meaning of words, to have said that the resolution of 1913 impaired its obligation. It would have been simply and only a form of exercising a legal right the ex-

ercise of which was contemplated by the contract. The case is not different if the grant, without such expression, really means, as the Supreme Court of Ohio held that it means, the same thing as if such provision had been incorporated into it, and since the state court arrived at its result by the construction of the grant wholly unaffected by the subsequent resolution terminating it, it seems clear enough, upon repeated decisions of this court, that a decision should not be rendered here based on the theory that the grant was impaired by a resolution in form terminating it. While this court has held that in such cases it will for itself determine whether a contract exists and what its terms are, yet where the decision of the state court is so manifestly unaffected by the later "law" as it is in this case, it should be given weight and authority comparable at least to that which would have been given it if it had been directed to the validity of the granting "law" under the state Constitution.

*592 The power to declare laws of states unconstitutional and to reverse the judgments of the Supreme Courts of states is so fateful and is so unprecedented in the history of governments other than ours that, as this court has repeatedly declared, it should be exercised only in cases which are clear, and it is impossible for me to think that this is such a case.

The only reason given by the court in its opinion for differing with the Supreme Court of Ohio in its construction of the granting resolution of 1892 is that:

"The circumstances surrounding the grant of 1892 show no intention either to give or accept a mere revocable right. It would be against common experience to conclude that rational men wittingly invested large sums of money in building a railroad subject to destruction at any moment by mere resolution of county commissioners."

There is no evidence whatever in this record that there were any special circumstances "surrounding the grant of 1892," and to undertake to infer what the unexpressed intention of the parties to this grant was twenty-five years ago is, it seems to me, an unusual and unpromising enterprise.

That it would be against common experience to conclude that rational men would wittingly invest their money in a railroad constructed under a grant determinable by the action of county commissioners is reasoning which it seems is more persuasive with courts than with investors or men of affairs. To reason upon what is reasonable is always uncertain and often misleading, but in this case we have ascertained facts to guide us.

Until recent years street railroad franchises (locations), and also electric light, gas, and other public utility franchises were revocable in Massachusetts, by aldermen in cities, and by selectmen in towns (counties), and they are still in the main so revocable, save that as to railroad grants revocation is now subject to approval by the state Railroad Commission, and as to some other "locations" revocation is subject to approval by the *593 Board of Gas and Electric Light Commissioners. Mass. Rev. Laws, 1902, vol. 2, §§ 7, 32, pp. 1044, 1051. Springfield v. Springfield St. Ry. Co., 182 Mass. 41, 48, 64 N. E. 577; Boston Electric Light Co. v. Boston Terminal Co., 184 Mass. 566, 6 N. E. 346; Metropolitan Home Telephone Co. v. Emerson, 202 Mass. 402, 88 N. E. 670. Yet hundreds of millions of dollars have been invested in that state in dependence upon these revocable ordinances.

In legislating for the District of Columbia, Congress has followed the Massachusetts example and has made street railroad grants indeterminate and revocable at the will of Congress. Act May 17, 1862, c. 73, 12 Stat. L. § 6, p. 390; Act July 29, 1892, c. 322, 27 Stat. L. § 8, p. 334.

Wisconsin, in 1907, adopted the principle of indeterminate franchises (Laws of Wisconsin, 1909, p. 775, § 1797t—2), and the new Constitution of Michigan recognizes it by providing that any franchise not revocable at will shall require the affirmative vote of sixty per cent. of the voters before it can become valid. Constitution, 1908, art. 8, § 25. Wilcox Municipal Franchises, vol. 1, pp. 36, 37, vol. 2, pp. 46, 47, and chapter 27.

This form of franchise has been called "a tenure during good behavior," it has resulted in superior service to the public and, to the surprise of those who reason a priori on the subject, such franchises have proved in effect perpetual. This type of franchise is undergoing modification in various parts of the country, which will, no doubt, improve it, but, of it even as it now is, Wilcox has this to say:

"Unquestionably, with the recognition of the unspeakable wrong that is inherent in the grant of perpetual franchises, and the great practical disadvantages that usually arise in connection with limited-term grants, public sentiment is rapidly crystallizing in favor of the indeterminate franchise as the most promising basis for public control of street railways." Municipal Franchises, vol. 2, p. 240.

*594 Perpetual franchises have proved to be such a burden in communities upon which they have been imposed (Wilcox, vol. 2, c. 26) that, for the reasons so well stated in Blair v. Chicago, supra, it is impossible for me to agree that any grant is perpetual unless the language used in it is so express and clear that reasonable men cannot differ in giving to it that effect.

Thus for the reasons (1) that a perpetual grant is not "in plain terms" made by the resolution of 1892; (2) that appropriate consideration seems to me not to be given to the decision of the Supreme Court of Ohio; and (3) that the reasons stated for inferring that an irrevocable franchise was intended by the granting power in the case before us are

not sound reasons, I should dissent from the opinion of the court even if convinced that it had jurisdiction to decide the case.

Mr. Justice BRANDEIS concurs in this dissent.

(245 U. S. 562)

SOUTHERN PAC. CO. v. STEWART.

(Decided Jan. 28, 1918.)

No. 348.

COURTS ⇐380—SUPREME COURT—REHEARING AFTER DISMISSAL.

Where a writ of error was dismissed on the assumption that the cause was removed from a state court on the sole ground of diversity of citizenship, and on petition for rehearing it is shown by a certified copy of the record that the fact that the cause of action arose under Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379, was also made a ground of removal, a rehearing will be granted, the order of dismissal set aside, and the cause restored to the docket.

On petition for rehearing. Petition granted, and cause restored to the docket.

For former opinion, see 245 U. S. 359, 38 S. Ct. 130, 62 L. Ed. ——. See, also, 233 Fed. 956, 147 C. C. A. 630.

Memorandum opinion by direction of the Court, by Mr. Justice DAY.

The opinion in this case was handed down on December 17, 1917. The cause was submitted on a motion to dismiss, which was sustained. The printed record did not contain the proceedings upon the application to remove the cause from the state court. The briefs of counsel upon both sides, upon which the case was submitted, stated that the case was removed because of diversity of citizenship. Treating these statements as the equivalent of a stipulation the court decided the case and rendered judgment. It now appears by a certified copy of the record on removal, filed by the plaintiff in error, that the removal petition contained an allegation that the complaint alleged a cause of action arising under the Interstate Commerce Act, and this fact, as well as diversity of citizenship was made a ground of removal.

*In this view it follows that as our order of dismissal rested upon the assumption that the removal was because of diversity of citizenship only, the petition for rehearing must be granted, the order of dismissal set aside, and the cause restored to the docket.

So ordered.

(245 U. S. 541)

JOHNSON v. LANKFORD et al.

(Submitted Dec. 18, 1917. Decided Jan. 28, 1918.)

No. 96.

1. APPEAL AND ERROR ⇐173(2), 193(1) — RESERVATION OF GROUNDS OF REVIEW—MATTERS NOT PRESENTED BELOW.

On a direct writ of error to a District Court to review the question of jurisdiction in an action against a state bank commissioner and his surety, the questions whether the surety is liable, or whether the petition or the case is defective in any particular, need not be decided; the judgment of the District Court not having been defensively invoked upon either question.

2. COURTS ⇐303(2) — FEDERAL COURTS—JURISDICTION—ACTIONS AGAINST STATE OFFICERS—"SUIT AGAINST THE STATE."

In an action against a state bank commissioner and his surety, the petition charged the commissioner with dereliction of duty under the laws of the state, consisting of continuous overlooking of violations of the law by bank officials, whereby a bank was brought to insolvency, and knowing of the depletion of its assets, and of the reduction of its reserves, and not requiring their repair, and further alleged that, after taking possession of the bank, the commissioner groundlessly refused to pay a certificate of deposit held by plaintiff from the available resources of the bank or the state guaranty fund, and so interpreted and enforced the laws of the state as to deny plaintiff the equal protection of the laws, and deprive him of his property without due process of law, and that because of the state's immunity from suit plaintiff had no remedy by judicial review. No relief was asked against the state guaranty fund. *Held*, that the action was not one against the state, within Const. Amend. 11, providing that the judicial power of the United States shall not be construed to extend to any suit commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state, as an officer of a state may be delinquent, without involving the state in delinquency.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suit Against the State.]

In Error to the District Court of the United States for the Western District of Oklahoma.

Action by Edward F. Johnson against J. D. Lankford and another. The action was dismissed for want of jurisdiction, and plaintiff brings error. Reversed and remanded.

Action for the sum of $5,235.60, with interest, for the failure of defendant in error Lankford to perform his duty as bank commissioner of Oklahoma, in consequence of which plaintiff in error sustained loss in the amount stated. Southwestern Surety Insurance Company, an Oklahoma corporation, was surety on the official bond of Lankford.

Defendants, defendants in error here, moved to dismiss the action on the ground of want of jurisdiction in the court, the action being "one against the state of Oklahoma without its consent, in violation of the Eleventh Amendment of the Constitution of the United States."

The court granted the motion, reciting that it was upon *the ground stated and that the question of jurisdiction was alone involved in its decision, and subsequently allowed a writ of error to review that question only. 542

Plaintiff in error (we shall refer to him as plaintiff) is a citizen of the state of Massachusetts. The defendants in error are citizens of the state of Oklahoma.

The petition of plaintiff is, in outline, as follows:

Lankford, in March, 1911, then being bank commissioner of Oklahoma, and again in March, 1915, entered into official bonds with the insurance company as surety in the sum of $25,000 for the faithful performance of his duties as required by law.

On October 11, 1913, the Farmers' & Merchants' Bank of Mountain View, Okl., a domestic banking corporation under the control and supervision of Lankford as bank commissioner, for value received, executed and delivered to plaintiff a certificate of deposit for the sum of $5,066.66, with interest at 3 per cent.

February 20, 1915, Lankford, as bank commissioner, took possession of the bank, and of its assets because of its insolvency. Thereupon plaintiff indorsed the certificate to one Martin for collection, who presented the same to Lankford for payment. Payment being refused, Martin reindorsed the same to plaintiff. Under the terms of the bonds given by Lankford it was his duty as commissioner to pay the certificate of deposit at the time it was presented to him. By refusal to so pay it, and his refusal afterward to pay upon the demand of plaintiff, he, Lankford, grossly and entirely failed to perform his duty, and being informed of the conditions of the bank and having means of knowledge he allowed the persons in charge of it to squander its assets so as to damage plaintiff in his right to compel payment from the bank. He, Lankford, also failed to exercise proper care and supervision in that before the making of the certificate of deposit and thence *543 continuously up to the time he took possession of the bank,* with full knowledge of the situation, he permitted the persons in charge of it to conduct it while its reserve was less than that required by law, and failed to take possession of it for the purpose of enforcing the law, or to do anything else adequate and requisite in the premises. He also permitted it while insolvent to make excessive loans and overdrafts in violation of law. And, knowing that it was in the hands of incompetent and inefficient persons, he allowed it to be controlled and managed by them inefficiently and incompetently and without economy, to the great damage of its assets, and plaintiff thereby was deprived of all opportunity of recovering the amount of his certificate out of its property.

Lankford failed to make the visits to the bank which the law of the state required him to make or exact the reports which the law required him to exact. He permitted it to reduce the funds which the law required it to have and failed to notify it of the deficiencies or to require it to repair them.

It was his duty to have taken possession of the bank, but he delayed to do so until February, 1915, when its assets were so squandered and depleted as to be insufficient to pay plaintiff's claim. He knew of the violations of law by its officers and of its insolvency.

It was his duty after he took possession to pay plaintiff's claim but he arbitrarily and capriciously refused, in violation of law and his bonds, and there was no cause whatever for him to have questioned the certificate as a valid claim against the guaranty fund of the state, which was available under the law of the state for the payment of claims against the bank.

The laws of the state have been so interpreted and enforced by him as to deny plaintiff the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States and he has exercised this power so arbitrarily and capri- *544 ciously that other depositors* of the same class and condition of plaintiff have been paid out of the available cash resources of the bank and the guaranty fund, and because the state is immune from suit plaintiff has no remedy by judicial review and Lankford, acting for the state as bank commissioner, has deprived plaintiff of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States by illegally preferring other depositors to plaintiff, thereby breaching the obligation of his bonds.

By failure to perform the promises made for the benefit of plaintiff in the bonds, he has been damaged by defendants in the sum of $5,235.60, on February 20, 1915, together with 6 per cent. interest thereon, amounting, August 20, 1915, to the sum of $5,392.67.

Plaintiff was without knowledge of the delinquencies of Lankford and the condition of the bank and, without fault on his part, allowed the moneys represented by the certificate to remain in the bank after the same became due.

Judgment was prayed for the amounts above specified.

Mr. Charles West, of Oklahoma City, Okl., for plaintiff in error.

Mr. Justice McKENNA, after stating the case as above, delivered the opinion of the Court.

[1] Whether the District Court had jurisdiction was necessarily to be determined by reference to the case made by the petition. Hence we have given it at some length, omitting repetitions. It will be observed that the basis of the action is the neglect of duty of Lankford as bank commissioner, by which plaintiff has been damaged to the amount of his certificate of deposit. The insurance *545 company has been made a party defendant because it has guaranteed the faithful performance of his duties, a statute of the state, it is contended, making it liable. Whether the contention is tenable or whether the petition or the case is defective in any particular we are not called upon to say. Upon neither question was the judgment of the Dis-

trict Court defensively invoked. The sole question for our consideration then is whether the cause of action stated is one against the state of which the District Court has no jurisdiction.

[2] There is certainly no assertion of state action or liability upon the part of the state, and no relief is prayed against it. The charges are all against Lankford. The relief sought is against him because of his willful or negligent disregard of the laws of the state, and it is because of this his surety is charged with liability, it having guaranteed his fidelity.

We think the question, therefore, should be answered in the negative; that is, that the action is not one against the state. To answer it otherwise would be to assert, we think, that whatever an officer does, even in contravention of the laws of the state, is state action, identifies him with it and makes the redress sought against him a claim against the state and therefore prohibited by the Eleventh Amendment. Surely an officer of a state may be delinquent without involving the state in delinquency, indeed, may injure the state by delinquency as well as some resident of the state, and be amenable to both.

The case is not like Lankford v. Platte Iron Works, 235 U. S. 461, 35 Sup. Ct. 173, 59 L. Ed. 316. There the effort was to compel the payment of a claim (certificates of deposit issued by a bank) out of the fund to which the state had a title and which it administered through its officers. Any demand upon it was a demand upon the state and a suit to enforce the demand was a suit against the state, necessarily precluded by the purpose of the law. The case at bar is not of such character. Its basis is Lankford's dereliction of duty, a duty enjoined by the laws of the state, and the dereliction is charged to have been continuous, overlooking violations of the requirements of law by the bank officials by which it was brought to insolvency, knowing of the depletion of its assets, knowing of the reduction of its reserves, and not requiring their repair. A further dereliction is charged after Lankford took possession and such arbitrary conduct and preferences that plaintiff's claim was subordinated to other claims of like character.

The present case finds example in Hopkins v. Clemson College, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243, where the college was held liable for acts of trespass upon private property, and it was said by Mr. Justice Lamar, speaking for the court, that immunity from suit was a "high attribute of sovereignty—a prerogative of the state itself—which cannot be availed of by public agents when sued for their own torts." And it was further said, "The Eleventh Amendment was not intended to afford them [public agents] freedom from liability in any case where, under color of their office, they have injured one of the state's citizens." And a distinction was marked between such acts and such as affect the state's political or property rights.

One charge in the petition will justify special comment. It is that the enforcement of the laws of Oklahoma in the matters complained of was and is solely through and by Lankford as bank commissioner and that he so arbitrarily and capriciously exercised his powers as to deprive plaintiff of the equal protection of the laws and to give to "other depositors an unequal and more advantageous enforcement of the law than to plaintiff, this to plaintiff's damage." And also it is alleged that Lankford's conduct in that particular deprived plaintiff of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

The purpose of the allegations is not very clear. They might be considered as intended for emphasis of the wrongful conduct of Lankford; but they seem to be made more of than this in the argument of counsel, and we are left in doubt whether they are pleaded as independent grounds of recovery or only as elements with other grounds. It is somewhat impossible to regard them as the former, for no special relief is asked on account of them. They represent completed acts the injury of which has been accomplished, the plaintiff losing by them access to the guaranty fund or its security, and hence Lankford is charged with personal liability. But no relief, as we have said, is prayed against the fund. If it were, Lankford v. Platte Iron Works, supra, might apply.

Judgment reversed and cause remanded for further proceedings in accordance with this opinion.

(245 U. S. 547)

MARTIN v. LANKFORD et al.

(Submitted Dec. 18, 1917. Decided Jan. 28, 1918.)

No. 97.

1. COURTS ⇐303(2)—FEDERAL COURTS—JURISDICTION—SUITS AGAINST STATE OFFICERS—"SUIT AGAINST THE STATE."

In an action against a state bank commissioner and his surety, the petition charged neglect of duty on the part of the commissioner in failing to exercise proper supervision over a bank as directed by the statute of a state, in allowing the parties in charge of the bank to squander its assets, in allowing it to continue business while and after its reserve was greatly less than required by law, in allowing its managers continuously and repeatedly to make excessive loans and overdrafts, and in allowing them to remain in charge, knowing them to be incompetent, when it was his duty to discover such incompetency and to take possession of the bank. An amendment alleged that the enforce-

ment of the law of the state through the commissioner abridged plaintiff's privileges and immunities as a citizen of the United States, in that such commissioner allowed and paid out of the assets of the bank and out of the state guaranty fund the deposits of other persons similarly situated, and refused arbitrarily to pay plaintiff's deposit, that his conduct in this particular was a denial of the equal protection of the law and of due process, and that the imposition of a lien on the assets of the bank by the state for sums advanced by it for the payment of other depositors postponed and prevented the collection of plaintiff's deposit. *Held* that, assuming that the allegation that the lien of the state was so enforced as to give other depositors a preference was intended to merely assert in another way the violation of the Constitution, not by the law of the state, but by defendant's wrongful administration of it, the action was not one against the state, so as to be beyond the jurisdiction of a federal court, as the petition was based on the commissioner's tortious conduct in violation of the state law, and not in exertion of such law, and the allegation as to the denial of equal protection and due process merely emphasized his wrongdoing, and could not be regarded as an independent ground of recovery.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suit Against the State.]

2. COURTS ⊂=300 — FEDERAL COURTS — JURISDICTION—NECESSITY OF DIVERSE CITIZENSHIP.

While the action was not one against the state, a federal court nevertheless had no jurisdiction, where plaintiff and the commissioner were citizens of the same state, and the surety was a corporation of that state.

In Error to the District Court of the United States for the Western District of Oklahoma.

Action by Lawrence Martin against J. D. Lankford and another. From a judgment dismissing the petition, plaintiff brings error Affirmed.

Mr. Charles West, of Oklahoma City, Okl., for plaintiff in error.

*548 *Mr. Justice McKENNA delivered the opinion of the Court.

The action is in certain particulars similar to No. 96 (245 U. S. 541, 38 Sup. Ct. 203, 62 L. Ed. ——) and was submitted with it. The citizenship of the parties, however, is not diverse as in the other action, they being all citizens of Oklahoma. There is a *549 further *difference from the other action in that in the latter the plaintiff was a depositor in the bank while in this he is a stockholder as well as a depositor and seeks to have his stockholder's liability of $2,000 offset against any sums that may be owing to him by reason of the matters set forth in his petition, Lankford, as bank commissioner, having refused to do so. Wherein and wherefore Lankford should have done so and wherein and wherefore he violated his duty to plaintiff through wrongful and neglectful conduct is charged in three causes of action substantially the same as the petition in No. 96, varied only to suit the differences in demand. In other words, that plaintiff lost his deposit because of neglect of duty upon the part of Lankford in the following particulars: (1) Failure to exercise proper supervision over the bank as directed by the statute of the state. (2) Allowing the parties in charge of the bank to squander its assets. (3) Allowing it to continue business while and after its reserve was greatly less than required by law. (4) Allowing its managers continuously and repeatedly to make excessive loans and excessive overdrafts. (5) Allowing such managers to remain in charge of its affairs, knowing them to be incompetent and notwithstanding it was his duty to discover such incompetency and, upon discovery, to take possession of the bank for the protection of its depositors and stockholders.

Plaintiff hence prayed that his stockholder's liability of $2,000 be offset against the sums due him, which he alleged to be $669.25 and interest thereon.

The Attorney General of the state appeared specially and alleged that the state "is a necessary party in interest to a proper determination of the issues described in the plaintiff's petition," that it "does not consent to be sued in this case and objects to the action being maintained against it." The motion concluded as follows: "Wherefore the state of Oklahoma moves the court to *550 dismiss this *action for want of jurisdiction over the party defendant."

Thereupon, by permission of the court, plaintiff inserted at the end of each cause of action an amendment in substance as follows: That the enforcement of the law of the state through Lankford, as bank commissioner, abridges plaintiff's privileges and immunities as a citizen of the United States in that Lankford allowed and paid out of the assets of the bank and out of the guaranty fund the deposits of other persons similarly situated with plaintiff and refused arbitrarily to pay his, plaintiff's, deposit. And by the imposition of the lien on the assets of the bank by the state for the sums advanced by it to the payment of such other depositors postpones and prevents the collection of plaintiff's deposit because the amount so advanced is greater than the assets, and that plaintiff was entitled to the same treatment as other depositors.

The court then passed upon the motion to dismiss and granted it, reciting that the question of jurisdiction was alone involved.

The petition charges delinquency on the part of Lankford whereby the bank's officers were enabled to so conduct its affairs as to bring it to insolvency, making it necessary for him to take possession of it with its assets depleted. The petition also charges such

conduct after he took possession as to subordinate plaintiff's claim to that of other depositors in the same situation. His conduct in this last particular, it is said, was in violation of the equal protection and due process clauses of the Constitution of the United States.

[1] We assume that the amendment to the petition which charges that the lien of the state upon the assets of the bank was so enforced as to give other depositors a preference was intended to be but another way of asserting violation of the Constitution, not by the law of the state, but by the wrongful administration of the law by*Lankford. Indeed the petition negatives state action. It is based, as we have seen, upon the tortious conduct of Lankford, not in exertion of the state law but in violation of it. The reasoning of No. 96 is therefore applicable and the conclusion must be the same, that is, the action is not one against the state, and the District Court erred in dismissing it for want of jurisdiction on that ground.

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We say "on that ground," for we are brought to the consideration whether the judgment of dismissal can be sustained upon another ground. There is confusion in the petition and the argument used to support it. As we have seen, Lankford is charged with dereliction of duty whereby plaintiff in error has been injured; but there is an assignment of error based upon the due process and other clauses of the Constitution of the United States. They were violated, the assignment recites, by Lankford's conduct by which other depositors were preferred to plaintiff, and the decision was "without evidence, without notice, without a hearing provided by law, and without an opportunity afforded by law for judicial review," and that the District Court erred in deciding that "the consequent action based upon said facts against" Lankford and the insurance company as his surety "was in effect one against the state of Oklahoma."

[2] In No. 96 we said of a like allegation that it was only possible to regard it as emphasis of Lankford's wrongdoing, not as an independent ground of recovery. To hold otherwise would be to disregard the whole scheme of plaintiff's petition which is, as we have seen, a cause of action against Lankford because of his derelictions. This being the nature of the action, the District Court erred in regarding it as one against the state and dismissing it on that ground. But, however, its judgment was right, plaintiff and Lankford being citizens of the same state, and the Surety Insurance Company being an Oklahoma corporation, and therefore the judgment must be affirmed.

So ordered.

(245 U. S. 552)

UNITED STATES et al. v. WOO JAN.

(Argued and Submitted Jan. 17, 1918. Decided Jan. 28, 1918.)

No. 586.

ALIENS ⇐32(1) — EXCLUSION AND DEPORTATION OF CHINESE—FORM OF REMEDY.

The Chinese Exclusion Acts (Comp. St. 1916, §§ 4290, 4313, 4334, 4337), provide for the deportation of Chinese persons found in the United States in violation of those laws by a judicial proceeding instituted before a justice, judge, or commissioner of any United States court. Immigration Act Feb. 20, 1907, § 21 (Comp. St. 1916, § 4270), provides that in case the Secretary of Labor shall be satisfied that an alien has been found in the United States in violation of that act, or is subject to deportation thereunder, or under any law of the United States, he shall cause such alien, within three years after landing or entry, to be taken into custody and returned to the country whence he came. Section 43 (section 4289) provides that such act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent. *Held*, that the Secretary of Labor, within three years from the last entry, has no jurisdiction to arrest and deport a Chinese alien upon the sole ground that he is in the country in violation of the Chinese Exclusion Acts, as section 21, if so construed, would alter, amend, or repeal the exclusion acts contrary to the prohibition of section 43, since the administrative action thereby provided would always be resorted to, to the exclusion of the judicial proceeding provided by the Exclusion Acts.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Habeas corpus by Woo Jan against the United States and another. From a judgment discharging the petitioner, defendants appealed to the Circuit Court of Appeals for the Sixth Circuit, which certifies certain questions to the Supreme Court (250 Fed. 595). Questions answered.

Mr. Assistant Attorney General Fitts, for the United States.

Mr. Francis R. Marvin, of Cleveland, Ohio, for Woo Jan.

Mr. Justice McKENNA delivered the opinion of the Court.

The Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898 (Comp. St. 1916, § 4270), provides as follows:

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"Sec. 21. That in case the Secretary* of* * * * Labor shall be satisfied that an alien has been found in the United States in *violation* of this act, or that an alien is subject to deportation under the provisions of this act, *or of any law of the United States* [italics ours], he shall cause such alien within the period of three years after landing or entry to be taken into custody and returned to the country whence he came. * * *"

It is provided, however (section 43 [section 4289]):

"That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent. * * *"

The relation of these sections has given rise to diversity of decision, District Courts of different districts and Circuit Courts of Appeals for different circuits being in opposition. Ex parte Woo Shing (N. D. Ohio), 226 Fed. 141, sustains the power of the Secretary of Labor exercised under section 21, and the decision was approved by the Circuit Court of Appeals for the Eighth Circuit. Lo Pong v. Dunn, 235 Fed. 510, 149 C. C. A. 56; Sibray v. United States, 227 Fed. 1, 141 C. C. A. 555. The power of the Secretary was denied in the instant case by the District Court for the Eastern District of Kentucky (228 Fed. 927), and the decision has been followed by the Circuit Courts of Appeals for the Seventh and Fifth Circuits. United States v. United States ex rel. Lem Him, 239 Fed. 1023, 152 C. C. A. 661; Lee Wong Hin v. Mayo, 240 Fed. 368, 153 C. C. A. 294.

The Circuit Court of Appeals, reciting this diversity, certifies to this court the following questions, "(a in the abstract, b concretely)":

"(a) Has the Secretary of Labor, acting within three years from the last entry, jurisdiction to arrest and deport a Chinese alien upon the sole ground that he is found in this country in violation of the Chinese Exclusion Act?

"(b) Are the facts stated in Woo Jan's petition and admitted by demurrer inconsistent with any jurisdiction in the Department of Labor to cause his arrest and deportation?"

*554 *The answer that is received to "(a)" determines the answer to "(b)". In other words, if the first be answered "No," the second will necessarily be answered "Yes," the second being, as indicated by the Circuit Court of Appeals, the concrete application of the abstraction of the first.

The facts are these: The Secretary of Labor, attempting to exercise the power supposed to be conferred upon him by section 21, caused the arrest of Woo Jan as a Chinese alien unlawfully within the United States, with the view and purpose of deporting him. The warrant of arrest recited "that the said alien is unlawfully within the United States in that he is found therein in violation of the Chinese Exclusion Laws, and is, therefore, subject to deportation under the provisions of section 21" of the act of Congress of February 20, 1907, amended by the act of March 26, 1910 (Comp. St. 1916, §§ 4244, 4247). It was directed to the "Inspector in Charge, Cleveland, Ohio, or to any immigrant inspector in the service of the United States."

Woo Jan petitioned the District Court in habeas corpus to be discharged from the arrest, asserting his right to be and remain in the United States and setting up as grounds of it that he was a merchant, and that his status as a resident had been investigated by the authorities of the United States and established, and that there was no authority of law for the issue of the warrant. To the petition the District Attorney demurred, and the court, holding that the warrant had been issued without authority of law, ordered the discharge of Woo Jan. The case, therefore, presents to us through the questions certified the validity of the judgment.

We are admonished at the outset by the diversity of opinion that there are grounds for opposing contentions. Indeed, sections 21 and 43 seem to be, at first impression, in irreconcilable conflict. The declaration of section 21 is that the power of the Secretary of Labor shall extend to taking into custody 555 and returning to the country from whence *he* came whoever is subject to deportation under the provisions "of any law of the United States." The universality of the declaration would seem to preclude exception and compel a single judgment. But, passing on to section 43, we find another law preserved and kept in function, a function so firm and exclusive that it is provided that the act, of which section 21 is but a part, shall not be construed to "repeal, alter or amend" it. Let us repeat the language:

"Provided, that this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent."

There is, therefore, an express qualification of the universality of section 21, indeed, from all of the provisions of the act the Chinese exclusion laws are excepted. They, the latter, are to stand in their integrity and efficacy. But it is asserted that they are so left to stand, and that section 21 only gives another remedy, and United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354, is cited, first as to the assertion, then as to the cited case.

That we may estimate both we insert in the margin the provisions of the Exclusion 556 Laws.[1] The government,* confronted with *

[1] The act of May 6, 1882, § 1, as amended by the act of July 5, 1884 (22 Stat. 58; 23 Stat. 115 [Comp. St. 1916, § 4290]), provides that:

"From and after the passage of this act, and until the expiration of ten years next after the passing of this act, the coming of Chinese laborers to the United States be and the same is hereby suspended, and during such suspension it shall not be unlawful for any Chinese laborer to come from any foreign port or place, or having so come to remain within the United States."

Section 13 of the Act of September 13, 1888 (25 Stat. 476, 479 [Comp. St. 1916, § 4313]), entitled "An act to prohibit the coming of Chinese laborers to the United States," provides:

"That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any Justice, Judge, or Commissioner of any United States court, * * * or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came.

"But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the District Court for the district."

Section 3 of the Act of March 3, 1901 (31 Stat. 1093 [Comp. St. 1916, § 4334]), provides:

"That no warrant of arrest for violation of the

those provisions, conceded at bar that the remedy of section 21 is not their equivalent. The difference is marked. It is the difference between administrative and judicial action; and the government recognized that the difference—we might say contrast—is the step on which it "must fall down, or else o'erleap." And necessarily so. Manifestly the remedy of section 21 has not the safeguards of impartiality and providence that the remedy of the Exclusion Laws has. Mere discretion prompts the first and last act of the former; the latter has the security of procedure and ultimate judgment of a judicial tribunal, where all action which precedes judgment is upon oath and has its assurance and sanctions.

The remedies are too essentially different to be concurrent. And yet we are asked to *557 decide that the law which permits the first, that is, permits the deportation of an alien simply upon the warrant or determination of an executive officer, is not an amendment or alteration of a law which prohibits it. And there can be no doubt of the result if such decision be made. The summary and direct remedy of section 21 will always be used. No Chinese person will be given the formal procedure of the Exclusion Laws with their safe guards. The cases demonstrate this and we cannot believe that Congress was insensible of it and left it possible. Nor can we ascribe to Congress a deliberately deceptive obscurity and an intention, by the use of words which can be given a double sense, to grant a right that can have no assertion. We must, indeed, assume that section 43 was intended to be sufficient of itself—fully exclusive and controlling.

We might terminate the discussion here and leave the case to the explicit language of section 43 that section 21 (to pass at once to the particular) "shall not be construed to alter, repeal or amend existing laws relating to the immigration or exclusion of Chinese persons." The government, however, contends, as we have seen, that this court has decided to the contrary in United States v. Wong You, supra.

The government's understanding of the case is erroneous. It concerned Chinese persons, but not the Exclusion Laws, and it was decided that such persons might offend against the Immigration Act and be subject to deportation by the Department of Labor if they should so offend. This was the extent of the decision, and its language was addressed to the contention that the latter act was applicable to all persons except Chinese because of section 43. The contention was declared to be untenable, and it was untenable. The case, therefore, is different from that at bar and the opinion was considerate of the difference, that is, considerate of the difference between the Immigration Act and the Exclusion Laws.

This difference must be kept in mind. The Chinese Exclusion Laws have not the character or purpose of the Immigration Act.* They are addressed under treaty stipulations[2] to laborers only. Other classes are not included in their limitation and it was provided by the treaty that the limitation or suspension of the entry of laborers should be reasonable. The questions therefore which could arise were deemed different from any under the Immigration Act, and the Exclusion Laws are adapted to them and their procedure is hence saved by section 43. *558

We, therefore, answer question "(a)" No, and question "(b)" Yes.

And it is so ordered.

Mr Justice CLARKE took no part in the consideration and decision of this case.

(245 U. S. 559)

GREER v. UNITED STATES.

(Argued and Submitted Jan. 18, 1918. Decided Jan. 28, 1918.)

No. 504.

1. CRIMINAL LAW ⇐376 — ISSUES—CHARACTER OF DEFENDANT.
The character of the defendant in a criminal case is not an issue in the case, unless the defendant chooses to make it one.

2. CRIMINAL LAW ⇐309—PRESUMPTIONS — CHARACTER OF DEFENDANT.
On a criminal trial, there is no presumption of defendant's good character, since a presumption upon a matter of fact, when not merely a

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Chinese Exclusion Laws shall be issued by the United States Commissioners except upon the sworn complaint of a United States District Attorney, Assistant United States District Attorney, Collector, * * * or Inspector of Customs, Immigration Inspector, United States Marshal, or Deputy United States Marshal, or Chinese Inspector, unless the issuing of such warrant of arrest shall first be approved or requested in writing by the United States District Attorney of the district in which issued."

By the act of April 29, 1902, § 1, as amended and re-enacted by section 5 of the Deficiency Act of April 27, 1904 (32 Stat. 176; 33 Stat. 428 [Comp. St. 1916, § 4337]), "all laws * * * regulating, suspending, or prohibiting the coming of Chinese persons or persons of Chinese descent into the United States * * * are hereby re-enacted, extended, and continued, without modification, limitation, or condition."

[2] Article I of the treaty provides that whenever in the opinion of the United States the coming of Chinese laborers to the United States or their residence therein might affect the interests of the United States, it was agreed that the United States might regulate, limit or suspend such coming or residence, but not absolutely prohibit it, and that the limitation should be reasonable and apply only to laborers, other classes not being included in the limitation. Article II of the treaty is as follows:

"Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come at their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." 22 Stat. 827.

disguise for some other principle, is based on common experience, showing the fact to be so generally true that courts may notice the truth, and it is not common experience that the character of most people indicted by a grand jury is good.

3. Courts ⊜348—Federal Courts—Rules of Evidence.

On a criminal trial in a federal court, the court is not conclusively bound by the rules of evidence as they stood in 1789.

Mr. Justice McKenna dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

J. Knox Greer was convicted of an offense, his conviction was affirmed by the Circuit Court of Appeals for the Eighth Circuit (240 Fed. 320, 153 C. C. A. 246), and he brings certiorari. Judgment affirmed.

Messrs. J. C. Denton and Frank Lee, both of Muskogee, Okl., for petitioner.

Mr. Assistant Attorney General Warren, for the United States.

Mr. Justice HOLMES delivered the opinion of the Court.

The petitioner was tried for introducing whiskey from without the State into that part of Oklahoma that formerly was within the Indian Territory. He was convicted and sentenced to fine and imprisonment. Material error at the trial is alleged because the Court refused to instruct the jury that the defendant was presumed to be a person of good character, and that the supposed presumption should be considered as evidence in favor of the accused, with some further amplifications not necessary to be repeated. *560 The court did instruct the jury that the defendant was presumed to be innocent of the charge until his guilt was established beyond a reasonable doubt, and that the presumption followed him throughout the trial until so overcome. The Circuit Court of Appeals sustained the Court below. 240 Fed. 320, 153 C. C. A. 246. This judgment was in accordance with a carefully reasoned earlier decision in the same circuit, Price v. United States, 218 Fed. 149, 132 C. C. A. 1, L. R. A. 1915D, 1070, with an acute statement in United States v. Smith (D. C.) 217 Fed. 839, and with numerous state cases and text books. But as other Circuit Courts of Appeal had taken a different view, Mullen v. United States, 106 Fed. 892, 46 C. C. A. 22; Garst v. United States, 180 Fed. 339, 344, 345, 103 C. C. A. 469, also taken by other cases and text books, it becomes necessary for this Court to settle the doubt.

[1] Obviously the character of the defendant was a matter of fact, which, if investigated, might turn out either way. It is not established as matter of law that all persons indicted are men of good character. If it were a fact regarded as necessarily material to the main issues it would be itself issuable, and the Government would be entitled to put in evidence whether the prisoner did so or not. As the Government cannot put in evidence except to answer evidence introduced by the defence the natural inference is that the prisoner is allowed to try to prove a good character for what it may be worth, but that the choice whether to raise that issue rests with him. The rule that if he prefers not to go into the matter the Government cannot argue from it would be meaningless if there were a presumption in his favor that could not be attacked. For the failure to put on witnesses, instead of suggesting unfavorable comment, would only show the astuteness of the prisoner's counsel. The meaning must be that character is not an issue in the case unless the prisoner chooses to make it one; otherwise he would be foolish to open the door to contradiction by going into evidence when without it good character would be incontrovertibly presumed. Addison v. People, 193 Ill. 405, 419, 62 N. E. 235. *561

[2] Our reasoning is confirmed by the fact that the right to introduce evidence of good character seems formerly to have been regarded as a favor to prisoners, McNally, Evidence, 320, which sufficiently implies that good character was not presumed. In reason it should not be. A presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that courts may notice the truth. Whatever the scope of the presumption that a man is innocent of the specific crime charged, it cannot be said that by common experience the character of most people indicted by a grand jury is good.

[3] It is argued that the Court was bound by the rules of evidence as they stood in 1789. That those rules would not be conclusive is sufficiently shown by Rosen v. United States (January 7, 1918) 245 U. S. 467, 38 Sup. Ct. 148, 62 L. Ed. —. But it is safe to believe that the supposed presumption is of later date, of American origin, and comes from overlooking the distinction between this and the presumption of innocence and from other causes not necessary to detail.

Judgment affirmed.

Mr. Justice McKENNA dissents.

(245 U. S. 594)

SUPREME LODGE, KNIGHTS OF PYTHIAS, v. SMYTH.

(Argued Jan. 2, 1918. Decided Jan. 28, 1918.)

No. 107.

Courts ⊜90(1) — Previous Decisions as Authorities.

The decision in a prior case as to the right of a fraternal insurer to raise its rates is controlling in a subsequent case, where the plaintiffs in the two actions were members of the same class, their policies were in almost the same words, the by-law relied on in the second action was confessedly in full force when

the policy was issued to the plaintiff in the first action, and previous increases of assessment paid by the plaintiff in the first action under protest were paid by the plaintiff in the second action without objection.

On Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Action by Arthur V. H. Smyth against the Supreme Lodge, Knights of Pythias. A decree for complainant was affirmed by the Circuit Court of Appeals for the Second Circuit (220 Fed. 438, 137 C. C. A. 32), and defendant appeals. Reversed.

Messrs. John J. McCall, of Albany, N. Y., and James E. Watson, of Rushville, Ind., for appellant.

Mr. Harry V. Borst, of Amsterdam, N. Y., for appellee.

*595 Mr. Justice CLARKE delivered the opinion of the Court.

We shall designate the parties as they were in the trial court, the plaintiff in error as defendant and the defendant in error as plaintiff.

This is a suit to enjoin an increase of assessment upon a certificate—we shall call it a policy—of insurance on the life of the plaintiff, issued by the defendant. The asserted claim, approved by the lower courts, is that the defendant is estopped to demand such increased payment, or to cancel the policy for failure to pay it, for the reason that at the time plaintiff's policy was delivered to him there was handed to him by the secretary of the local section a pamphlet which purported to be a copy of the "Constitution and General Laws" of the insurance section or "Endowment Rank" of the defendant, which were then in force. In this copy of the general laws—by-laws—article IV, section 1, reads:

"Each member * * * shall pay * * * a monthly assessment, as provided in the following table, *and shall continue to pay the same amount thereafter as long as he remains a member of the Endowment Rank.*"

This provision, it is contended, became a part of the contract of insurance with the plaintiff, which could not be changed without his consent, and made unlawful any increase in his assessment. The defense is *596 that power was given to the defendant by its charter to change its by-laws; *that by provisions in his policy and in his application for it, the plaintiff was notified and charged with knowledge of this fact; and that the increase of assessment complained of was duly authorized pursuant to the terms of this grant of power.

In the disposition which we make of the case the further claim of the defendant, that the by-law relied upon by the plaintiff had been amended before the policy was issued to him, becomes unimportant.

The facts of the case before us make it clear that it must be ruled by the decision of this court in Supreme Lodge, Knights of Pythias, v. Mims, 241 U. S. 574, 36 Sup. Ct. 702, 60 L. Ed. 1179, L. R. A. 1916F, 919.

The defendant is the same fraternal insurance corporation which was plaintiff in error in that case, and its corporate history there detailed need not be repeated here.

The plaintiff in this case (as in the other) was a member of the fourth class of the "Endowment Rank," and his policy for $3,000 was delivered to him on November 26, 1889, upon an application filed the 26th of the preceding month. He paid a monthly assessment of $3 until 1894 when it was increased to $3.15, which he paid until 1901 when it was increased to $4.80, which he paid until 1910 when he received a notice of an increase to $14.70, which he refused to pay and made the basis of his claim in this suit.

In the Mims Case the original policy was issued in 1879, but was surrendered for another in May, 1885, which contained, as the report shows, the same provisions, in almost the same words, as in the Smyth policy. When it was issued the by-law on which the plaintiff relies in this case was confessedly in full force, so that if it be admitted that this by-law was in the form which the plaintiff claims it was represented to him to be at the time his policy was issued, nevertheless his position would be precisely that of Mims.

Two increases of assessment made prior to *597 the one*objected to were paid by Mims "under protest" and by Smyth without objection. The cases are on all fours one with the other and the decision of the earlier one, which it should be noted was rendered since the decision in the Circuit Court of Appeals, must be accepted as ruling this case on the merits as it also rules against the motion by the defendant in error to dismiss. Texas & Pac. Ry. Co. v. Hill, 237 U. S. 208, and also 215, 35 Sup. Ct. 575, 59 L. Ed. 918.

It results that the decision of the Circuit Court of Appeals must be

Reversed.

(245 U. S. 597)

WM. FILENE'S SONS CO. v. WEED et al.

(Argued Dec. 17 and 18, 1917. Decided Feb. 4, 1918.)

No. 93.

1. CORPORATIONS ⇐565(1)—RECEIVERSHIP—CLAIMS PROVABLE.

A sublease to a corporation of premises held by the lessor under various leases required the payment as rental of all sums payable under the original leases, together with the further sum of $20,000 yearly, payable in monthly installments. It provided that, at the joint request of the lessee and the overlessors, the lessee would cancel overleases and abate the rent, on payment of a sum equal to $20,000 a year for the rest of the term, plus one day, less a discount at the rate of 5 per cent. per annum on payments anticipated. In providing for an abatement of rent, and other payments in case of fire, etc., the payment of the $20,000 was ex-

cepted, and it was further provided that, if the overlease of any part of the premises was terminated, the payment of the $20,000 should continue without abatement, and that on termination of the lease as provided therein the lessee would pay a sum equal to $20,000 a year for the unexpired period, with one day added, less the 5 per cent. discount. It further provided for a re-entry in case of a failure to perform any covenant, or on the appointment of a receiver. A receiver was appointed, who elected not to assume the lease, and the lessor re-entered. *Held*, that the claim for the $20,000 a year for the unexpired portion of the term was a provable claim, though it was not presently payable until the termination of the lease after the filing of the bill, as the lease did not deal with such payment as rent, but as a separate item, and as the inducing consideration for the sublease, the right to the whole of which was earned when the sublease was made, and the courts, in receivership suits, cannot exclude creditors, or introduce supposed equities other than those determined by the debtor's contracts, or give to the filing of the bill the effect of a petition in bankruptcy to exclude claims maturing within a reasonable time before distribution.

2. CORPORATIONS ⟸565(1)—RECEIVERSHIP—CLAIMS PROVABLE.

That the claim was perfected by the lessor's act after a default in the rent did not affect the right to prove the claim; the lessor's course being the prudent and only possible course to take, and one contemplated by the covenant in the lease.

3. CORPORATIONS ⟸565(2)—RECEIVERSHIP—CLAIMS—LIEN.

The discount on the payments anticipated should be a simple discount on such payments as they would fall due monthly.

4. CORPORATIONS ⟸565(1)—RECEIVERSHIP—CLAIMS PROVABLE.

Rev. Laws Mass. c. 163, § 33, provides, relative to insolvency proceedings, that, if any of the debtor's property consists of a lease, the assignee may elect to accept it, or to disclaim it, and that, if he elects to disclaim, the lessor may prove the damages caused by the surrender. A lease to a corporation provided that, on termination of the lease as provided for, the lessee would pay the difference between the rental value and the rent reserved, less the amount received under another provision of the lease, for the residue of the term. A receiver was appointed, who elected not to assume the lease, and the lessor thereupon re-entered. *Held*, that the claim for such difference between the rental value and the rent reserved was a provable claim, as the contract did not provide that all the rent for the term should become presently due, but provided for liquidating the damages on a fair footing.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Suit against William S. Butler & Co., Incorporated, in which Charles F. Weed and others were appointed receivers of such corporation. An order disallowing the claim of William Filene's Sons Company was affirmed by the Circuit Court of Appeals for the First Circuit (230 Fed. 31, 144 C. C. A. 329), and the claimant brings certiorari. Reversed.

Messrs. George R. Nutter, James Butler Studley, and Louis D. Brandeis, all of Boston, Mass., and Francis B. James, of Washington, D. C., for petitioner.

Messrs. Frederick H. Nash and Charles F. Choate, Jr., both of Boston, Mass., for respondents.

*598 * Mr. Justice HOLMES delivered the opinion of the Court.

This case comes to this Court by writ of certiorari upon a bill for instructions filed by the receivers of William S. Butler and Company, incorporated. The receivers were appointed upon the prayer of a creditor, assented to by the corporation, in a bill brought for continuing the business until the assets *599 could be applied in satisfaction of the* company's debts. Instructions are asked as to the amount to be paid to the petitioner, Wm. Filene's Sons Company, under a lease of the premises that William S. Butler & Co. occupied. The lease covered five parcels of land held by the petitioner, also as lessee, and ran for the terms, less one day, of the respective original leases, which expired at different dates, from December 30, 1917, to February 28, 1921. It provided for a reentry in case of a failure to perform any covenant, of bankruptcy, etc., or of a receiver being appointed and not discharged within ninety days. These proceedings were begun on November 7, 1912. On December 5, 1912, the receiver elected not to assume the lease and left the rent due December 1, unpaid; on December 9 the petitioner reentered in pursuance of leave granted by the Court, and on December 17 made demand upon the receiver for the sum that it alleges to be due. The receiver filed this petition for instructions on April 7, 1913. On September 30, 1913, the petitioner filed a formal claim, the time for proving claims not yet having expired.

The lease is made in consideration of the lessee's covenant to pay twenty thousand dollars a year until February 27, 1921 (the day before the longest of the original leases expired,) and of the other covenants therein contained by the lessee to be performed. The reddendum requires the payment as rental of all sums payable by the lessor under the leases to it at the times specified in their leases, "together with a further sum of twenty thousand dollars yearly, payable in equal monthly instalments until February 27, 1921." The lessor agrees, at the joint request of the lessee and the overlessors in all the original leases in force at the time, to cancel the overleases and abate the rent in respect of them upon payment of a sum equal to $20,000 a year for the residue of the term plus one day, "less a discount at the rate of five per cent. per annum on payments so anticipated." There is a proviso for an *600 abatement of rent and other payments in case of fire, the taking of part of the prem-

ises, etc., "except said payment of twenty thousand dollars per year"; and there is a further stipulation that if the overlease of any part of the demised premises is terminated, the payment of twenty thousand dollars per year shall continue without any abatement. Finally it is agreed that upon a termination of the lease as provided for the lessee will pay to the lessor, upon demand, a sum equal to twenty thousand dollars per year and at the same rate for a fractional part of a year, for so much of the period up to February 27, 1921, as remains unexpired, with one day added (less the five per cent. discount, as aforesaid), and will further make one of three several payments at the election of the lessor, of which it is only necessary to mention the second. This was to pay to the lessor as damages, the difference between the rental value and the rent and other payments named in the lease for the residue of the term, deducting, however, such sum as has been paid for the same period under the clause requiring the payment of twenty thousand dollars a year.

The substance of the petitioner's claim as argued before us is for a sum equal to twenty thousand dollars a year in monthly payments from December 9, 1912, to February 28, 1921, less a discount at the rate of five per centum per annum on the payments anticipated, and for whatever sum may represent its damages estimated in the manner that we have just stated as stipulated in the lease. The Courts below were of opinion that the twenty thousand dollars were simply an addition to the rent, that the provisions for payment upon termination of the lease were an attempt to secure a preference by accelerating the instalments and also were in the nature of a penalty, that the analogy of bankruptcy applied, and that the claim for the above-mentioned items could not be *601 allowed. The Circuit Court of Appeals seems to have considered also that the filing of the bill had the same effect as a petition in bankruptcy in stopping claims that like this were not provable at that date. 230 Fed. 31, 144 C. C. A. 329.

[1, 2] We are driven to different conclusions. In the first place, whether a letter showing that the payment of $20,000 a year was a substitute for a bonus of $340,000 was admissible or not, United States v. Bethlehem Steel Co., 205 U. S. 105, 120, 27 Sup. Ct. 450, 51 L. Ed. 731, we are of opinion that on the face of the lease and the figures it was dealt with as a separate item and as the inducing consideration for the sublease, the right to the whole of which was earned when the sublease was made. The summary of the clauses referring to it that we have given shows that the whole amount was to be paid in any event, whether the overleases were cancelled, or a part of the rent was abated, or the leases were terminated, as well as if they ran their full course. It is true that in the reddendum the words "as rental" might be construed to embrace the later clause "together with a further sum of $20,000," but the sentence does not compel that construction and the dominant intent and obvious fact seems to us to override any argument upon that ground. See Cox v. Harper, [1910] 1 Ch. 480. Rent issues from the land, is not due until the rent day, and is due in respect of the enjoyment of the premises let. The twenty thousand dollars a year was to be paid whether the premises were enjoyed or not, upon a personal covenant that created a present debt, with no contingency except those possibly and lawfully accelerating the time in which it was to be paid.

We perceive no ground that would justify the rejection of the petitioner's proof for the whole sum subject to the discount agreed. Certainly the fact that the termination of the lease happened after the filing of the bill has no such effect, although the sum was not presently payable until then. When a statutory system is administered the only question *602 for the Courts is what the statutes prescribe. But when the Courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts except from the Court's hands, they have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. In order to make a distribution possible they must of necessity limit the time for the proof of claims. But they have no authority to give to the filing of the bill the effect of the filing of a petition in bankruptcy so as to exclude any previously made and lawful claim that matures within a reasonable time before distribution can be made. Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 740, 741, 117 C. C. A. 503. Of course it does not matter that the claim was perfected by the petitioner's act, after a default in the rent. The receivers would not, and Butler & Company could not pay it, so that all agree that the petitioner's course was the prudent and only possible course to take, as it was the course that was contemplated by the covenant in the lease. Wilder v. McDonald, 63 Ohio St. 383, 397, 59 N. E. 106.

[3] We agree with the petitioner that the discount on payments so anticipated should be a simple discount on the payments as they would fall due, that is, monthly, making the total according to the Master's report, $137,348.88.

[4] The rest of the claim is for damages ultra the twenty thousand dollars a year—the difference between the rental value at the date of entry and the rent reserved, less the amount received under the twenty thousand dollar clause. This also was contracted for and we see no reason why it should not

be paid. The contract was not that all the rent for the term should become presently due, it was not for rent at all, but was a personal covenant that liquidated the damages upon a footing that was familiar and fair. *603 Mass. Rev. Laws, c. 163, § 33; Woodbury v. Sparrell*Print, 187 Mass. 426, 428, 73 N. E. 547; International Trust Co. v. Weeks, 203 U. S. 364, 27 Sup. Ct. 69, 51 L. Ed. 224; People v. St. Nicholas Bank, 151 N. Y. 592, 45 N. E. 1129; Woodland v. Wise, 112 Md. 35, 76 Atl. 502; Reading Iron Works—Sweatman's Appeal, 150 Pa. 369, 24 Atl. 617; McGraw v. Union Trust Co., 135 Mich. 609, 98 N. W. 390; Smith v. Goodman, 149 Ill. 75, 85, 86, 36 N. E. 621; Kalkhoff v. Nelson, 60 Minn. 284, 288, 62 N. W. 332; Ex parte Llynvi Coal & Iron Co. in Re Hide, L. R. 7 Ch. 28. The claim divides itself into two items: One from January 1, 1913, until April 1, 1913, when the whole premises were relet, put by the master at $39,829.80; the other from April 1, 1913, to the end of the term, put at $34,433.47. The other disputed item for expenses of reletting is disallowed.

Decree reversed.

Mr. Justice BRANDEIS having been of counsel took no part in the decision of this case.

(245 U. S. 603)

GARDINER v. WILLIAM S. BUTLER & CO., Inc., et al.

(Argued Dec. 18, 1917. Decided Feb. 4, 1918.)

No. 95.

1. Corporations ⟸565(1)—Receivership—Claims Provable.

Where a lease to a corporation provided that in case of re-entry the lessee should pay the difference between the rental value and the rent and other payments required for the residue of the term, and after the appointment of a receiver the lessor re-entered, the lessor's claim for rent up to the time of re-entry and for the stipulated damages for the period subsequent to the re-entry was a provable claim.

2. Landlord and Tenant ⟸198 — Rent — Rights After Re-entry.

Under the law of Massachusetts a lessor, who terminated the lease and evicted the tenant, had no claim against the lessee for the loss of the benefit of his bargain from the time of his re-entry, in the absence of any statute or provision in the lease giving such right.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Receivership suit against William S. Butler & Co., Incorporated, and others. An order disallowing the claim of Robert H. Gardiner, trustee of the Perry Real Estate Trust, was affirmed by the Circuit Court of Appeals for the First Circuit (230 Fed. 1021, 144 C. C. A. 663), and the claimant brings certiorari. Reversed in part, and affirmed in part.

Messrs. Alexander Whiteside and Bentley W. Warren, both of Boston, Mass., and Francis B. James, of Washington, D. C., for petitioner.

Messrs. Frederick H. Nash and Charles F. Choate, Jr., both of Boston, Mass., for respondents.

*604 * Mr. Justice HOLMES delivered the opinion of the Court.

[1] This case comes here upon the report of a master asking the Court to decide whether two claims are provable. The first is upon a lease made by the petitioner to William S. Butler & Company. Receivers were appointed for the William S. Butler & Company corporation on November 7, 1912. At that time the winding up of the company was not contemplated by the bill or decree, but the object was to preserve the good will and pay the debts. On October 1, 1913, the petitioner entered, and on December 1, 1913, presented his proof of claims. The lease contained a clause similar to that in the lease of Wm. Filene's Sons Co., just considered (245 U. S. 597, 38 Sup. Ct. 211, 62 L. Ed. ——), providing that in case of reentry the lessee should pay to the lessor the difference betwen the rental value and the rent and other payments required for the residue of the term. The claim was for rent up to the time of reentry and for damages for the later period. It was rejected by the courts below upon the same grounds as in the former case. 230 Fed. 1021, 144 C. C. A. 663. This decision, like the other, must be reversed.

*605 * [2] The second claim is upon a lease by Russell to the same company of which Gardiner had purchased the reversion. In substance it is for damages similar to those held allowable under the former lease, but simply on the ground that the petitioner has lost the benefit of his bargain from the time of his reentry, the lease not containing any clause stipulating for such an allowance. Of course there are plausible analogies for the contention. But the law as to leases is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke. Massachusetts has followed the English tradition and we believe that it is the general understanding in that State that in the absence of statute or express contract a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee. Sutton v. Goodman, 194 Mass. 389, 395, 80 N. E. 608; Central Trust Co. v. Chicago Auditorium Association, 240 U. S. 581, 590, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580. Upon this claim the decree below is affirmed.

Decree reversed.

Mr. Justice BRANDEIS took no part in the decision of this case.

(245 U. S. 605)

STELLWAGEN v. CLUM.

(Argued and Submitted Dec. 14, 1917. Decided Feb. 4, 1918.)

No. 89.

1. BANKRUPTCY ⟸9(2) — EFFECT OF BANKRUPTCY LAW—SUSPENSION OF STATE LAWS.

Under Const. art. 1, § 8, giving Congress power to establish uniform laws on the subject of bankruptcy, state laws to the extent that they conflict with the laws of Congress on the subject of bankruptcies are suspended, but they are suspended only to the extent of actual conflict with the system provided by Congress.

2. BANKRUPTCY ⟸3 — VALIDITY OF BANKRUPTCY ACT—UNIFORMITY OF OPERATION.

Though Const. art. 1, § 8, requires laws on the subject of bankruptcy to be uniform throughout the United States, the recognition and enforcement by the Bankruptcy Act of the laws of the state affecting dower, exemptions, the validity of mortgages, priorities of payment, and the like, does not affect its constitutionality.

3. BANKRUPTCY ⟸20(1)—EFFECT ON JURISDICTION OF STATE COURTS.

Under Bankr. Act July 1, 1898, c. 541, § 3, cl. 4, 30 Stat. 546, as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 (Comp. St. 1916, § 9587), specifying as acts of bankruptcy the making of a general assignment or an application for, or the appointment of, a receiver or trustee on the ground of insolvency, bankruptcy proceedings taken within four months after the institution of assignment, or receivership proceedings, displace the proceedings in the state court, and terminate the jurisdiction of such court.

4. BANKRUPTCY ⟸185 — TRANSFERS IN VIOLATION OF STATE LAWS—RIGHTS OF TRUSTEES.

Bankr. Act, § 70e (Comp. St. 1916, § 9654), provides that the trustee may avoid any transfer by the bankrupt which any creditor might have avoided, and recover the property so transferred from any one except a bona fide holder for value. Section 60b (section 9644) authorizes the trustee to avoid transfers made within four months and recover the property if such transfers operate as a preference. Section 67e (section 9651) makes transfers within four months for the purpose of hindering, delaying, or defrauding creditors null and void, and provides that property so transferred shall pass to the trustee. *Held* that, under section 70e the trustee is given a right of action to recover property transferred in violation of a state law if a creditor could have avoided the transfer under the state law, though the transfer was not made within four months.

5. BANKRUPTCY ⟸9(2) — EFFECT OF BANKRUPTCY LAW—SUSPENSION OF STATE LAWS.

Rev. St. Ohio 1908, § 6343, as amended April 30, 1908 (99 Ohio Laws, p. 241), provides that every sale, transfer, etc., in trust or otherwise and every judgment suffered by a debtor in contemplation of insolvency, and with a design to prefer one or more creditors, and every sale, transfer, etc., made with intent to hinder, delay, or defraud creditors, shall be void as to creditors, and that in any suit brought by creditors for the purpose of declaring such sale void, a receiver may be appointed who shall take charge of all the assets of the debtor, including the property so sold, or transferred, and administer such assets for the equal benefit of creditors. Section 6344 authorizes any creditor as to whom any of the acts or things prohibited in the preceding section are void to sue to have them declared void, and provides that the court shall appoint a trustee or receiver to recover the property sold or transferred, and administer it for the equal benefit of all creditors. *Held*, that this statute is not opposed to the policy of the bankruptcy law, or in contravention of the rules and principles established by it, and is not suspended by such law, especially as there is nothing in the statute releasing the debtor from his debts.

On Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Proceedings on a petition by A. C. Stellwagen, trustee for Margaret Zengerle, for an order requiring the surrender of certain property by Alfred Clum, trustee in bankruptcy of the Georgian Bay Company. From an order dismissing the petition, the petitioner appealed to the Circuit Court of Appeals for the Sixth Circuit, which certified certain questions (218 Fed. 730, 134 C. C. A. 408) to the Supreme Court. Questions answered.

Messrs. Alfred Clum, George B. Marty, and Harvey D. Goulder, all of Cleveland, Ohio, for Clum.

Messrs. Bernard B. Selling and James McNamara, both of Detroit, Mich., for Stellwagen.

*609

*Mr. Justice DAY delivered the opinion of the Court.

This case is here upon certificate from the United States Circuit Court of Appeals for the Sixth Circuit. From the statement accompanying the certificate it appears that Stellwagen, trustee for Margaret Zengerle, filed a petition in the United States District Court to require the surrender and transfer to him of a quantity of white pine lumber and balance due upon a certain open account then in possession of Clum as trustee in bankruptcy of the Georgian Bay Company. The order was denied, the petition dismissed, and appeal taken to the Circuit Court of Appeals.

The questions are whether certain provisions of the statutes of Ohio are suspended by virtue of the Bankruptcy Act of 1898. The facts upon which the questions arise, and in view of which they are to be answered, are thus stated:

"The Georgian Bay Company, an Ohio corporation, was at the time of the transactions in dispute engaged in the wholesale and retail lumber business at Cleveland, Ohio. February 2, 1910, the company delivered to appellant's predecessor (A. L. McBean), as trustee for Margaret Zengerle and the Dime Savings Bank of Detroit, its bill of sale, describing 433,500 feet of white pine lumber then in the company's yards, and stating a total price of $14,013; crediting the trustee with certain promissory notes of the company for a like sum and payable in different amounts, to the order of Margaret Zengerle, C. M. Zengerle, agent, and the Dime Savings Bank, respectively. Neither the bill of sale nor a copy was filed with the recorder of Cuyahoga county, Ohio; but the lumber so in terms sold consisted of piles (stacked in the ordinary way) which were to be and at the time in fact were each distinctly marked: 'Sold to A. L. McB., Agt.' May 3, 1910, the company with consent of McBean sold this lumber and certain of its own lumber then in the yards, to Schuette & Co. of

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Pittsburgh. Payment was to be made by Schuette & Co., part in cash, part in notes maturing at fixed times between date of sale and the following September 10th and the balance in cash on or before October 1st. Two days later, May 5th, the Georgian Bay Company transferred to appellant 'the balance, twenty-five per cent. of invoice value or what may show due on the 1st of October, A. D. 1910, of the purchase price of the lumber' (so sold to Schuette & Co.), to secure payment in full of all moneys that should be advanced by, and 'payment pro rata of all moneys' then owing to, the Dime Savings Banks, Mrs. Zengerle and C. M. Zengerle, agent; and any surplus remaining was to be returned to the company. Schuette & Co., while owing a balance of $7,500 on portions of the lumber it had received, rejected the rest; this can be identified and is worth about $4,000. It was the transfer of this balance and the surrender of this rejected lumber that appellant sought in the court below.

"October 31, 1910, the Georgian Bay Company made a general assignment for the benefit of its creditors, which was properly filed the following November 7th; and on the 9th of that month the company was adjudicated a bankrupt. At the time there remained due from the bankrupt to Mrs. Zengerle $7,100. C. M. Zengerle is the husband of Margaret Zengerle, and was the president of the Georgian Bay Company; the notes payable to his wife represented loans of money belonging to her; and in negotiating those loans and in the transaction had under the bill of sale, he acted as her agent and as president of the company. The theory of the court below was that the bill of sale (February 2, 1910) was intended merely as security and, not having been deposited in accordance with section 4150 (2 Bates' Ann. Ohio Stat. p. 2302) concerning chattel mortgages, was null and void; that the transfer (May 5th) of balance accruing October 1st from Schuette & Co. was made with intent to hinder and delay creditors, when, according to the laws and the rule of judicial decision of the state of Ohio, the Georgian Bay Company was insolvent, though not according to the Bankruptcy Act; that Margaret Zengerle was, through her agent, C. M. Zengerle chargeable with knowledge of such intent and insolvency, and the Savings Bank was not; that as to Margaret Zengerle the transfer was null and void and so was set aside, but that the Savings Bank was entitled to be paid out of the balance of the Schuette account. No appeal was taken from the portion of the decree which allowed recovery by the Savings Bank."

The statutes of the state of Ohio in question are sections 6343 and 6344 of the Revised Statutes of Ohio as amended April 30, 1908, 99 Ohio Laws, 241, 242. These sections were arranged under the General Code of Ohio approved February 15, 1910, wherein they appear as sections 11102 to 11107 inclusive. (These sections are given in the certificate, as they stood February 2, 1910, and are found in the margin.[1])

* The claim is stated to be that section 6343 when considered in connection with the chapter concerning insolvent debtors is suspended by the Bankruptcy Act. Reliance is had for this contention upon the following portion of section 6343 which provides:

[1] Sec. 6343. Every sale, conveyance, transfer, mortgage or assignment, made in trust or otherwise by a debtor or debtors, and every judgment suffered by him or them against himself or themselves in contemplation of insolvency, and with a design to prefer one or more creditors to the exclusion in whole or in part of others, and every sale, conveyance, transfer, mortgage or assignment made, or judgment procured by him or them to be rendered, in any manner, with intent to hinder, delay or defraud creditors, shall be declared void as to creditors of such debtor or debtors at the suit of any creditor or creditors, and in any suit brought by any creditor or creditors of such debtor or debtors for the purpose of declaring such sale void, a receiver may be appointed who shall take charge of all the assets of such debtor or debtors, including the property so sold, conveyed, transferred, mortgaged, or assigned, which receiver shall administer all the assets of the debtor or debtors for the equal benefit of the creditors of the debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured.

Provided, however, that the provisions of this section shall not apply unless the person, or persons to whom such sale, conveyance, transfer, mortgage or assignment be made, knew of such fraudulent intent on the part of such debtor or debtors, and provided further, that nothing in this section contained shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if such mortgage be filed for record in the county wherein the property is situated, or as otherwise provided by law, within three (3) days after its execution, and where, upon foreclosure or taking possession of such property, the mortgagee fully accounts for the proceeds of such property.

Every sale or transfer of any portion of a stock of goods, wares or merchandise otherwise than in the ordinary course of trade in the regular and usual prosecution of the seller's or transferrer's business, or the sale or transfer of an entire stock in bulk shall be presumed to be made with the intent to hinder, delay or defraud creditors within the meaning of this section, unless the seller or transferrer shall, not less than seven (7) days previous to the transfer of the stock of goods sold or intended to be sold, and the payment of the money thereof, cause to be recorded in the office of the county recorder of the county in which such seller or transferrer conducts his business, and in the office of the county recorder of the county or counties in which such goods are located, a notice of his intention to make such sale or transfer, which notice shall be in writing describing in general terms the property to be sold and all conditions of such sale and the parties thereto; excepting, however, that no such presumption shall arise because of the failure to record notice as above provided in the case of any sale or transfer made under the direction or order of a court of competent jurisdiction, or by an executor, administrator, guardian, receiver, assignee for the benefit of creditors or other officer or person acting in the regular and proper discharge of official duty or in the discharge of any trust imposed upon him by law, nor in the case of any sale or transfer of any property exempt from execution.

Sec. 6344. Any creditor or creditors, as to whom any of the acts or things prohibited in the preceding section are void, whether the claim of such creditor or creditors has matured or will thereafter mature, may commence an action in a court of competent jurisdiction to have such acts or things declared void. And such court shall appoint a trustee or receiver according to the provisions of this chapter, who upon being duly qualified shall proceed by due course of law to recover possession of all property so sold, conveyed, transferred, mortgaged or assigned, and to administer the same for the equal benefit of all creditors, as in other cases of assignments to trustees for the benefit of creditors. And any assignee as to whom any thing or act mentioned in the preceding section shall be void, shall likewise commence a suit in a court of competent jurisdiction to recover possession of all property so sold, conveyed, transferred, mortgaged or assigned, and shall administer the same for the equal benefit of all creditors as in other cases of assignments to trustees for the benefit of creditors. 99 Ohio Laws, 241, 242.

"A receiver may be appointed who shall take charge of all the assets of such debtor or debtors, including the property so sold, conveyed, transferred, mortgaged, or assigned, which receiver shall administer all the*assets of the debtor or debtors for the equal benefit of all the creditors of the debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured." *611

The questions propounded are:

"(a) Whether the Bankruptcy Act of the United States, in force on the dates herein mentioned, operated to suspend section 6343 of the Revised Statutes of Ohio, as such section stood February 2, 1910.

"(b) Whether the Bankruptcy Act operated to suspend the sections into which section 6343 was divided and numbered, February 15, 1910, by the General Code of Ohio, to wit, sections 11102, 11103, 11104 and 11105 as such sections existed May 5, 1910.

"(c) If the Bankruptcy Act did not operate to suspend in their entirety the several sections of the Ohio statutes mentioned in the preceding questions, whether such suspension extended only to the portions thereof which in*terms appropriated, for the benefit of all the creditors, the property of the debtor not specifically described in the bill of sale and transfer of account in dispute." *612

The Circuit Court of Appeals also sends an opinion in re the certification aforesaid, in which the court says that it is disposed to hold that if the provisions of the Ohio statutes were suspended, the appellant is entitled in behalf of Margaret Zengerle to recover, otherwise the trustee in bankruptcy is entitled to hold the balance due from Schuette & Co. and the lumber rejected by them, and administer the same as the part of the estate of the bankrupt for the benefit of its general creditors. The court states that as between Mrs. Zengerle and the general creditors of the Georgian Bay Company, there was sufficient delivery of possession of lumber covered by the bill of sale to dispense with the necessity of depositing the instrument with the county recorder. The sale subsequently made to Schuette & Co., upon the consent of Mrs. Zengerle's trustee, was a distinct recognition of the intent and effect of the bill of sale, and the marking of the piles of lumber, and the transfer of account made two days later was manifestly designed at once to execute the transaction involved under the bill, and transfer the rights thereunder of Mrs. Zengerle, as well as of the Savings Bank, to the sales' proceeds. The court further says, upon the hypothesis that the state statutes are suspended, that because more than four months elapsed between the delivery of the bill of sale, as also of the transfer of account, and the bankruptcy, the trustee cannot by virtue of the Bankruptcy Act alone question the validity of either of those instruments. The court adds that if the state statutes were not suspended, the general creditors acquired rights to have the instruments in dispute set aside because, under the facts shown, the company was not able to meet its debts as they fell due, and so was insolvent; and, further, the instruments in terms were*made to a trustee. The rights so vested in the creditors being enforceable at any time within four years under the Ohio law. *613

[1] The federal Constitution, article I, section 8 gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States. In view of this grant of authority to the Congress it has been settled from an early date that state laws to the extent that they conflict with the laws of Congress, enacted under its constitutional authority, on the subject of bankruptcies are suspended. While this is true, state laws are thus suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress. Sturges v. Crowninshield, 4 Wheat. 122, 4 L. Ed. 529; Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606.

[2-4] Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states. For example, the Bankruptcy Act recognizes and enforces the laws of the states affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the Act is not alike in all the states. Hanover National Bank v. Moyses, 186 U. S. 181, 188, 189, 190, 22 Sup. Ct. 857, 46 L. Ed. 1113. True it is that general assignments for the benefit of creditors are acts of bankruptcy, Act of 1898, section 3, clause 4, and since the amendment of 1903, 32 Stat. 797, a receivership of an insolvent debtor with a view to distribution of his property for the benefit of creditors will have the like effect. 1 Loveland on Bankruptcy (4th Ed.) § 153. In such cases the bankruptcy proceedings, taken within four months, displace those in the state court and terminate the jurisdiction of the latter. Randolph v. Scruggs, 190 U. S. 533, 537, 23 Sup. Ct. 710, 47 L. Ed. 1165; In re Watts & Sacks, 190 U. S.*1, 31, 23 Sup. Ct. 718, 47 L. Ed. 933.* But it does not follow that state statutes intended to avoid conveyances actually or constructively fraudulent and thereby to promote the equal distribution of insolvent estates may not be availed of by the trustee. Section 70e of the Bankruptcy Act provides: *614

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

This section as construed by this court gives the trustee in bankruptcy a right of action to recover property transferred in violation of state law. Security Warehousing Co. v. Hand, 206 U. S. 415, 425, 426, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789; Knapp v. Milwaukee Trust Co., 216 U. S. 545, 548, 30 Sup. Ct. 412, 54 L. Ed. 610.

And a right of action under this subdivision is not subject to the four months' limitation of other sections (60b, 67e) of the Bankruptcy Act. Under this subdivision if a creditor could have avoided a transfer under a state law, a trustee may do the same. In re Mullen (D. C.) 101 Fed. 413 (opinion by Judge Lowell); 1 Loveland on Bankruptcy (4th Ed.) 786, 787; Collier on Bankruptcy (11th Ed.) p. 1178, and cases cited in note 439.

[5] Turning now to the sections of the Ohio laws in question—the right to proceed by due course of law to recover particular property transferred as prohibited in section 6344, and to cause the same to be administered for the equal benefit of creditors, as in cases of assignment to trustees for the benefit of creditors, has long been part of the statutory law of Ohio. The part in section 6343 which enables the court to appoint a receiver to take charge of all the assets of the debtor or debtors, including the property conveyed, and administer the same for the equal benefit of creditors, is the new feature of the law.

It is apparent that this section intends to permit the appointment of a receiver to take charge of all the assets of the debtor when the provisions of the statute apply as to the debtor and his transferee, and the latter is required to know of the fraudulent intent on the part of the debtor.

Creditors are not thereby deprived of rights, but in case of bankruptcy proceedings within four months of a general assignment for creditors, as was the case here, the property may be brought into the bankruptcy court, or, as in this case, may be in its possession and be retained in that court to be administered for the benefit of general creditors. This state statute is not opposed to the policy of the bankruptcy law or in contravention of the rules and principles established by it with a view to the fair distribution of the assets of the insolvent. It is only state laws which conflict with the bankruptcy laws of Congress that are suspended; those which are in aid of the Bankruptcy Act can stand. Miller v. New Orleans Fertilizer Co., 211 U. S. 496, 29 Sup. Ct. 176, 53 L. Ed. 300.

This view of the sections in question was taken by the Circuit Court of Appeals, Sixth Circuit, in Re Farrell, 176 Fed. 505, 509, 510, 100 C. C. A. 63, wherein in the opinion it was said that the changes made by the new statutes were in harmony with the policy of the Bankruptcy Act and in aid of its purposes.

There is much discussion in the books as to what constitutes a bankruptcy act as distinguished from an insolvency law. It is settled that a state may not pass an insolvency law which provides for a discharge of the debtor from his obligations, which shall have the effect of a bankruptcy discharge as to creditors in other states, and this although no general federal bankruptcy act is in effect. And while it is not necessary to decide that there may not be state insolvent laws which are suspended although not providing for a discharge of indebtedness, all the cases lay stress upon the fact that one of the principal requisites of a true bankruptcy law is for the benefit of the debtor in that it discharges his future acquired property from the obligation of existing debts.

In the case of Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377, this court had before it, while the Bankruptcy Act of 1867 was in force, the question of the validity of the assignment of an insolvent, in Ohio, to trustees for the benefit of all his creditors executed six months before the proceedings in bankruptcy had been taken, and it was held that the assignment was good and the assignees in bankruptcy not entitled to the possession of the property. Mr. Justice Field in delivering the opinion of the court said:

"In the argument of the counsel of the defendant in error, the position is taken that the Bankrupt Act suspends the operation of the act of Ohio regulating the mode of administering assignments for the benefit of creditors, treating the latter as an insolvent law of the state. The answer is, that the statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize, assignments; it assumes, that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustees for the discharge of their duties; it requires them to file statements showing what they have done with the property; and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment; it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing a trust are substantially such as a court of chancery would apply in the absence of any statutory provision. The assignment in this case must, therefore, be regarded as though the statute of Ohio, to which reference is made, had no existence. There is an insolvent law in that state; but the assignment in question was not made in pursuance of any of its provisions. The position, therefore, of counsel, that the bankrupt law of Congress suspends all proceedings under the insolvent law of the state, has no application."

The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors. Our decisions lay great stress upon this feature

of the law—as one not only of private but of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life. Neal v. Clark, 95 U. S. 704, 709, 24 L. Ed. 586; Traer v. Clews, 115 U. S. 528, 541, 6 Sup. Ct. 155, 29 L. Ed. 467; Hanover National Bank v. Moyses, 186 U. S. 181, 192, 22 Sup. Ct. 857, 46 L. Ed. 1113; Wetmore v. Markoe, 196 U. S. 68, 77, 25 Sup. Ct. 172, 49 L. Ed. 390, 2 Ann. Cas. 265; Burlingham v. Crouse, 228 U. S. 459, 473, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148.

This feature of a bankruptcy law is wholly wanting in the Ohio statutes under consideration. Indeed, there is not now, any more than when Mayer v. Hellman, supra, was decided, any attempt in the Ohio laws to provide for the discharge of the debtor from his existing debts.

If the Ohio statutes in the feature now under consideration be suspended, it would follow that a person in Ohio might successfully claim a part of the estate which is being administered in bankruptcy, although the conveyance under which the property is claimed is voidable under the laws of the state where it was made and the alleged *618 right* in the property secured. We think that Congress in the Bankruptcy Act did not intend any such result, but meant to permit the trustee in bankruptcy to have the benefit of state laws of this character which do not conflict with the aims and purposes of the federal law. And certainly, in view of the provisions of section 70e of the Bankruptcy Act, Congress did not intend to permit a conveyance such as is here involved to stand which creditors might attack and avoid under the state law for the benefit of general creditors of the estate.

From what we have said it follows that questions A and B should be answered in the negative, and it is unnecessary to answer question C.

So ordered.

(245 U. S. 618)

WEEKS v. UNITED STATES.

(Submitted Jan. 2, 1918. Decided Feb. 4, 1918.)

No. 109.

1. Commerce ⇐5 — Powers of Congress — Shipment of Food Products.

Act June 30, 1906, c. 3915, 34 Stat. 768 (Comp. St. 1916, §§ 8717-8728), making it unlawful to ship or deliver for shipment in interstate commerce an article of food which is misbranded, in that it bears a false or misleading label, or is offered for sale under the distinctive name of another article, is a legitimate exercise of the power of Congress to regulate interstate commerce.

2. Commerce ⇐40(1) — "Interstate Commerce"—Sales of Goods.

The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is "interstate commerce."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

3. Food ⇐21 — Misbranding — Criminal Prosecutions—Evidence.

On a trial for shipping from one state to another an article labeled "Special Lemon. Lemon Terpene and Citral," which, it was alleged, was misbranded, in that it was offered for sale as lemon oil, when in fact it was an imitation thereof, evidence that defendant's salesman, who solicited the order for the oil, represented that it was pure lemon oil, was admissible, as tending to prove that the order to fill which the shipment was made was obtained by offering the article for sale in the distinctive name of another article, and therefore that it was misbranded within the meaning of the statute.

4. Criminal Law ⇐1086(14), 1144(16)—Appeal—Failure to Object—Presumptions.

On a trial for shipping an imitation of lemon oil, which it was claimed defendant's salesman misrepresented to be pure lemon oil, where the court told the jury that, in order to hold defendant responsible criminally by reason of such representations, it must appear beyond a reasonable doubt that they were made by his authority, and the record did not show that defendant objected to the submission of the question in this way, and did not purport to contain all the evidence, the verdict must be taken as conclusively determining that the representations were made with defendant's sanction, and hence the question whether such sanction was necessary was not in the case, though the Circuit Court of Appeals expressed its opinion on such question.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Oscar J. Weeks was convicted of an offense, his conviction was affirmed in part by the Circuit Court of Appeals for the Second Circuit (224 Fed. 64, 139 C. C. A. 626), and he brings certiorari. Affirmed.

Mr. Walter Jeffreys Carlin, of New York City, for petitioner.

Messrs. Solicitor General Davis and Assistant Attorney General Frierson, for the United States.

*619 * Mr. Justice VAN DEVANTER delivered* the opinion of the Court.

This was a prosecution under the Act of June 30, 1906, c. 3915, 34 Stat. 768, upon a charge of shipping an article of food in interstate commerce in circumstances making the shipment a violation of the act. The information contained two counts, both charging that the article was misbranded—one because it bore a false and misleading label, and the other because it was offered for sale as lemon oil when in truth it was an imitation thereof containing alcohol and citral derived from lemon grass. In the District Court there was a conviction upon both counts, and the Circuit Court of Appeals reversed the conviction as* to the first count* *620 and affirmed it as to the second. 224 Fed. 64, 139 C. C. A. 626. The judgment upon the latter is all that is brought here for review.

The defendant was engaged in making and selling various articles of food used by bakers, confectioners and ice cream makers, including the article with which this prosecution is concerned. On the occasion in question he shipped from one state to another a quantity of this article labeled "Special Lemon. Lemon Terpene and Citral." The printed record, although not purporting to contain all the evidence, shows that there was testimony tending to prove the following facts, among others: The shipment was made to fill an order solicited and taken by a traveling salesman in the defendant's employ. The salesman had been supplied by the defendant with a sample bottle of the article which was labeled simply "Special Lemon." In offering the article for sale and soliciting the order the salesman exhibited the sample and represented that the article was pure lemon oil obtained by a second pressing and that this pressing produced a good, if not the best, oil. In truth the article was not lemon oil, but an imitation thereof containing alcohol and citral made from lemon grass. Some of the elements of lemon oil were present in other than the usual proportions and others were entirely wanting.

The testimony respecting the salesman's representations was admitted over the defendant's objection; and later the court denied a request on the part of the defendant that the jury be instructed that this testimony could not be considered, but only the statement appearing on the label when the article was shipped. In that connection the court told the jury that the defendant could not be held responsible criminally by reason of any representations made by the salesman unless it appeared beyond a reasonable doubt that the same were made by the defendant's authority.

*621 *The defendant, who is the petitioner here, complains of the admission and consideration of this testimony and insists that under the statute the question whether an article is misbranded turns entirely upon how it is labeled when it is shipped, regardless of any representations made by a salesman, or even the vendor, in offering it for sale.

The statute, in its second section (Comp. St. 1916, § 8718), makes it unlawful to ship or deliver for shipment from one state to another "any article of food or drugs which is adulterated or misbranded, within the meaning of this act." In its eighth section (section 8724) it declares:

"That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the state, territory, or country in which it is manufactured or produced.

"That for the purposes of this act an article shall also be deemed to be misbranded:

"In the case of drugs:

* * * * * *

"In the case of food:

"First. If it be an imitation of or offered for sale under the distinctive name of another article."

This section contains other provisions relating to misbranding, but they are not material here, and need not be set forth or specially noticed.

It is apparent that the statute specifies and defines at least two kinds of misbranding—one where the article bears a false or misleading label, and the other where it is offered for sale under the distinctive name of another article. The two are quite distinct, a deceptive label being an essential element of one, but not of the other. No*doubt both involve a measure of deception, but they differ in respect of the mode in which it is practiced. Evidently each is intended to cover a field of its own, for otherwise there would be no occasion for specifying and defining both. That one article of food may be offered for sale in the distinctive name of another, and the offer accomplish its purpose, without the aid of a false or misleading label hardly needs statement. *622

[1, 2] The statute does not attempt to make either kind of misbranding unlawful in itself, but does, as before indicated, make it unlawful to ship or deliver for shipment from one state to another an article of food which is misbranded in either way. That this is a legitimate exertion of the power of Congress to regulate interstate commerce is settled by our decisions. Hipolite Egg Co. v. United States, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364; McDermott v. Wisconsin, 228 U. S. 115, 128, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39; Seven Cases of Eckman's Alterative v. United States, 239 U. S. 510, 514, 36 Sup. Ct. 190, 60 L. Ed. 411, L. R. A. 1916D, 164. It also is settled by our decisions that "the negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce." Robbins v. Shelby Taxing District, 120 U. S. 489, 497, 7 Sup. Ct. 592, 596 (30 L. Ed. 694); Crenshaw v. Arkansas, 227 U. S. 389, 396, 33 Sup. Ct. 294, 57 L. Ed. 565.

[3] It follows that the testimony respecting the representations of the defendant's traveling salesman was rightly admitted in evidence and submitted to the jury. It tended to prove that the order, to fill which the shipment was made, was obtained by offering the article for sale in the distinctive name of another article, and therefore that the article was misbranded within the meaning of the statute. To have confined the jury's attention to the label borne by the article when it was shipped, as was requested

by the defendant, would have been to disregard the nature of the charge in the second count and the distinction between the two kinds of misbranding.

*623 [4] In the Circuit Court of Appeals the view was expressed *that intent was not an element of the offense charged in the second count and therefore that it was immaterial whether the representations of the salesman had the sanction of the defendant. Complaint is now made of this. But the question is not in the case, the view expressed by the Circuit Court of Appeals not being essential to an affirmance of the judgment. The District Court had expressly instructed the jury that to hold the defendant responsible criminally by reason of such representations it must appear, and appear beyond a reasonable doubt, that they were made by his authority. The record before us does not show that the defendant objected to the submission of this question to the jury in this way; neither does it purport to contain all the evidence. The verdict therefore must be taken as conclusively determining that the representations were made with the defendant's sanction.

Judgment affirmed.

MEMORANDUM DECISIONS

Disposed of at October Term, 1917

No. 84. STONEBRAKER-ZEA COMPANY, appellant, v. UNITED STATES. Jan. 28, 1918. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 220 Fed. 99, 135 C. C. A. 96. Mr. Henry B. Martin, of Tulsa, Okl., for appellant. The Attorney General, for the United States.

PER CURIAM. Judgment affirmed upon the authority of McCaskill Co. v. United States, 216 U. S. 504, 514, 30 Sup. Ct. 386, 54 L. Ed. 590; Washington Securities Co. v. United States, 234 U. S. 76, 78, 34 Sup. Ct. 725, 58 L. Ed. 1220; Wright-Blodgett Co. v. United States, 236 U. S. 397, 402, 405, 35 Sup. Ct. 339, 59 L. Ed. 637; Causey v. United States, 240 U. S. 399, 401, 36 Sup. Ct. 365, 60 L. Ed. 711, and cause remanded to the District Court of the United States for the Western District of Oklahoma.

No. 153. ATCHISON, TOPEKA & SANTA FÉ RAILWAY COMPANY, plaintiff in error, v. Paul D. COLE. Jan. 28, 1918. In error to Supreme Court of the State of Kansas. For opinion below, see 97 Kan. 461, 155 P. 949. Mr. Robert Dunlap, of Chicago, Ill., for plaintiff in error. Messrs. Alfred M. Jackson, of Winfield, Kan., and Charles T. Atkinson, of Arkansas City, Kan., for defendant in error.

PER CURIAM. Judgment affirmed with costs and 10 per cent damages upon the authority of Chicago Junction Railway Co. v. King, 222 U. S. 222, 32 Sup. Ct. 79, 56 L. Ed. 173; Seaboard Air Line Ry. v. Padgett, 236 U. S. 668, 35 Sup. Ct. 481, 59 L. Ed. 777; Great Northern Railway Co. v. Knapp, 240 U. S. 464, 36 Sup. Ct. 399, 60 L. Ed. 745; Baltimore & Ohio R. R. Co. v. Whitacre, 242 U. S. 169, 37 Sup. Ct. 33, 61 L. Ed. 228; Southern Ry. Co. v. Puckett, 244 U. S. 571, 574, 37 Sup. Ct. 703, 61 L. Ed. 1321.

No. 156. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, plaintiff in error, v. W. P. SCHNOUTZ and Texas Midland Railroad Company. Jan. 28, 1918. In error to the County Court of Kauffman County, State of Texas. Messrs. Joseph M. Bryson, of St. Louis, Mo., and Alex. Britton and Evans Browne, both of Washington, D. C., for plaintiff in error.

PER CURIAM. Judgment reversed upon the authority of Texas & Pacific Ry. Co. v. Mugg, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; Kansas City Southern Ry. Co. v. Albers Commission Co., 223 U. S. 573, 596–598, 32 Sup. Ct. 316, 56 L. Ed. 556; Illinois Central R. R. Co. v. Henderson Elevator Co., 226 U. S. 441, 33 Sup. Ct. 176, 57 L. Ed. 290; Kansas City Southern Ry. Co. v. Carl, 227 U. S. 639, 653, 33 Sup. Ct. 391, 57 L. Ed. 683. See Louisville & Nashville R. R. Co. v. Maxwell, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665.

No. 167. John E. ROLLER, plaintiff in error, v. Lindsay M. ARMENTROUT. Jan. 28, 1918. In error to the Supreme Court of Appeals of the State of Virginia. For opinion below, see 118 Va. 173, 86 S. E. 906. Mr. John E. Roller, of Harrisonburg, Va., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of: 1. Deming v. Carlisle Packing Co., 226 U. S. 102, 105, 33 Sup. Ct. 80, 57 L. Ed. 140; Consolidated Turnpike v. Norfolk, &c., Ry. Co., 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; Ennis Water Works v. Ennis, 233 U. S. 652, 658, 34 Sup. Ct. 767, 58 L. Ed. 1139; Stewart v. Kansas City, 239 U. S. 14, 36 Sup. Ct. 15, 60 L. Ed. 120. 2. Eustis v. Bolles, 150 U. S. 361, 14 Sup. Ct. 131, 37 L. Ed. 1111; Leathe v. Thomas, 207 U. S. 93, 28 Sup. Ct. 30, 52 L. Ed. 118; Holden Land Co. v. Inter-State Trading Co., 233 U. S. 536, 541, 34 Sup. Ct. 661, 58 L. Ed. 1083; Mellon Co. v McCafferty, 239 U. S. 134, 36 Sup. Ct. 94, 60 L. Ed. 181.

No. 581. STATE OF OHIO on the relation of HARTFORD LIFE INSURANCE COMPANY, plaintiff in error, v. Alonzo J. DOUDS et al. Jan. 28, 1918. In error to the Supreme

Court of the State of Ohio. Messrs. James C. Jones, of St. Louis, Mo., and Harry B. Arnold, of Columbus, Ohio, for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237, Judicial Code Act March 3, 1911, c. 231, 36 Stat. 1156, as amended by the act of Congress of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. 1916, § 1214); Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245 U. S. 162, 38 Sup. Ct. 58, 62 L. Ed. —.

No. 702. Emma GOLDMAN et al., plaintiffs in error, v. UNITED STATES. Jan. 28, 1918. See, also, 245 U. S. 474, 38 Sup. Ct. 166, 62 L. Ed. —. Motion that mandate issue at once granted.

No. 181. Bert WILLIAMS et al., plaintiffs in error, v. A. P. SANDLES et al. Jan. 31, 1918. In error to the Supreme Court of the State of Ohio. For opinion below, see 93 Ohio St. 92, 112 N. E. 206. Mr. F. S. Monnett, of Columbus, Ohio, for plaintiffs in error. Mr. Edward C. Turner, of Columbus, Ohio, for defendants in error. Dismissed with costs, pursuant to the tenth rule.

No. 369. EL PASO SASH & DOOR COMPANY, plaintiff in error, v. E. M. CARRAWAY. Feb. 4, 1918. In error to the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas. For opinion below, see 186 S. W. 363. Mr. Charles B. Braun, of Waco, Tex., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) McCorquodale v. Texas, 211 U. S. 432, 437, 29 Sup. Ct. 146, 53 L. Ed. 269; Waters Pierce Oil Co. v. Texas, 212 U. S. 112, 118, 29 Sup. Ct. 227, 53 L. Ed. 431; Kansas City Star Co. v. Julian, 215 U. S. 589, 30 Sup. Ct. 406, 54 L. Ed. 340; St. Louis & San Francisco Ry. Co. v. Shepherd, 240 U. S. 240, 241, 36 Sup. Ct. 274, 60 L. Ed. 622. (2) Miller v. Cornwall R. R. Co., 168 U. S. 131, 134, 18 Sup. Ct. 34, 42 L. Ed. 409; Harding v. Illinois, 196 U. S. 78, 84, et seq., 25 Sup. Ct. 176, 49 L. Ed. 394; Bowe v. Scott, 233 U. S. 658, 664, 665, 34 Sup. Ct. 769, 58 L. Ed. 1141.

No. 423. SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, plaintiff in error, v. W. E. HOLLIFIELD. Feb. 4, 1918. In error to the Supreme Court of the State of North Carolina. For opinion below, see 172 N. C. 714, 90 S. E. 996. Mr. James H. Merrimon, of Asheville, N. C., for plaintiff in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

No. 694. Robert F. STROUD, plaintiff in error, v. UNITED STATES of America. Feb. 4, 1918. In error to the District Court of the United States for the District of Kansas. Mr. Solicitor General Davis, of Washington, D. C., for defendant in error. Judgment reversed upon confession of error; and cause remanded for further proceedings, on motion of Mr. Solicitor General Davis for the defendant in error, and mandate granted.

No. 807. RIGNEY & COMPANY, petitioner, v. AUNT JEMIMA MILLS COMPANY. Feb. 4, 1918. For opinion below, see 247 Fed. 407. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 811. S. L. HEATHERLY, administrator, etc., petitioner, v. LOUISVILLE & NASHVILLE RAILROAD COMPANY. Feb. 4, 1918. Petition for a writ of certiorari to the Court of Appeals of the State of Kentucky denied.

No. 812. Edward STROECKER, as trustee, etc., petitioner, v. Mariam A. PATTERSON et al. Feb. 4, 1918. For opinion below, see 245 Fed. 732. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(246 U. S. 227)

EGAN v. McDONALD.

(Submitted Jan. 28, 1918. Argued March 4, 1918.)

No. 88.

1. INDIANS ⟸15(1)—ALIENATION OF LANDS —REMOVAL OF RESTRICTIONS.

Though under Act March 2, 1889, c. 405, § 11, 25 Stat. 891, and a trust patent issued thereunder to an Indian, the heirs of the Indian as well as the patentee were without power to convey title for 25 years, Congress had power to remove the restrictions imposed upon alienation by the heirs as was done by Act May 27, 1902, c. 888, § 7 (Comp. St. 1916, § 4223), authorizing the adult heirs of patentees to convey with the approval of the Secretary of the Interior.

2. INDIANS ⟸15(2)—ALIENATION OF LANDS —CONDITIONS PRECEDENT.

An adjudication of heirship by a federal court was not a condition precedent to a valid conveyance by heirs of an Indian allottee holding under a trust patent executed in 1908 and approved by the Secretary of the Interior in 1909; there being no provision of law at that time requiring that some federal court should first establish that the grantors were the heirs.

3. COURTS ⟸394(16)—REVIEW OF DECISIONS OF STATE COURTS—MATTERS REVIEWABLE.

In an action by a purchaser of land to recover back an amount paid by him on the ground that the vendor's title was not merchantable, in which it appeared that the vendor's title depended on a deed approved by the Secretary of the Interior and purporting to be executed by persons who declared themselves to be the only heirs of an Indian allottee, a holding of the state court that the burden was on plaintiff to establish the fact that there were other heirs, and that the mere suggestion that there may have been additional heirs did not cast such a suspicion on the title as to render it unmerchantable, was a matter of state law, with which the federal Supreme Court has no concern.

In Error to the Supreme Court of the State of South Dakota.

Action by George W. Egan against Charles S. McDonald. Judgment for defendant was affirmed by the Supreme Court of South Dakota (36 S. D. 92, 153 N. W. 915), and plaintiff brings error. Affirmed.

Mr. George W. Egan, of Sioux Falls, S. D., pro se.

Messrs. Charles O. Bailey and John H. Voorhees, both of Sioux Falls, S. D., for defendant in error.

*228 *Mr. Justice BRANDEIS delivered the opinion of the Court.

Egan agreed to buy of McDonald a parcel of land in South Dakota and paid $1,000 to bind the bargain. McDonald agreed to furnish a merchantable title. After examining the abstract, Egan asserted that the title was not merchantable, demanded back his money, and, upon refusal, brought an action in a state court to recover it. Upon substantially undisputed facts judgment was entered for defendant and was affirmed on appeal by the Supreme Court of South Dakota. 36 S. D. 92, 153 N. W. 915. The case comes here on writ of error under section 237 of the Judicial Code (Act March 3, 1911, c. 321, 36 Stat. 1156 [Comp. St. 1916, § 1214]).

McDonald's title was this: (1) A 25-year trust patent dated December 12, 1895, for an Indian allotment issued to Weasel, under section 11 of Act of Congress March 2, 1889, c. 405 (25 Stat. 888, 891). (2) Deed to R. J. Huston dated October 9, 1908, from Plays and two others therein described as "sole and only heirs of Weasel, deceased, a Crow Creek Sioux Indian," approved by the Secretary of the Interior, March 2, 1909, and thereafter duly*recorded in the Department* of the Interior and the Registry of Deeds. (3) A final decree of distribution of the estate of Weasel in the county court making distribution of the land to Plays and two others as only heirs. (4) Deed from Huston to McDonald, dated November 3, 1910. (5) A decree of the state circuit court entered in 1912 in a suit brought by McDonald to quiet title and declaring him to be the owner in fee of the land.

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Egan contends that this title was not merchantable, both because there was no power in the heirs of Weasel to alienate the property and because there had been no adjudication in any federal court that the three persons purporting to convey to Huston were the only heirs of Weasel.

[1] First. As to the power of Weasel's heirs to convey: The trust patent was issued under section 11 of the Act of Congress of March 2, 1889. Under the provisions of that statute and the terms of the trust patent, the heirs, as well as Weasel, were without power to convey title before the expiration of the 25 years. But, by section 7 of the Act of Congress May 27, 1902 (32 Stat. 275, 888 [Comp. St. 1916, § 4223]), adult heirs were given power to convey with the approval of the Secretary of the Interior; and it is declared that "such conveyances * * * when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee." Congress had, of course, power to remove the restrictions originally imposed upon alienation by heirs. Williams v. Johnson, 239 U. S. 414, 420, 36 Sup. Ct. 150, 60 L. Ed. 358.

[2] Second. As to the lack of federal adjudication: Neither in 1908 when the deed to Huston was executed, nor in 1909 when it was approved by the Secretary of the Interior, was there any provision of law that heirs of an Indian allottee under a trust patent could make a valid conveyance only if some federal court should first have established that they were the heirs. Nor was there then a*provision, like that prescribed* by Act of June 25, 1910, c. 431 (36 Stat. 855 [Comp. St. 1916, § 4226]), that the Secretary of the Interior shall determine in such case who the legal heirs are. Hallowell v. Com-

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⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

mons, 239 U. S. 506, 36 Sup. Ct. 202, 60 L. Ed. 409. Plaintiff relies upon McKay v. Kalyton, 204 U. S. 458, 468, 27 Sup. Ct. 346, 51 L. Ed. 566; but the case does not decide that adjudication of heirship in a federal court is a condition precedent to a valid conveyance by heirs. It decides merely that the Act of August 15, 1894, c. 290 (28 Stat. 286), which gave to Indians, who claimed to be entitled to an allotment the right to litigate their claim in a federal court, did not confer the right to litigate in state courts.

[3] Third. The case at bar is not a suit to establish who are the heirs of a deceased Indian allottee, nor a suit to establish the right to an allotment, nor a suit to quiet title. It is an action at law upon an implied promise to return the earnest money, if the vendor fails to furnish Egan a merchantable title. It was admitted that the persons who joined in the deed to Huston were heirs of Weasel and that they were adults. The state court held that, McDonald having shown a deed to Huston approved by the Secretary of the Interior and executed by three persons who declared themselves to be the only heirs, the burden was upon the plaintiff to establish the fact, if it was such, that there were other heirs; and that the mere suggestion in argument that there may have been some additional heirs does not cast such a suspicion upon the title as to render it unmerchantable. This is a matter of state law with which we have no concern. Nor have we occasion to consider whether, as held in Daugherty v. McFarland (S. D.) 166 N. W. 143, decided January 18, 1918, the mere approval by the Secretary of the Interior would have operated to convey to the grantee a good title, even if it had appeared that the deed was executed by a part of the heirs only.

The decision of the Supreme Court of South Dakota is

Affirmed.

(246 U. S. 63)

MUNICIPAL SECURITIES CORP. v. KANSAS CITY.

(Argued Nov. 15, 16, 1917. Decided March 4, 1918.)

No. 56.

COURTS ⊜391(4)—REVIEW OF DECISIONS OF STATE COURTS—DUE PROCESS OF LAW.

A city contracted for the construction of a sewer, and paid for the work by issuing special tax bills to the contractors, who assigned them to plaintiff. Proceedings were then pending to condemn a lot within the sewer district, in which such lot was subsequently appropriated by the city for park purposes. Plaintiff sued the city, alleging that by reason of the condemnation proceedings the tax bill never became a lien on such lot, that the city was liable to pay the amount of the tax bill, and that it could not, by any act of itself, destroy plaintiff's right to collect the cost of the work, the Fourteenth Amendment of the United States Constitution respecting due process of law being invoked by plaintiff. The state Supreme Court, in reversing a judgment for plaintiff, *held* that the suit was on the tax bills, that the city was not liable thereon, and that the city was not liable to plaintiff in tort as for an alleged conversion or destruction of the property to which the lien of the tax bill would ordinarily have attached because the assignment of the tax bill did not pass to plaintiff any right of action in tort which the contractor had. *Held*, that as the court rested its decision upon a ground of general law adequate to support it independent of the decision on the alleged violation of federal right under the Fourteenth Amendment, the case was not reviewable by the federal Supreme Court.

In Error to the Supreme Court of the State of Missouri.

Action by the Municipal Securities Corporation against Kansas City. A judgment for plaintiff was reversed by the Supreme Court of Missouri (265 Mo. 252, 177 S. W. 856), and plaintiff brings error. Writ of error dismissed.

Mr. W. C. Scarritt, of Kansas City, Mo., for plaintiff in error.

Mr. A. F. Smith, of Kansas City, Mo., for defendant in error.

Mr. Justice DAY delivered the opinion of the Court.

The plaintiff in error brought suit in the circuit court of Jackson county, Missouri, to recover on certain tax bills issued to one Michael Walsh, its assignor, for the construction of a sewer in Kansas City, Missouri. The case was tried on an amended petition and answer. The amended petition was filed on May 20, 1909, but it is said the suit was begun on May 29, 1906. The amended petition set out that by an ordinance approved January 24, 1901, Kansas City provided a sewer district, and let a contract for the construction of the sewer to Walsh. That Walsh constructed the sewer, and was paid for the work by special tax bills against sewer district number 146 in Kansas City. That lot 1, block 1, C. H. Pratt's Vine Street addition, is located in said sewer district, and that at the time the work was done and the tax bills issued the owner of said property held the same subject to certain proceedings to condemn said lot for a public parkway in the South Park district of Kansas City established by an ordinance approved October 3, 1899; that said parkway ordinance ordered that said lot 1, block 1 and other property should be condemned for the purpose of a public parkway, and proceedings were begun in the circuit court of Jackson county, Missouri, for the condemnation of the lot for that purpose; that the condemnation proceedings were carried to judgment in the circuit court of Jackson county, Missouri, wherein a verdict had been rendered for the value of the property on June 4, 1901, that the verdict was duly affirmed, and judgment rendered on September 14, 1901, in the circuit court. Upon appeal to the Supreme Court of Missouri said

judgment was suspended until affirmed by the Supreme Court, June 4, 1902, and that after that date the city paid for and took possession of said lot 1, block 1, Pratt's Vine Street addition, and now is holding the same for a public park. Plaintiff further alleges that, while the condemnation proceedings were pending in the Supreme Court, Walsh completed the work, and that tax bills therefor were issued to him on March 15, 1902, chargeable in payment of the appropriate *65 share of the cost of the sewer upon the lot above described. The plaintiff alleges that Walsh sold and assigned the certificates or special tax bills to it; that by reason of the condemnation proceedings and the judgment therein the tax bill never became a lien upon the lot, above described, and that upon a final determination of said condemnation case Kansas City was liable to pay the amount of said tax bill with interest, and that the city cannot by an act of itself, not consented to by the plaintiff, either by judicial proceedings in the nature of condemnation or otherwise destroy plaintiff's right to collect the cost of the said work in accordance with the contract mentioned; the plaintiff invokes the Fourteenth Amendment of the Constitution of the United States guaranteeing the protection of its property by due process of law as against the acts of states. Plaintiff alleges that before the beginning of the suit it offered to surrender to the Board of Public Works of Kansas City the tax bills issued as aforesaid, and to accept a certificate as provided in the city charter in lieu thereof, if the board should hold that the said certificates or tax bills were not certificates conformable to the provisions of the charter of Kansas City, but the board refused to accept the same or to issue a new certificate, and denied all liability for the said charge.

The city answered the amended petition, and stated therein that on March 15, 1902, it did issue special tax bills to Michael Walsh as set out in the petition; and that Walsh on March 15, 1902, executed and delivered to Kansas City a full and complete release on account of any claim arising on said tax bills as provided in section 16, article 9 of the charter of Kansas City. The answer further sets up that the charter of Kansas City provides a method by which the city shall pay its share of any public improvement on land owned in fee by it; that no certificate was issued by the city on the lot in question or any other lots described in the petition; and that it was not found that *66 the lots mentioned in the petition were owned in fee simple by the city; that there was no compliance with the charter of the city, and no obligation created thereunder.

At the trial the tax bills sued upon were introduced, indorsed as follows: "Assignment. For value received ——— assign this special tax bill and the lien thereof to Municipal Securities Corporation, and ——— authorize to sign ——— name — to the receipt. Michael Walsh."

The record does not disclose when this assignment was made, and it bears no date.

Upon trial in the circuit court the court held as a matter of law that Kansas City was an agency of the state of Missouri, and had by its official acts, ordinances and conduct appropriated to the public use the property and property rights of the plaintiff consisting of valid and subsisting liens upon certain real estate without making just compensation, or any compensation therefor, and thereby deprived the plaintiff of its property without due process of law contrary to the Fourteenth Amendment and contrary to the Bill of Rights of the state of Missouri, and rendered judgment for the plaintiff.

The case being taken to the Supreme Court of Missouri the judgment of the circuit court was reversed (265 Mo. 252, 177 S. W. 856) and the case was brought to this court because of an alleged violation of the protection afforded by the Fourteenth Amendment as the result of the alleged wrongful appropriation of the plaintiff's property. The Supreme Court of Missouri after reciting the facts, held that the suit was upon the tax bills, that as Walsh's agreement with the city and the ordinance itself provided that the city should not be liable to pay for the work or any part thereof otherwise than by the issue of special tax bills, and because the charter of the city provided that the city should in no event or in any manner be liable for or on account of the work done in constructing the sewer, but that the work should be paid for in special tax bills which would be a lien on the property described in them,* and that under *67 the Constitution of Missouri and the statutes of that state the use of municipal funds in the payment of tax bills was absolutely forbidden, there could be no recovery upon them, and in so far as recovery was sought because of the asserted conversion or destruction of the lien of the tax bills, the judgment for the plaintiff could not stand. Concerning this feature of the case the court said:

"The suit here is upon a tax bill in some aspects and upon a tort as for conversion in others. The petition is sui generis, being possibly what is meant by learned counsel for plaintiff when they say of it in their brief that it is 'typical in form.'

"We need not consider whether a recovery could have been had upon tort, as for the alleged conversion, or destruction, of the property upon which ordinarily the lien of the tax bills would have been fixed. The assignment is not of the tort, nor of the contract, nor of the right to recover upon a quantum meruit, but of the tax bill pure and simple, for it says: 'For value received ——— assign this special tax bill and the lien thereof to Municipal Securities Corporation,' etc. The lien assigned was upon the lots and not against defendant; but the law is fairly well settled that the title of the city to these lots for use as a street attached by relation back under the facts here to the date of

the judgment confirming the verdict of the jury, to wit, September 14, 1901, a date long prior to the issuing of the tax bills, which were issued March 15, 1902. In re Paseo, 78 Mo. App. 518. The best that can be said for plaintiff's insistence touching this lien is that the lien of the tax bills attached conditionally to these lots; the condition of attachment being that the defendant would dismiss its condemnation case short of final judgment and payment of the money into court, as under the general law absent a charter provision forbidding, it had the *68 right to do. State ex rel. v. Fort, 180 Mo. 97 [79 S. W. 167]; Railroad v. Second Street Imp. Co., 256 Mo. loc. cit. 407 [166 S. W. 296]. The city did not so dismiss the proceeding and the right of the city, temporarily suspended, as we may express it, by the appeal, attached upon the affirmance here of the judgment of condemnation as of the date of such judgment (In re Paseo, supra), and had the effect to convert these lots of private persons, into integral parts of the highway, or street system of Kansas City, and to take them out of the category of property of private persons upon which liens of tax bills would attach; but since these lots became parts of public highways the judgment condemning them did not have the effect of converting them into that class of city property, the sewering of which created a liability against the city for which certificates evidencing such liability against the city were issuable by charter. Section 14, art. 9, Charter of Kansas City, 1898.

If Walsh himself had sued for the tort of conversion alleged in effect by the briefs and contentions of counsel for plaintiff, a different and much more serious question would confront us; but it seems idle to insist that upon the petition here and upon the assignment above quoted, that plaintiff may recover upon the theory of tort. We have seen already how futile and idle is the view that plaintiff may recover upon contract. Moreover, no such tort is assigned. Nothing is assigned, but the tax bill and the lien thereof. * * * But be this as may be, the point of peculiarity in the instant case that plaintiff cannot in any event recover upon any theory of contract, but that it must recover, if at all, upon the theory of liquidated compensation for a tort, which tort was not assigned to it, and on which it does not sue, destroys in our view any helpful analogy between the above cases from other jurisdictions and this one at bar."

As the matter above extracted from the *69 opinion of the Supreme Court of Missouri shows, that court held the action to be on the assigned tax bills, and that if Walsh might have maintained a suit because of the wrongful taking of the property as alleged, nothing was assigned to the plaintiff in error but the tax bills and the lien thereof; and that the plaintiff could not maintain this action as one in tort because it did not appear to be the assignee of such right of action if one existed. It therefore follows that the Missouri Supreme Court rested its decision upon a ground of general law adequate to support it, independently of the decision upon alleged violation of federal right under the Fourteenth Amendment. In that situation it is well settled that a case from a state court is not reviewable here. Wood v. Chesborough, 228 U. S. 672, 33 Sup. Ct. 706, 57 L. Ed. 1018; Consolidated Turnpike Co. v. Norfolk & O. V. R. Co., 228 U. S. 596, 33 Sup. Ct. 605, 57 L. Ed. 982; Giles v. Teasley, 193 U. S. 146, 24 Sup. Ct. 359, 48 L. Ed. 655.

It follows that the writ of error must be dismissed for want of jurisdiction, and it is

So ordered.

(246 U. S. 208)

DENEE v. ANKENY.

GUNNING et ux. v. MORRISON et ux.

(Argued Jan. 23, 1918. Decided March 4, 1918.)

Nos. 147, 440.

1. FORCIBLE ENTRY AND DETAINER ⟸2—CONSTITUTIONALITY OF STATUTE—CONFLICT WITH FEDERAL STATUTE.

Rem. & Bal. Code Wash. §§ 811 and 825, making possession for five days preceding an unlawful entry sufficient basis for a forcible entry and detainer action, etc., does not unconstitutionally conflict with U. S. Rev. St. § 2289 et seq. (Comp. St. 1916, § 4530 et seq.), relating to homestead entries, since the federal statutes do not provide for determining conflicting possessory claims, and the question of title or paramount right of possession could not be determined under the above-mentioned state statutes.

2. PUBLIC LANDS ⟸32—UNLAWFUL POSSESSION—COLOR OF TITLE.

Act Feb. 25, 1885, c. 149, 23 Stat. 321, prohibiting inclosures of public lands by persons without color of title, etc., *held* not to forbid the fencing of land by a person holding the land by himself or his predecessors under claim of right and color of title for over 20 years, nor authorize another to break such inclosure to initiate a homestead claim on the inclosed land.

In Error to the Supreme Court of the State of Washington.

Forcible detainer actions by W. M. Ridpath, revived in name of one Ankeny, executrix, against Louis H. Denee and by Peter Morrison and Agnes Morrison, his wife, against H. J. Gunning and Ellen E. Gunning, his wife. Judgments for plaintiffs were affirmed by the Supreme Court of Washington (85 Wash. 322, 148 Pac. 15, and 91 Wash. 693, 157 Pac. 1199), and the defendants bring error. Judgments affirmed.

Mr. Fred B. Morrill, of Spokane, Wash., for plaintiffs in error.

Mr. Reese H. Voorhees, of Spokane, Wash., for defendants in error.

*210 Mr. Justice McREYNOLDS delivered the opinion of the Court.

*211 These cases involve the same points; the second was decided below upon authority of the first. Ridpath v. Denee, 85 Wash. 322, 148 Pac. 15; Morrison v. Gunning, 91 Wash. 693, 157 Pac. 1199. It will suffice briefly to state and indicate our opinion in respect of the federal questions as raised in No. 147.

The following portions of Remington & Ballinger's Ann. Codes & Stats. of Washington are in force as law in that state:

"Sec. 811. Every person is guilty of a forcible detainer who either,—

"1. By force, or menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or

"2. Who in the nighttime, or during the absence of the occupant of any real property [unlawfully] enters thereon, and who, after demand

made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning of this subdivision is one who, for the five days next preceding such unlawful entry, was in the peaceable and undisturbed possession of such real property."

"Sec. 825. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to a forcible entry complained of, that he was peaceably in the actual possession at the time of the forcible entry; or in addition to a forcible detainer complained of, that he was entitled to the possession at the time of the forcible detainer."

Relying upon these sections, defendant in error instituted an action of forcible detainer in the superior court for Spokane county, alleging that while he was (and for more than five days had been) in peaceful and undisturbed possession of certain lands inclosed by a good and substantial fence plaintiff in error in the nighttime "broke the inclosure above mentioned around said above-described premises and entered thereon, and has since said *entry continuously occupied and remained upon said premises," and has refused to surrender them. He asked restitution and damages.

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By answer and also by tender of proof plaintiff in error unsuccessfully sought to set up and show that the lands belonged to the United States (having never been granted) were unlawfully inclosed and that he entered in order to initiate a homestead claim. The Supreme Court affirmed a judgment granting relief asked by defendant in error. 85 Wash. 322, 325, 326, 327, 328, 148 Pac. 15, 16. It found that for more than 20 years he had been in peaceful possession of the lands which were fenced and under cultivation, and that at night plaintiff in error broke the inclosure, entered, and refused to remove.

After quoting the two sections set out above, the court said:

"These statutes are clearly peace statutes, and the issues in a case of this kind are but two: First. Was the plaintiff, for five days prior to the entry of the defendant, in the peaceable and actual possession of the land? and, second, Was the entry of the defendant a forcible entry and an unlawful detainer? The statute makes no provision for the trial of title or the right of possession in such a case. Other remedies are afforded by other statutes to try title or right of possession. This statute does not contemplate that a person, even though he be entitled to possession, may, by force or stealth, obtain possession, and thereby put upon the plaintiff the burden of proving the paramount title or a paramount right of possession."

[1] Replying to insistence that the premises were unappropriated public lands which a qualified citizen might rightfully enter upon and improve under laws of the United States (R. S. § 2289 et seq. [Comp. St. 1916, § 4530 et seq.]) and the state statutes concerning unlawful or forcible detainer interfered therewith, the court declared:

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"It is clear, we think, that there is no conflict between the state statutes *and the United States statutes. The United States statutes have made no provision for determining conflicting rights under claim of possession, but the determination of these rights is left to the states to be regulated by state statutes. * * * Gauthier v. Morrison, 232 U. S. 452, 461 [34 Sup. Ct. 384, 58 L. Ed. 680]. * * * The question in this case was whether the respondent was in the peaceable and quiet possession of the real estate at the time of the forcible entry and unlawful detainer. If he was in the peaceable and quiet possession, then it follows, of course, that the appellant could not, by force or by unlawful entry in the nighttime, dispossess him of that peaceable possession. As stated above, neither could the question of title, or the paramount right of possession, be determined in this action. There is clearly no conflict between the federal and the state laws upon this question."

This answer, we think, is sufficient, and nothing need be added.

[2] To the further claim that the premises were fenced contrary to Act Feb. 25, 1885, c. 149, 23 Stat. 321, 322, and consequently plaintiff in error could properly break inclosure and enter in order to initiate a homestead claim, the court replied:

"It is plain that the legal right of the parties to the possession of these lands cannot be tried in this action. But if the same could be tried, the appellant did not seek to show, either that the respondent was in possession of this particular tract of land without claim of right or color of title, or in bad faith, for it was apparently conceded that the respondent, or his tenant, was in actual possession of the tract of land in dispute, and that the respondent had purchased the land at a fair price and was in possession thereof claiming to be the owner. * * * Cameron v. United States, 148 U. S. 301, 305 [13 Sup. Ct. 595, 37 L. Ed. 459]. * * * Even though the respondent had inclosed the land claimed to have been inclosed, such inclosure was not necessarily unlawful, because the inclosure is not prohibited where it is under claim of right or color of title. The record in *this case conclusively shows that the respondent was holding the land, which was surrounded by fence, under claim of right and color of title, and he and his predecessors had so held it for more than 20 years."

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This reply we also think is correct and adequate.

In Lyle v. Patterson, 228 U. S. 211, 215, 216, 33 Sup. Ct. 480, 482 (57 L. Ed. 804), we held a possessory title may be good as against all except the United States and pointed out the evil consequences which would "result if possession secured by violence and maintained with force and arms could furnish the basis of a right enforceable in law."

There is no error in either of the judgments below in respect of any federal question and both are

Affirmed.

(246 U. S. 110)

ANICKER v. GUNSBURG et al.

(Argued Jan. 28, 1918. Decided March 4, 1918.)

No. 164.

1. INDIANS ⟸16(3) — LANDS — LEASES — ESTABLISHMENT OF TRUST.

Where a Creek Indian gave oil and gas leases to complainant and defendants, and defendants' lease was approved by the Secretary of the Interior, complainant, in order to maintain a suit to charge defendants as trustees for him, and to require an assignment of the lease to him, must establish not only that the action of the Secretary was wrong in approving defendants' lease, but that complainant was entitled to an approval of his lease, and that it was refused to him because of an erroneous ruling of law by the Secretary, and where it did not appear that the Secretary would have approved complainant's lease if he had disapproved defendants' lease, complainant was not entitled to the relief sought, though his lease was first filed with the Indian agent, and was recorded with the Register of Deeds pursuant to Act April 26, 1906, c. 1876, § 20, 34 Stat. 145, and Act March 1, 1907, c. 2285, 34 Stat. 1026.

2. INDIANS ⟸16(3) — LANDS — LEASES — APPROVAL BY SECRETARY OF INTERIOR.

Under Act April 26, 1906, c. 1876, § 20, requiring leases of the lands of Creek allottees for longer than one year to be approved by the Secretary of the Interior, and Act May 27, 1908, c. 199, § 2, 35 Stat. 312, requiring leases of restricted lands for oil or gas purposes to be made with the approval of the Secretary of the Interior, an oil and gas lease of the lands of a Creek Indian has no validity without the Secretary's approval.

3. INDIANS ⟸16(3) — LANDS — LEASES — APPROVAL BY SECRETARY OF INTERIOR.

Under Act April 26, 1906, c. 1876, § 20, and Act May 27, 1908, c. 199, § 2, the approval of an oil and gas lease of the lands of an Indian rests in the discretion of the Secretary of the Interior, and while the law does not vest him with arbitrary authority, it gives him power to consider the advantages and disadvantages of the lease presented, and to grant or withhold approval as his judgment may dictate.

4. INDIANS ⟸16(3) — LANDS — LEASES — APPROVAL BY SECRETARY OF INTERIOR.

That the Secretary of the Interior in approving an oil and gas lease of the lands of a Creek Indian has given reasons which might not in all respects meet with approval does not deprive him of authority to exercise the discretionary power with which by statute he is invested.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by William J. Anicker against David Gunsburg and another. A decree for defendant was affirmed by the Circuit Court of Appeals (226 Fed. 176, 141 C. C. A. 174), and complainant appeals. Affirmed.

Messrs. Frank Hagerman, of Kansas City, Mo., and J. W. Zevely and Richard W. Stoutz, both of Muskogee, Okl., for appellant.

Messrs. George S. Ramsey and Edgar A. De Meules, both of Muskogee, Okl., and Malcolm E. Rosser, of Tulsa, Okl., for appellees.

*113 *Mr. Justice DAY delivered the opinion of the Court.

This is a contest between holders of oil and gas leases made by one Eastman Richard, a full-blood Creek Indian, the owner by patent of the west half of the northeast quarter of section 5 of township 17 N., range 7 E., in Creek County, Oklahoma. Richard made a lease of the west one-half of the quarter to David Gunsburg and the Southwestern Petroleum Company on March 20, 1912. This lease was not filed for record with the Indian Agency until April 5, 1912, nor was it recorded with the Register of Deeds for Creek County, Oklahoma. On March 28, 1912, Richards made a like lease for the same premises to the appellant, William J. Anicker, which was filed with the Indian Agency on March 30, 1912, and on April 1, 1912, was filed for record with the *114 Register of *Deeds for Creek County, Oklahoma. It thus appears that the lease to Gunsburg and the Southwestern Petroleum Company was earlier than the one to Anicker but the latter was first recorded. Upon hearing upon these conflicting leases the United States Indian Superintendent recommended the approval of the Gunsburg and Southwestern Petroleum Company lease.

After referring to the dates of the leases and the time of filing the same for record, the superintendent said:

"The Department has uniformly held in such cases that where a lease is filed, with the papers necessary for completion of same, within thirty days, that the date of execution is the date from which the priority of the lease is determined.

"To my mind this is the only reasonable construction of the regulations, so long as thirty days or any other period is allowed within which to file a lease. But it is contended on behalf of Mr. Anicker that the lease to Gunsburg and the Southwestern Petroleum Company was obtained by fraud. To this contention I cannot agree for the reason that this lease and the lease to Messrs. Funk & Riter were presented to this office on the date of execution, fully explained by Mr. William Kremer, Asst. Chief Clerk, a notary in this office, and acknowledged by the lessor. This contention the attorneys for Mr. Anicker were unable to support in their cross-examination of Eastman Richard, although it was apparent at that time that the lessor did not remember the names of the lessees. He was, however, confident that he had leased his entire allotment at that time, and it appears from Mr. Kremer's testimony, May 14, 1912, page 23, that the lease was fully explained to the lessor, as is done in all cases where leases are acknowledged before a notary in the employ of this office, and considering the numerous declarations and affidavits submitted bearing the lessor's signature in connection with this case, *115 showing a change of attitude *upon every occasion approached in connection with these leases, and his lack of business ability, I am not inclined to entertain any doubt as to the fact that the lease was fully explained to him upon the date of execution thereof, notwithstanding his uncertainty at the hearing on May 13th and 14th as to the name of the lessee.

"It is further contended, in behalf of Mr. Anicker, that he should be considered prior lessee for the reason that his lease was made prior to the time the lease of Gunsburg and the Southwestern Petroleum Company was filed at the Union Agency or elsewhere, and that the same was not only filed in the county wherein

the land is situate, but also filed at Union Agency at a date prior to the date upon which the lease to Gunsburg and the Southwestern Petroleum Company was received.

"It is also contended that he had no actual notice, and an attempt has been made to show that the lessor had conveyed the idea to Mr. Anicker or his agent that the only lease he had executed when approached by Mr. Anicker, was the lease in favor of the Eastern Oil Company. It will be noted in the testimony that an unsuccessful effort was made to secure an admission from Eastman Richard that would corroborate this contention.

"For the purposes of this case I do not consider it necessary to determine at this time whether or not the evidence at hand shows that such representations were made by the lessor; even admitting that the lessee was misled by the lessor, the regulations which provide thirty days within which a lease may be filed, if binding upon parties interested in securing leases, should be considered as heretofore, as giving that lease priority which bears the prior date of execution and is filed with the papers required, within the 30-day period.

*116 "An examination of the lease to David Gunsburg and the Southwestern Petroleum Company discloses the fact that this lease was filed within thirty days, in accordance with the regulations, and that the same was executed prior to the lease in favor of Mr. Anicker. Concerning the contention of Mr. Anicker that the date of filing should be regarded as the date of priority, which carries with it the contention that the regulations of the Secretary of the Interior allowing thirty days within which to file a lease is not within the power conferred on the Secretary of the Interior, under the law, which provides in part (section 2, Act of Congress of May 27, 1908 [35 Stat. L. 312]): 'That leases of restricted lands for oil and gas mining purposes * * * may be made with the approval of the Secretary of the Interior under rules and regulations provided by the Secretary of the Interior and not otherwise.'"

After upholding the right of the Secretary of the Interior to make rules and regulations the superintendent further said:

"The Secretary clearly having the right to fix a reasonable period within which time lessees may and must file their leases for approval, it follows that if such a regulation is made all lessees must receive the same treatment, both as to the benefits or privileges of taking the time allowed, or on the contrary the penalty, if they fail to comply with the regulation. If this policy was not followed, the rule might as well be abolished, but this would lead to many opportunities of double dealing on behalf of both lessees and lessors. It being almost a physical impossibility to execute, complete the papers and file leases simultaneously, a reasonable time must be given. The thirty-day rule has been in effect since the early days of oil lease development in the Five Tribes and persons taking leases almost universally understand that the date of the lease, if filed within the thirty-day period, governs, instead of the date of filing.

* * * * * * *

*117 "The lease of Mr. Anicker must also be disapproved not because he was in any way delinquent himself, but because of the prior lease of David Gunsburg and the Southwestern Petroleum Company filed with all papers required within even a shorter period than that allowed by the Department."

The superintendent concluded that the lease in favor of Anicker should be disapproved, and the lease to Gunsburg and Southwestern Petroleum Company should be approved.

Upon hearing before the First Assistant Secretary of the Interior that officer reached a like conclusion. A motion to reconsider was denied, the Secretary concluding:

"If there were any advantage in the prior filing of a lease which was entered into and executed after another lease, both having been filed at the agency within the time required by regulation, Anicker would have had that advantage. The Act of March 1, 1907 (34 Stat. 1026), makes the filing at Union Agency legal notice. Anicker's lease is stamped as filed at the Agency March 30, 1912. Until approved by the Secretary, it was not a completed instrument and the fact of its having been recorded in a county office cannot estop the Secretary from finding that another lease regularly executed and filed is more for the allottee's interest and better entitled to approval."

[1] The plaintiff's bill was filed upon the theory that the lease to Gunsburg and Southwestern Petroleum Company had been approved by the Secretary by mistake of law, and that, but for the mistake, the lease of plaintiff in error would have been approved, and the bill sought to charge the defendants in error as trustees for the complainant, and to require an assignment of the lease to him. The District Court held against complainant, and that decree was affirmed by the Circuit Court of Appeals, 226 Fed. 176, 141 C. C. A. 174.

In order to maintain a suit of this sort the complainant must establish not only that the action of the Secretary was wrong in approving the other lease, but that the complainant was himself entitled to an approval of his lease, and that it was refused to him because of an erroneous ruling of law by the Secretary. Bohall v. Dilla, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. Ed. 61. *118

The statutes of the United States provide:

Section 20 of the Act of April 26, 1906, 34 Stat. 145, c. 1876:

"All leases and rental contracts, except leases and rental contracts for not exceeding one year, for agricultural purposes, for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes shall be in writing, and subject to approval by the Secretary of the Interior, and shall be absolutely void and of no effect without such approval: * * * Provided, * * * that all leases entered into for a period of more than one year, shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

Section 2 of the Act of May 27, 1908, 35 Stat. 312, c. 199:

"That leases of restricted lands for oil, gas or other mining purposes, * * * may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

The Act of March 1, 1907, 34 Stat. at Large, 1026, c. 2285:

"The filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice."

Under the authority to make rules the Secretary of the Interior provided:

"All leases shall be in quadruplicate, and, with the papers required, shall be filed within thirty days from and after the date of execution by the lessor with the United States Indian Agent at Union Agency, Muskogee, Oklahoma."

*119 [2] Whatever may be the effect of this rule providing for the filing of leases within thirty days from and after their execution, in view of the requirements of the statutes, the lease can have no validity without the Secretary's approval. The protection of the Indian's rights is left to the Indian Bureau of which the Secretary is the head, and the courts may only interfere to protect the rights of others when they are imaded by clearly unauthorized action.

Much stress is placed in argument upon the provisions of section 20 of the Act of April 26, 1906, requiring leases entered into for a period of more than one year to be recorded in conformity with the law requiring the recording of conveyances in force in the Territory; and upon the Act of March 1, 1907, providing that the filing of the lease in the office of the Indian Agency shall be deemed constructive notice. An elaborate argument is based on these requirements, and the statutes of Arkansas in force in the Territory are set out in the brief, which, it is contended, show the necessity of recording such instruments in order to give constructive notice to persons dealing with the title. But these requirements do not relieve the appellant of the primary difficulty of maintaining this suit; the lack of a showing that his lease would have been approved but for a mistake of law which resulted in the approval of the lease to another.

[3] The statute is plain in its provisions—that no lease, of the character here in question, can be valid without the approval of the Secretary. Such approval rests in the exercise of his discretion; unquestionably this authority was given to him for the protection of Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation. It is also true that the law does not vest arbitrary authority in the Secretary of the Interior. But it does give him power to consider the advantages and disadvantages of the lease presented for his action, and to grant or withhold approval as his judgment may dictate.

*120 There is nothing in this record to show that approval of the appellant's lease has been given by the Secretary as required by the statute. On the contrary, it appears that the Secretary approved another lease of the same land, and has withheld his approval of the one under which the appellant claims. The Secretary declares in substance in the finding which we have quoted, being his final action in the case, that the prior recording of one lease does not abridge his authority to find that another lease, regularly executed and filed, is more to the allottee's interest and better entitled to approval. It does not appear that had he disapproved the Gunsburg lease, he would have approved the one to appellant, and until this affirmatively appears, he has no standing which permits a court by its decree to award the leasehold to him.

[4] We find nothing in this record to indicate that the Secretary of the Interior has exceeded the authority which the law vests in him. The fact that he has given reasons in the discussion of the case, which might not in all respects meet with approval, does not deprive him of authority to exercise the discretionary power with which by statute he is invested. United States ex rel. West v. Hitchcock, 205 U. S. 80, 85, 86, 27 Sup. Ct. 423, 51 L. Ed. 718.

It follows that the decree of the United States Circuit Court of Appeals must be

Affirmed.

(246 U. S. 121)

GREAT NORTHERN RY. CO. v. DONALDSON.

(Argued Jan. 31, 1918. Decided March 4, 1918.)

No. 172.

1. COURTS ⊂⊃399(2) — FEDERAL SUPREME COURT — REVIEW OF DECISIONS OF STATE COURT—QUESTIONS OF FACT.

On writ of error to a state court, it is not the province of the federal Supreme Court to weigh conflicting evidence, where the record shows testimony supporting the verdict.

2. MASTER AND SERVANT ⊂⊃204(2)—ASSUMPTION OF RISK — VIOLATION OF "STATUTE ENACTED FOR SAFETY OF EMPLOYÉS."

The federal Employers' Liability Act (Act April 22, 1908, c. 149, § 4, 35 Stat. 66 [Comp. St. 1916, § 8660]) provided that in actions thereunder employés shall not be held to have assumed the risk, where the violation by the carrier of any statute enacted for the safety of employés contributed to the injury or death. The federal Boiler Inspection Act (Act Feb. 17, 1911, c. 103, § 2, 36 Stat. 913 [Comp. St. 1916, § 8631]) provides that it shall be unlawful for interstate carriers to use any locomotive engine, propelled by steam power, unless the boiler and the appurtenances thereto are in proper condition and safe to operate without unnecessary peril to life or limb, and that all boilers shall be inspected from time to time, and be able to withstand such tests as may be prescribed thereunder. *Held*, that this last-mentioned act is a "statute enacted for the safety of employés," within the Employers' Liability Act.

3. MASTER AND SERVANT ⊂⊃295(1, 7), 296(3)—ACTIONS FOR INJURIES—INSTRUCTIONS—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

In an action under the federal Employers' Liability Act for the death of an employé resulting from a boiler explosion, the court charged that the law made it unlawful for a carrier, such as defendant, to use any locomotive engine propelled by steam power, unless in proper condition and safe to operate in the service to which it was put, without unnecessary peril, and provided that no employé should be deemed to have assumed the risk, or to have been guilty of contributory negligence, by reason of any engine operated in violation of such law; that if the jury believed that the boiler in question

was not in proper condition and safe to operate in the active service of defendant in moving traffic, without unnecessary peril, by reason of defendant's negligence in any of the respects alleged, then deceased did not assume the risk, and was not guilty of contributory negligence; but that if such boiler and appurtenances were in proper condition and safe for such use, but due to defendant's negligence were defective in some of the respects alleged, and decedent had actual knowledge of such defects, or they were so plainly observable that in the reasonable exercise of his faculties he should have known of them, and might be presumed to have known thereof and the danger surrounding him, then he assumed the risks and could not recover. *Held*, that this instruction was more favorable to defendant than the law required.

4. MASTER AND SERVANT ⊂⊃278(6)—ACTIONS FOR INJURIES — EVIDENCE — LOCOMOTIVE BOILERS.

In an action under the federal Employers' Liability Act, evidence *held* insufficient to show an approval by government inspectors of the use of the large type of button head on the crown bolts of the boiler of oil-burning engines.

5. MASTER AND SERVANT ⊂⊃124(9)—LIABILITY FOR INJURIES—INSPECTION BY PUBLIC AUTHORITIES—EFFECT.

Boiler Inspection Act, § 2, requiring locomotive boilers to be safe for use without unnecessary peril to life or limb, and requiring them to be inspected from time to time, does not prevent liability for injury or death caused by some particular feature of construction which is in fact unsafe, though it has not been disapproved by the federal boiler inspector.

In Error to the Supreme Court of the State of Washington.

Action by Adaline Donaldson, as administratrix of Vance H. Thoms, deceased, against the Great Northern Railway Company. A judgment for plaintiff was affirmed by the Supreme Court of Washington (89 Wash. 161, 154 Pac. 133), and defendant brings error. Affirmed.

Messrs. F. G. Dorety, of Seattle, Wash., and E. C. Lindley, of St. Paul, Minn., for plaintiff in error.

Mr. James McCabe, of Seattle, Wash., for defendant in error.

*122 *Mr. Justice DAY delivered the opinion of the court.

Adaline Donaldson, as administratrix of the estate of Vance H. Thoms, deceased, brought suit in the superior court of Snohomish county, Wash., under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]), to recover damages for injuries received which resulted in the death of Vance H. Thoms, by reason of a boiler explosion upon one of the defendant's engines upon which decedent was employed as an engineer.

The charges of negligence, in the amended complaint alleged to have resulted in the injury and death of the decedent were: That the boiler on the engine was insufficient in that:

1. The button heads of the crown bolts of the boiler were excessively and unnecessarily large and consequently unduly exposed to the direct heat produced by the oil fuel used on the locomotive;

2. That the boiler was not provided with fusible safety plugs;

*123 * 3. That scale was negligently allowed by defendant company, its officers and employés, to accumulate upon the crown sheet in the boiler.

The answer of the company denied negligence, and specifically set up the defense of contributory negligence and assumed risk on the part of the deceased. In the trial court the plaintiff recovered a verdict and judgment, and the judgment was affirmed in the Supreme Court of the state of Washington. 89 Wash. 161, 154 Pac. 133.

The ground of reversal principally urged here is that the testimony did not warrant a recovery by the plaintiff, and when properly considered required an instruction to the jury to find a verdict in favor of the company.

An examination of the record discloses that there was testimony tending to support the allegations of negligence set forth in the amended complaint. That the engine upon which the deceased was working had been a coal-burning engine but that at the time of the explosion the fuel used in its operation was, and for some time had been, oil. That the button heads on the bolts of the crown sheet at the top of the fire box (this sheet also formed the bottom of the water compartment over the fire box) were large ones when the engine was fired with coal, and were not changed with the change of fuel from coal to oil. That these button heads because of their size became overheated when oil was used for fuel, resulting in the deterioration and weakening of the strength of their material, and from the consequent giving away of the button heads, the crown sheet came down and the explosion resulted. There is also testimony tending to show that there was an accumulation of scale and a want of use of fusible plugs.

[1] On the part of the company there was testimony tending to meet and refute that introduced by the plaintiff, and a considerable amount of testimony was introduced tending to show that the water in the boiler was too low,* thereby causing the explosion from the* fault of the deceased engineer in allowing it to become so. There was testimony for the plaintiff to the effect that the water was not too low at the time of the explosion. The trial court submitted these issues to the jury, with the result that a verdict was found in favor of the plaintiff. The circuit court held that there was evidence sufficient to sustain the verdict, and refused to disturb it. The Supreme Court of Washington affirmed the judgment. In this situation it is enough to say that it is not the province of this court to weigh conflicting evidence. The record shows testimony supporting the verdict, and that is as far as this court enters upon a consideration of that question.

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Complaint is made that the trial court failed to give an instruction requested by the company as to assumption of risk, and as to the effect of the federal Boiler Inspection Act.

[2] Section 4 of the federal Employers' Liability Act (35 Stat. 65) provides:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employés, such employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé." Comp. St. 1916, § 8660.

That the federal Boiler Inspection Act was enacted for the safety of employés is obvious. Section 2 of that act (Act Feb. 17, 1911, c. 103, 36 Stat. 913 [8 U. S. Comp. Stats. 1916, § 8631]) provides:

"That from and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this act to use any locomotive
*125 engine propelled by steam power in moving interstate or foreign traffic unless the boiler of
*125 said *locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

Counsel for the company at the trial upon assumed risk requested the following charge:

"You are instructed that even where an employer, such as a railroad company, is negligent in the construction or maintenance of its tools or equipment, such as a locomotive, yet an employé who accepts, or continues his employment, knowing of the existence of such defects or negligence, and knowing the danger therefrom, assumes the risk of the injury to himself from such defects and cannot recover if he is injured as a result of them. This would not be true in the present case, if the negligence or defects involved some violation of a United States statute, but there is no evidence of any violation of such a statute in this action, so that the rule which I have just given to you would apply in this case. Therefore, even if you find that the defendant company had been negligent in adopting an improper type of bolt, or in failing to install fusible plugs, or in some other particular in the construction or maintenance of this boiler, and even though you should also find that such negligence caused the explosion, still, the plaintiff cannot recover in this action, if you should also find that the deceased, V. H. Thoms, was familiar with the type of construction used, or the particular form of negligence involved, and knew the danger likely to arise therefrom, or if, in the exercise of a rea-
*126 sonable care, he should have known of these
*126 things prior to the time of his injury."

*[3] But the court charged upon this subject:

"You are instructed that the law provides that it shall be unlawful for any common carrier, as was the defendant, engaged in interstate commerce, to use any locomotive engine propelled by steam power, unless the boiler of the locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of said carrier in moving traffic, without unnecessary peril to life and limb; and that no employé shall be deemed to have assumed any risk of death by reason of any locomotive engine operated in violation of said law, and that no employé injured or killed by reason of a locomotive engine operated in violation of said law shall be held to have been guilty of contributory negligence.

"Therefore, if you shall believe, from a fair preponderance of all the evidence in the case, that the boiler of the locomotive engine No. 1902 or the appurtenances thereof were not in proper condition and safe to operate in the active service of the defendant in moving traffic without unnecessary peril to life or limb, by reason of the negligence of the defendant, in any one or more of the three respects alleged in the complaint, then and in that case Vance H. Thoms assumed no risk of death and was guilty of no contributory negligence, and the affirmative defenses must fail.

"However, if such boiler and appurtenances were in proper condition and safe for such use in moving traffic, but due to defendant's negligence were defective in one or more of the respects alleged in the complaint and Vance H. Thoms had actual knowledge of such defect or defects, or such defects were so plainly observable that in the reasonable exercise of his faculties he should have known of such and may be
*127 presumed to have known thereof and the dangers
*127 that surrounded him, then Vance *H. Thoms assumed the risks of injury and the plaintiff cannot recover in this action."

The charge requested is inconsistent with the provisions of section 4 of the federal Employers' Liability Act and section 2 of the Boiler Inspection Act. As given it is enough to say that it is more favorable to the company than the law requires. See Chesapeake & Ohio Ry. v. Proffitt, 241 U. S. 462, 468, 36 Sup. Ct. 620, 60 L. Ed. 1102.

[4] The further contention is that the effect of this charge was to leave to the jury to determine the type of boiler construction, in respect to the use of the large button heads which are alleged to have made the engine unsafe to operate. And it is contended that there is testimony tending to show that the use of either the large or small kind of button heads was approved by the federal department of boiler inspection. Attention is directed to the testimony of an expert witness, offered by the defendant for the purpose of showing that low water was the cause of the explosion, in which he spoke of the use of the button heads of the larger and also of the smaller or taperhead kind, and was asked whether the United States government made certain requirements as to how boilers and engines should be constructed, to which he answered:

"No. Not as long as we have the proper factor of safety. * * * They have a factor of safety, and the factor of safety is five on the shell of the boilers; that is if we have a 200-pound pressure boiler it should stand up to a test of 1,000 pounds; five to one."

Asked whether the government inspects engines and locomotives in general, he answered, "Yes, by the United States inspector," and that there was a standard to which locomotives must be built in order to pass inspection. Asked as to the type of the crown bolt permitted, he answered that ei-

ther type is acceptable when properly applied. It is evident that this testimony, whatever might be its effect, is far from showing an approval by government inspectors of the use of the large type of button head upon an oil-burning engine.

[5] Nor can we agree with the contention of the plaintiff in error that so long as the large button head had not been disapproved by the government inspector such fact is conclusive of the sufficiency of the type in use. We find nothing in the Boiler Inspection Act to warrant the conclusion that there is no liability for an unsafe locomotive, in view of the provisions of section 2 of the act, because some particular feature of construction, which has been found unsafe has not been disapproved by the federal boiler inspector.

Other errors are assigned, so far as they are open here we have examined these assignments and find in none of them reason for the reversal of the judgment of the Supreme Court of Washington, and that judgment is

Affirmed.

(246 U. S. 253)

NELSON v. SOUTHERN RY. CO.

(Argued Jan. 8, 1918. Decided March 4, 1918.)

No. 129.

MASTER AND SERVANT ⟸112(2)—INJURIES TO SERVANT—SAFE PLACE OF WORK.

A railway company is not liable under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]) to its civil engineer, who slipped when a decayed spot on a tie gave way and allowed his foot to fall in the space between the ties where the ballasting was low, neither the defect in the tie nor in the ballasting, which was not according to rule, rendering the track unfit for use.

In Error to the Supreme Court of the State of North Carolina.

Action by Philip Nelson against the Southern Railway Company. A judgment for plaintiff was reversed by the North Carolina Supreme Court (170 N. C. 170, 86 S. E. 1036), and plaintiff brings error. Affirmed.

Mr. A. L. Brooks, of Greensboro, N. C., for plaintiff in error.

Mr. Garland S. Ferguson, Jr., for defendant in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Nelson a civil engineer who had been in the employ of the Southern Railway eleven years, was directed to make a survey in one of its yards. While doing so he walked on the main track between the rails where he had seen others walk. As he stepped upon a cross-tie, a small V-shaped piece of it one and a half inches by six, being rotten, slivered off under his weight. His foot slipped down between the ties where the ballast was five or six inches below the top of the tie; and stumbling, he fell and dislocated his knee. The defect in the tie could have been discovered by sounding with an iron rod and the standard of maintenance of roadbed prescribed by the Railway was to ballast to the top of the ties. But neither the condition of the tie, nor the failure to ballast to the top of the tie, was a defect of a character to impair safety in operation. Plaintiff knew that there were always some ties on the line which were partly decayed, and also that the ballast was occasionally below the top of the ties.

Upon these facts Nelson sought in a state court of North Carolina to recover damages from the Railway under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]). The trial court refused defendant's motion for a non-suit; and the jury rendered a verdict for plaintiff. Judgment thereon was reversed by the Supreme Court of the State (170 N. C. 170, 86 S. E. 1036) on the ground that there was no evidence of negligence; and the case came here on writ of error.

It is clear that the defendant did not fail in any duty which it owed to the plaintiff.

Judgment affirmed.

(246 U. S. 79)

PEOPLE'S TOBACCO CO., Limited, v. AMERICAN TOBACCO CO.

(Argued Jan. 4–7, 1918. Decided March 4, 1918.)

No. 124.

1. CORPORATIONS ⟸668(9)—FOREIGN CORPORATIONS—AGENT FOR SERVICE.

Where a foreign corporation conveyed its branch within a state pursuant to a trust dissolution decree, its agent therein resigned, and his power of attorney was revoked by filing an instrument in the Secretary of State's office, his agency to accept service for the foreign corporation ceased.

2. CORPORATIONS ⟸668(9) — FOREIGN CORPORATIONS—REVOKING POWER OF ATTORNEY.

An instrument revoking a power of attorney to accept service for a foreign corporation signed by such corporation's vice president and attested by its seal is not ineffectual because not formally sanctioned by the directors, where the vice president apparently had the necessary authority.

3. CORPORATIONS ⟸642(1)—FOREIGN CORPORATIONS—DOING BUSINESS WITHIN STATE.

To subject a foreign corporation to service of process, it must be doing business of such a nature and character as to warrant the inference that it has subjected itself to the local jurisdiction and is, by its duly authorized officers or agents, present within the state or district.

4. CORPORATIONS ⟸642(1)—FOREIGN CORPORATIONS—"DOING BUSINESS."

A foreign tobacco corporation which sold its business within a state pursuant to a trust dissolution decree *held* not to be "doing business" therein so as to subject it to service of process, although it owned stock in local subsidiary com-

panies and advertised its goods and sent soliciting agents within the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

In Error to the District Court of the United States for the Eastern District of Louisiana.

Suit by the People's Tobacco Company, Limited, against the American Tobacco Company. From a judgment quashing an attempted service of process upon defendant, plaintiff brings error. Affirmed.

Mr. Edwin T. Merrick, of New Orleans, La., for plaintiff in error.

Messrs. Junius Parker, of New York City, and George Denegre, Victor Leovy, and Henry H. Chaffe, all of New Orleans, La., for defendant in error.

*Mr. Justice DAY delivered the opinion of the Court.

On January 4, 1912, the People's Tobacco Company, Limited, began suit against the American Tobacco Company in the District Court of the United States for the Eastern District of Louisiana to recover treble damages under section 7 of the Sherman Act of 1890 (Act July 2, 1890, c. 647, 26 Stat. 210 [Comp. St. 1916, § 8829]). On January 5, 1912, service of process was made upon W. R. Irby as manager of the company. On January 16, 1912, the company filed exceptions to the service on the ground that it was a corporation organized under the laws of the State of New Jersey; that it was not found within the Eastern District of Louisiana or in the State of Louisiana, and was not engaged in business there, nor had it an agent therein; that W. R. Irby, upon whom service had been attempted, was not an officer, agent, or employé of the defendant, the American Tobacco Company, or authorized to accept service of process upon it at that time. On January 25, 1912, service was made upon the Assistant Secretary of State of Louisiana. Exceptions to that service upon practically the same grounds were filed by the defendant company. A further service was undertaken on February 2, 1914, on the Secretary of State of Louisiana and like exceptions were filed by the defendant company to that service.

Testimony was taken and upon hearing the District Court held that:

1. W. R. Irby was not the agent of the company at the time of the attempted service, and, therefore, the service upon him did not bring the company into court;

2. That the American Tobacco Company was not doing business in Louisiana at the time of the attempted service;

3. That the attempted service upon the Secretary of State of Louisiana did not bring the defendant corporation into court.

*Section 7 of the Sherman Act provides that suits of the character of the one now under consideration may be brought in the district in which the defendant "resides or is found." When applied to a corporation this requirement is the equivalent of saying that it must be present in the district by its officers and agents carrying on the business of the corporation. In this way only can a corporation be said to be "found" within the district. In that manner it may manifest its submission to local jurisdiction and become amenable to local process.

The testimony shows that up to November 30, 1911, the American Tobacco Company had a factory in New Orleans for the manufacture of tobacco and cigarettes known as the W. R. Irby Branch of the American Tobacco Company, of which W. R. Irby was manager. Under the law of the State it had filed in the office of the Secretary of State an appointment of W. R. Irby as agent, upon whom service of process might be made.

On November 16, 1911, the Circuit Court of the United States for the Southern District of New York made a decree dissolving the American Tobacco Company. Among other things that decree provided that the American Tobacco Company should convey its W. R. Irby Branch to a company to be formed and known as the Liggett & Myers Tobacco Company. Conveyances were made to carry out this purpose.

The American Tobacco Company by an instrument executed by Mr. Hill, its vice president, revoked the authority of W. R. Irby as its resident agent, and filed the revocation of authority in the office of the Secretary of State of Louisiana on December 15, 1911. W. R. Irby testified that thereafter he was the manager of the Liggett & Myers Tobacco Company, and that he had no connection whatsoever with the American Tobacco Company, nor had he drawn any salary from that company since December 1, 1911.

*It is true that the record discloses some instances in which collections were made upon bills in the name of the Irby Branch of the American Tobacco Company after the revocation of Mr. Irby's authority as its agent. Most of them were stamped across the face, Liggett & Myers Tobacco Company.

There remained on hand with the Irby Branch at the time of the dissolution a quantity of cigarette paper which was continued to be delivered to purchasers by the employés of the Irby Branch of the Liggett & Myers Tobacco Company upon orders received from the American Tobacco Company, and for its benefit and upon its account. This practically continued until the stock was exhausted, which the testimony shows was within a month after the dissolution, and before the attempted service of process in this case.

There were lodged in the custom house in New Orleans powers of attorney of the American Tobacco Company giving authority to those named therein to do what was neces-

sary to make out export papers on behalf of the company. These powers of attorney do not appear to have been revoked, and existed after the service of process. The defendant company issued circulars subsequent to the time it was served with process in this suit; it also advertised in the New Orleans newspapers.

A consideration of all the testimony leads us to the conclusion that the American Tobacco Company undertook in good faith to carry out the decree of dissolution, and to take that company out of business in the State of Louisiana. It is true, as found by the District Court, that at the time of the service, and thereafter, the American Tobacco Company was selling goods in Louisiana to jobbers, and sending its drummers into that State to solicit orders of the retail trade, to be turned over to the jobbers, the charges being made by the jobbers to the retailers. It further appears that these agents were not domiciled in the State, and did not have the right or authority to make sales on account of the defendant company, collect money, or extend credit for it. It also appears that the American Tobacco Company owned stock in other companies which owned stock in companies carrying on the tobacco business in the State of Louisiana. With these facts in mind we come to a consideration of the proper disposition of the case.

[1, 2] We agree with the District Court that Irby at the time of the attempted service upon him was not the authorized agent of the American Tobacco Company. On December 1, 1911, the American Tobacco Company conveyed its Irby Branch to the Liggett & Myers Tobacco Company. On the same day W. R. Irby, who had been the designated agent of the defendant company, resigned as a director of the American Tobacco Company, and ceased to remain in its employment. On December 5, 1911, the power of attorney was revoked as we have hereinbefore stated by the company filing an instrument of revocation in the office of the Secretary of State of Louisiana; it is true that the revocation was by one of the vice presidents of the company and was attested by the seal of the corporation. But we are not impressed with the argument that this revocation was ineffectual because not sanctioned by formal action of the board of directors of the company. The vice president seems to have had authority in the matter. Apparently he acted with the knowledge and acquiescence of the corporation, and was carrying into effect the decree of dissolution.

[3, 4] Upon the broader question, we agree with the District Court that the American Tobacco Company at the time of the attempted service was not doing business within the State of Louisiana. The question as to what constitutes the doing of business in such wise as to make the corporation subject to service of process has been frequently discussed in the opinions of this court, and we shall enter upon no amplification of what has been said. Each case depends upon its own facts. The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted. Phila. & Reading R. R. Co. v. McKibbin, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710; St. Louis Southwestern R. R. Co. v. Alexander, 227 U. S. 218, 226, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77.

The fact that the company owned stock in the local subsidiary companies did not bring it into the State in the sense of transacting its own business there. Peterson v. Chicago, R. I. & P. R. R. Co., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841; Phila. & Reading R. R. Co. v. McKibbin, 243 U. S. 264, 268, 37 Sup. Ct. 280, 61 L. Ed. 710. As to the continued practice of advertising its wares in Louisiana, and sending its soliciting agents into that State, as above detailed, the agents having no authority beyond solicitation, we think the previous decisions of this court have settled the law to be that such practices did not amount to that doing of business which subjects the corporation to the local jurisdiction for the purpose of service of process upon it. Green v. C. B. & Q. R. R. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; Phila. & Reading R. R. Co. v. McKibbin, 243 U. S. 264, 268, 37 Sup. Ct. 280, 61 L. Ed. 710.

The plaintiff in error relies upon International Harvester Co. v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479, but in that case the facts disclosed that there was not only a continuous course of business in the solicitation of orders within the State, but there was also authority upon the part of such agents to receive payment in money, checks and drafts on behalf of the company, and to take notes payable and collectible at banks in Kentucky; these things, taken together, we held amounted to doing business within the State of Kentucky in such manner as to make the Harvester Company amenable to the process of the courts of that State.

As to the attempted service of process upon the Secretary of State of Louisiana under the Louisiana Act of 1904 (Act No. 54 of 1904) as amended 1908 (Act No. 284 of 1908), we understand the Act, as construed by the State Supreme Court, is not applicable to foreign corporations not present within the State and doing business therein at the time of the service, and having as in this case withdrawn from the State and ceased to do business there. Gouner v. Missouri Valley Iron Co., 123 La. 964, 49 South. 657.

We reach the conclusion that the District

Court did not err in maintaining the exceptions filed by the defendant company and in quashing the attempted service made upon it.

Judgment affirmed.

Mr. Justice McREYNOLDS took no part in the consideration or decision of this case.

(246 U. S. 58)

GULF, C. & S. F. RY. CO. v. STATE OF TEXAS.

(Argued and Submitted Jan. 25, 1918. Decided March 4, 1918.)

No. 158.

1. COMMERCE ⊜58—REGULATION—STOPPING OF TRAINS.

Under Vernon's Sayles' Ann. Civ. St. Tex. 1914, art. 6676, subd. 2, providing that four passenger trains each way, if so many are run daily, shall be required to stop at all county seat stations, an order of the Railroad Commission requiring a railroad to stop two interstate trains at a county seat having a population of 1,500, and at which two other trains each way stopped daily, did not impose an unreasonable burden on interstate commerce where, though the railroad competed with other railroads having shorter routes, and in order to keep its contracts for the carriage of the mails had to make fast time, it also appeared that the county seat in question was the only county seat at which it did not stop such trains, that it stopped them at some smaller places, and made a detour in order to go through Houston, and that the time required to stop such trains would be only four or five minutes for one of them and about ten minutes for the other.

2. COMMERCE ⊜58—REGULATION—STOPPING OF TRAINS.

As Vernon's Sayles' Ann. Civ. St. 1914, art. 6676, subd. 2, requires railroads to render specified service to county seats with an aim that is not directed against interstate trains as such, the Railroad Commission was not deprived of power to require stopping of interstate trains at a county seat, thereby incidentally interfering with such trains, by section 1 of the Hepburn Amendment to Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379, as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 [Comp. St. 1916, § 8563]), and Act June 18, 1910, c. 309, § 7, 36 Stat. 544 (Comp. St. 1916, § 8563), requiring carriers to make reasonable regulations affecting the facilities for transportation and giving the Interstate Commerce Commission jurisdiction over such matters.

3. RAILROADS ⊜254(4)—VIOLATIONS OF REGULATIONS—PENALTIES—SUCCESSIVE VIOLATIONS.

Vernon's Sayles' Ann. Civ. St. 1914, art. 6672, imposes a penalty of not more than $5,000 for every failure to obey a lawful order of the Railroad Commission. Article 6657 provides that if any railroad company be dissatisfied with any order or regulation adopted by the Commission it may file a petition in a court of competent jurisdiction against the Commission as defendant. *Held* that, where a railroad company ordered by the Commission to stop certain trains at a county seat instead of instituting a suit to test the validity of the order saw fit to await proceedings against it by the state, it was proper to impose a penalty for each failure to stop.

The Chief Justice, Mr. Justice McKenna, and Mr. Justice McReynolds dissenting.

In Error to the Court of Civil Appeals, Third Supreme Judicial District, State of Texas.

Suit by the State of Texas against the Gulf, Colorado & Santa Fé Railway Company. A judgment against defendant was affirmed by the Court of Civil Appeals (169 S. W. 385), and defendant brings error. Affirmed.

Messrs. J. W. Terry, of Galveston, Tex., Alex. Britton and Evans Browne, both of Washington, D. C., A. H. Culwell, of El Paso, Tex., and Robert Dunlap and Gardiner Lathrop, both of Chicago, Ill., for plaintiff in error.

Messrs. B. F. Looney and Luther Nickels, both of Austin, Tex., for State of Texas.

*59 *Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit by the State to compel the defendant railroad, the plaintiff in error, to stop two interstate trains, one numbered 17 and southbound, the other numbered 18 and northbound, at the City of Meridian, for a time sufficient to receive and let off passengers. Meridian is the County Seat of Bosque County and has a population of 1500. Two other trains of the defendant going each way stopped there daily, but the Railroad Commission of the State found that these were insufficient for the needs of business at that station and made the order that this *60 suit* seeks to have carried out. The statute* of Texas giving to the Commission power to make such order contains a proviso that "four trains each way, carrying passengers for hire, if so many are run daily, Sundays excepted, be required to stop as aforesaid at all county seat stations"—so that the Commission seems to have obeyed a statutory mandate. Art. 6676, (2), Vernon's Sayles' Texas Civil Statutes. Another article, 6672, imposes a penalty of not more than $5,000 for every failure to obey such lawful order, and this suit seeks to recover penalties as well. The trial Court confirmed the finding of the Commission that the present service is insufficient, and the order, and imposed a fine of $22,400, being $100 for each failure to stop. It stated the facts in great detail but it will not be necessary to repeat them here. The Court of Civil Appeals again confirmed the above finding and affirmed the judgment. The Supreme Court of the State refused to allow a writ of error, declaring itself unable to say that the conclusion of the lower Court was unwarranted as matter of law.

[1] This case does not require quite so critical an examination into the facts as was made in Mississippi R. R. Commission v. Illinois Central R. R. Co., 203 U. S. 335, 344, 345, 27 Sup. Ct. 90, 51 L. Ed. 209, and Atlantic Coast Line R. R. Co. v. Wharton, 207 U. S. 328, 330, 334, 335, 28 Sup. Ct. 121, 52 L.

Ed. 230, in order to decide whether the judgment of the State Courts and Commission and, it would seem, of the legislature, was wrong. If the reasoning that prevailed with the Court of Civil Appeals were applied to Meridian simply in view of the number of its inhabitants there would be a serious question whether it could be sustained. For the consideration most emphasized was that no sleeping cars were attached to the local trains and that in order to make use of such accommodation on the trains in question passengers had to get in or out at stations from seven or eight to twelve or fifteen miles away. It was thought that when the railroad * furnished such accommodations to a part of the public it was bound to furnish the same to all others—a very questionable proposition as applied. The other fact relied upon was that passengers not infrequently came on trains 17 and 18 destined for Meridian and had to get out at Morgan or Clifton, the next stations to the north and south. We repeat that whether these facts would justify an intermeddling with interstate trains in favor of a place of this size, merely as such, would be a serious question. But the State Court sustained the order as one required by statute in favor of county seats, up to the number of four trains each way, Sundays excepted. The law is not directed adversely at interstate trains, but expresses the specific judgment of the legislature as to the needs of the county seats, all of which, of course, it knew. If its judgment is correct, which we have no grounds for denying, the order may be justified, so far as its interference with interstate commerce is concerned, unless some other fact shows that the burden is too great.

The only additional facts material to this point are that the defendant competes with railroads having shorter routes, that for that reason and in order to keep its contracts for the carriage of United States mails it has to make fast time—and that it has little or none to spare. On the other hand Meridian is the only county seat at which it does not stop, and it does stop at some smaller places, as well as make a detour in order to go through Houston. The time that would be taken would be four or five minutes for Number 17, and about 10 minutes for Number 18, according to the trial Court. The Court of Civil Appeals says in general terms from three to five. We are not prepared to say that the finding that there will be no unreasonable burden is wrong.

[2] It is urged that the power of the State Commission has been taken away by the Hepburn Amendment to the Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379), of June 29, 1906, c. 3591, § 1, 34 Stats. * 584. and the further Act of June 18, 1910, c. 309, § 7, 36 Stats. 546, making it the duty of carriers, including sleeping car companies, to make reasonable regulations affecting the facilities for transportation, the Interstate Commerce Commission having jurisdiction over such matters. But the State requires certain services to county seats with an aim that is not directed against interstate trains as such. The statute is subordinate to the regulations of the Commission so far as it may lead to an incidental interference with such trains and in the absence of any conflict it may stand as here applied. See Chicago, Burlington & Quincy R. R. Co. v. Railroad Commission of Wisconsin, 237 U. S. 220, 233, 35 Sup. Ct. 560, 59 L. Ed. 926.

[3] The other point argued here is that the railroad could not be subjected to, at most, more than one penalty while the validity of the order was awaiting judicial determination. Ex parte Young, 209 U. S. 123, 147, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, being relied upon. But the statutes of Texas provided for a suit to test the validity of the order, in a court either of the State or of the United States, Art. 6657. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 391, 392, 14 Sup. Ct. 1047, 38 L. Ed. 1014. Railroad Commission of Texas v. Galveston, Harrisburg & San Antonio Ry. Co., 51 Tex. Civ. App. 447, 112 S. W. 345. Eastern Texas R. R. Co. v. Railroad Commission (D. C.) 242 Fed. 300. The railroad company saw fit to await proceedings against it, and although the case in all its aspects, is somewhat extreme the judgment must be affirmed. Wadley Southern Ry. Co. v. Georgia, 235 U. S. 651, 669, 35 Sup. Ct. 214, 59 L. Ed. 405.

Judgment affirmed.

The CHIEF JUSTICE, Mr. Justice McKENNA and Mr. Justice McREYNOLDS dissent.

(246 U. S. 276)

GREAT NORTHERN RY. CO. v. ALEXANDER.

(Argued Jan. 15, 1918. Decided March 4, 1918.)

No. 130.

1. REMOVAL OF CAUSES ⊂⊃3 — NATURE OF RIGHT.

Under Judicial Code, c. 3, §§ 28, 39 (Act March 3, 1911, c. 231, 36 Stat. 1094, 1099 [Comp. St. 1916, §§ 1010, 1021]), specifying certain grounds for removal, the right of removal is statutory and a suit commenced in the state court must remain there until cause is shown for its transfer under an act of Congress.

2. REMOVAL OF CAUSES ⊂⊃3—FEDERAL EMPLOYERS' LIABILITY ACT—COMPLAINT.

Under Act April 5, 1910, c. 143, 36 Stat. 291, prohibiting removal of causes arising under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]), an allegation that plaintiff's deceased was employed in interstate commerce when killed brought the case within such act, so as to prevent its removal, either because of

diversity of citizenship or because arising under a federal law.

3. Removal of Causes ⟸15—Cases Removable—When Right Accrues.

A case, not removable from a state court when commenced, may afterwards become removable.

4. Removal of Causes ⟸25(1)—Right to Remove—How Determined.

Whether a case arising under a federal law is removable when it is commenced, no fraudulent attempt to evade removal being claimed, is determined by the complaint or petition, and the case cannot be made removable by the petition for removal or defendant's subsequent pleadings.

5. Removal of Causes ⟸25(1)—Right to Remove—How Determined.

A case arising under the federal laws, if nonremovable on the complaint when commenced, cannot be made removable by defendant's evidence, or an order of the court upon a contested issue, but only by plaintiff voluntarily amending his pleadings, or by his voluntary dismissal or nonsuit of parties defendant.

6. Removal of Causes ⟸3—Right to Removal — Federal Employers' Liability Act.

Where plaintiff consistently contended that the proof supported the complainant's allegations that plaintiff's deceased was employed in interstate commerce when killed, defendant railroad could not remove the case, although it claimed that deceased was not so employed, and that the prohibition against removing cases arising under the federal Employers' Liability Act did not apply was upheld by the state Supreme Court, since the case could be converted into a removable one only by plaintiff's voluntary action.

In Error to the Supreme Court of the State of Montana.

Suit by J. C. Alexander, as administrator of the estate of John P. Hall, deceased, against the Great Northern Railway Company. A judgment for plaintiff was affirmed by the Supreme Court of Montana (51 Mont. 565, 154 Pac. 914), and defendant brings error. Dismissed.

Messrs. I. Parker Veazey, Jr., of Great Falls, Mont., and E. C. Lindley, of St. Paul, Minn., for plaintiff in error.

Mr. Cornelius B. Nolan, of Helena, Mont., for defendant in error.

*277 *Mr. Justice CLARKE delivered the opinion of the Court.

This case presents for decision the question whether the nonremovable case stated in the complaint became one subject to removal when the plaintiff rested his case, and, as the defendant claimed, it became apparent that the allegation of the complaint that the deceased was employed in interstate commerce when killed was not sustained by the evidence.

We shall designate the parties as they were in the trial court, the defendant in error as plaintiff and the plaintiff in error as defendant.

The suit was commenced in a district court of Montana and is one to recover damages for wrongful death. The plaintiff was a citizen of Montana when the case was commenced and he alleges in his complaint that the defendant was an interstate carrier, organized under the laws of the state of Minnesota at the time the accident occurred; that the deceased was a conductor employed by *the defendant in interstate commerce at the time he was killed; and that the proximate cause of the accident was the failure of defendant to fence its line, which resulted in the derailing of the car on which plaintiff's decedent was employed, causing his instant death. *278

The defense is a denial that deceased was employed in interstate commerce when injured, and a denial of negligence in the failure to fence, with a plea of assumption of risk.

When the plaintiff rested his case the defendant "moved for a judgment of nonsuit and dismissal upon the merits, * * * based upon the complaint of the plaintiff and upon the testimony adduced."

This motion asserted in various forms that the evidence introduced failed to show any actionable negligence on the part of the defendant and concluded with a fifth paragraph, alleging, in substance, as follows:

That there was a fatal variance, amounting to failure of proof, between the allegation of the complaint that the deceased was employed in interstate commerce at the time he was injured and the evidence introduced; * * * that, this variance is substantial in that with the complaint charging that the deceased was killed while engaged in interstate commerce, the defendant could not remove said case to the federal court, whereas if the case as made by the proof had been made, to wit, an intrastate case, it could have been removed; and hence the failure to recognize the variance would operate to deny to the defendant a right under a statute or law of the United States, to wit, the right to remove such a case properly pleaded to the federal court.

The trial court having overruled this motion, the defendant introduced its evidence in defense and after the plaintiff's rebuttal was concluded renewed its motion, which was again denied, the defendant reserving its exception, and thereupon the case was submitted to the jury and judgment was entered on the verdict in favor of the plaintiff. *279

On review the Supreme Court of Montana (51 Mont. 565, 154 Pac. 914) held that the trial court had erred, and should have ruled that on the evidence adduced the deceased was not employed in interstate commerce when injured, but holding that the defendant had waived its right to remove by failing to file a petition for removal, as required by law, the court went forward and held, that a case of negligence at common law was stated in the complaint, and that the evidence introduced justified the trial court in submitting the case to the jury, and that the judgment must be affirmed.

In disposing of the question presented by this motion for "nonsuit and dismissal" which we are considering, the Supreme Court of Montana said:

"We recall but one respect in which a defendant can be seriously prejudiced in such a situa-

tion, and that is where, by reason of diverse citizenship, removal of the cause to the federal court might be in order. In such a situation, however, the defendant must assert its right, under penalty of waiver, by filing a petition to remove at the first opportunity. * * * This the appellant did not do; instead, and with the knowledge of its right to have the cause removed, it submitted to the jurisdiction of the state court in which the trial occurred, by seeking a dismissal for variance as well as for failure to show the breach by it of any legal duty to the decedent under either state or federal law."

No claim is made that the allegation that the plaintiff's decedent was employed in interstate commerce was incorporated into the complaint fraudulently or in bad faith, for the purpose of defeating the right of the defendant to remove the case to the federal court.

The claim now made in this court by the defendant is that the state Supreme Court correctly held that the evidence introduced *210 failed to show that the deceased was employed in interstate commerce when he was injured, but that it committed reversible error and denied to the defendant the federal right to remove the case when it held that the right to remove had been waived, and affirmed the judgment instead of reversing and remanding the case to the lower court for further proceedings.

The plaintiff replies to this claim with the contention that the court is without jurisdiction to review the decision of the state Supreme Court for the reason that no federal right was denied to the plaintiff in error at any stage of the proceeding in the state court.

[1] It is, of course, familiar law that the right of removal being statutory, a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress. Gold Washing, etc., Co. v. Keyes, 96 U. S. 199, 24 L. Ed. 656; Jud. Code, c. 3, §§ 28, 39.

[2] The allegation of the complaint that the deceased was employed in interstate commerce when injured, brought the case within the scope of the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]) and it would have been removable either for diversity of citizenship or as a case arising under a law of the United States, except for the prohibition against removal contained in the amendment to the act, approved April 5, 1910 (36 Stat. L. 291, c. 143). But this allegation rendered the case, at the time it was commenced, clearly not removable on either ground. Kansas City Southern Ry. Co. v. Leslie, 238 U. S. 599, 35 Sup. Ct. 844, 59 L. Ed. 1478; Southern R. R. Co. v. Lloyd, 239 U. S. 496, 36 Sup. Ct. 210, 60 L. Ed. 402.

[3] The removal provisions of the Judicial Code (chapter 3, §§ 28 and 39, inclusive; Act March 3, 1911, c. 231, 36 Stat. 1094, 1099 [Comp. St. 1916, §§ 1010, 1021]), in effect when this case was tried, were substantially the same as they have been since the Removal Act of 1888 was passed, and that a case not removable when commenced may afterwards become removable is settled by Ayers v. Watson, 113 U. S. 594, 5 Sup. Ct. 641, 28 L. Ed. 1093; Martin's Administrator v. B. & O. R. R. Co., 151 U. S. 673, 688, 691, 14 Sup. Ct. 533, 38 L. Ed. 311; Powers v. C. & O. Ry. Co.,*169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, and Fritzlen v. Boatmen's Bank, 212 U. S. 364, 29 Sup. Ct. 366, 53 L. Ed. 551. Under the doctrine of these cases the defendant, admitting the nonremovable character of the case at bar when it was commenced, argues that the failure of the plaintiff to prove his allegation that the deceased was employed in interstate commerce when he was injured, left the complaint as if the allegation had not been incorporated into it, and that therefore the case became removable for diversity of citizenship when the plaintiff rested his case. *211

[4] But unfortunately for the validity of this contention it has been frequently decided by this court that whether a case arising, as this one does, under a law of the United States is removable or not, when it is commenced (there being no claim of fraudulent attempt to evade removal), is to be determined by the allegations of the complaint or petition and that if the case is not then removable it cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant. Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; Chappell v. Waterworth, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85; Texas & Pacific Ry. Co. v. Cody, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132; Taylor v. Anderson, 234 U. S. 74, 34 Sup. Ct. 724, 58 L. Ed. 1218.

[5] It is also settled that a case, arising under the laws of the United States, nonremovable on the complaint, when commenced, cannot be converted into a removable one by evidence of the defendant or by an order of the court upon any issue tried upon the merits, but that such conversion can only be accomplished by the voluntary amendment of his pleadings by the plaintiff or, where the case is not removable because of joinder of defendants, by the voluntary dismissal or nonsuit by him of a party or of parties defendant. Kansas City, etc., Ry. Co. v. Herman, 187 U. S. 63, 23 Sup. Ct. 24, 47 L. Ed. 76; Alabama Great Southern Ry. Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147; Lathrop, Shea & Henwood Co. v. Interior Construction Co., 215 U. S. 246, 30 Sup. Ct. 76, 54 L. Ed. 177; American Car, etc., Co. v. Kettlehake, 236 U. S. 311, 35 Sup. Ct. 355, 59 L. Ed. 594. *212

* The obvious principle of these decisions is that, in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the

status with respect to removability of a case, arising under a law of the United States, when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case nonremovable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, in invitum, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion.

[6] The result of the application of this principle to the case at bar is not doubtful.

The plaintiff did not at any time admit that he had failed to prove the allegation that the deceased was employed in interstate commerce when injured, and he did not amend his complaint, but, on the contrary, he has contended at every stage of the case and in his brief in this court still contends that the allegation was supported by the evidence. The first holding to the contrary was by the state Supreme Court and the most that can be said of that decision is that the defendant prevailed in a matter of defense which he had pleaded, but, as we have seen, this does not convert a nonremovable case into a removable one, in the absence of voluntary action on the part of the plaintiff, and it therefore results that the defendant did not at any time have the right to remove the case to the federal court, which it claims was denied to it, and that therefore, there being no substance in the claim of denial of federal right, this court is without jurisdiction to review the decision of the Supreme Court of Montana and the writ of error must be

Dismissed.

(246 U. S. 283)

NORTHERN PAC. RY. CO. v. WISMER.

(Argued Jan. 28, 29, 1918. Decided, March 4, 1918.)

No. 152.

1. PUBLIC LANDS ⟸75—RESERVATION—VALIDITY.

Reservations made by heads of bureaus, such as the Commissioner of the General Land Office or Commissioner of Indian Affairs, in the administration of matters committed to their charge, stand on the same footing as those authorized by the Secretary of the Interior, where he is informed of the action and either expressly or tacitly approves.

2. PUBLIC LANDS ⟸76—RESERVATION—ESTABLISHMENT.

Where the Commissioner of Indian Affairs, charged with the management of such matters under direction of the Secretary of the Interior, directed an Indian inspector to treat with a tribe for the establishment of a reservation, and pursuant to an agreement between the tribe and inspector a reservation was established, the Secretary of the Interior approving, as shown by the sending of his report concerning the matter to the Senate and the protection of the reservation by military forces from intruders, the reservation must be deemed lawfully established at the time the Secretary sent his report, and the lands then withdrawn from settlement, even though the executive order of the President, formally setting aside and reserving the territory, was not promulgated until after a railroad company, which as an aid to construction had been granted certain alternate sections, on either side of its line as located, out of public lands to which the United States had full title, and which were not reserved or subject to preemption claims, had filed its plat, the filing of which would have entitled it, but for the reservation, to lands included therein.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Action by the Northern Pacific Railway Company against Emma A. Wismer, substituted for George F. Wismer, deceased. A judgment for defendant, was, on a writ of error, affirmed by the Circuit Court of Appeals (230 Fed. 591, 144 C. C. A. 645), and plaintiff brings error. Affirmed.

Mr. Charles Donnelly, of St. Paul, Minn., for plaintiff in error.

Mr. Assistant Attorney General Kearful and Mr. John W. Davis, of Washington, D. C., for defendant in error.

Mr. Justice CLARKE delivered the opinion of the Court.

This suit is one in ejectment by the Northern Pacific Railway Company to recover possession of 80 acres of land (the title to 64,000 acres depends upon the decision), and it is here on writ of error to review the judgment of the Circuit Court of Appeals, affirming that of the District Court in favor of the defendant.

*284 * The principles of law applicable to the case are few and well settled and the decision of it depends upon the interpretation to be given to stipulated facts.

The plaintiff in error is the successor in interest to the Northern Pacific Railroad Company, and the defendant in error, substituted for the deceased defendant, George F. Wismer, claims to own the land in controversy by virtue of a homestead entry made in 1910, upon which a patent was issued in 1913.

By act of Congress dated July 2, 1864 (13 Stat. 365, c. 217) there was granted to the Northern Pacific Railroad Company, for the purpose of aiding in the construction of its line to the Pacific Coast, 20 alternate odd-numbered sections of land per mile on each side of the railroad line, which it should locate and adopt, within the boundaries of any territory and 10 alternate odd-numbered sections per mile on each side of the railroad line, which it should adopt, within the boundaries of any state. The grant embraces only lands to which "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or

other claims or rights, at the time the line of said road is definitely fixed."

On October 4, 1880, the Railroad Company definitely located the position of its line opposite the land in controversy and filed a plat thereof, as required by law, and it is claimed that upon the filing of this plat the company became entitled to the lands granted, including those of the defendant in error, as of July 2, 1864, the date of the granting act of Congress.

The claim of the defendant in error, which prevailed in each of the lower courts, is that the land in controversy was reserved or otherwise appropriated, within the meaning of the terms of the grant to the railroad company of 1864, quoted above, at the time this part of the line of the railroad was definitely located, for the reason that it was then within an Indian reservation, or was subject to an Indian claim, which prevented the grant attaching to it, by virtue of the following facts, which we condense from the stipulation between the parties.

Prior to August 16, 1877, bands of Indians of the Spokane and other tribes occupied, for hunting and fishing, the extensive territory now comprising the eastern part of the state of Washington, in which they had not then ceded to the United States any part of their rights. In the spring of that year certain of these Indian tribes commenced hostilities against the white settlers which resulted in war with the United States, in which they were urging the Spokane tribe, then at peace, to join.

On May 7, 1877, the Commissioner of Indian Affairs directed Col. E. C. Watkins, an Indian inspector, in charge of all agencies in Washington Territory, to give his "special attention" to the subject of gathering the roving Indians "upon permanent reservations," with the result that on August 16, 17, 18, 1877, a council was held at Spokane Falls, Washington, between the chiefs and headmen of the Spokane tribe of Indians and Col. Watkins, acting "in his official capacity as Indian inspector, representing the Department of the Interior," and Gen. Frank Wheaton and Capt. M. C. Wilkinson, of the United States Army, representing the Department of War.

It is expressly stipulated "that for the purpose of collecting the said Indians belonging to the said tribe (the Spokane tribe) on a reservation," and of inducing them to establish homes and to engage in agricultural pursuits, to extinguish their title "to all other lands not within the said reservation" and to remain at peace with the United States, the agreement following was signed by the representatives of the government of the United States and the chiefs and headmen of the tribe who attended the council, viz.:

"In Council at Spokane Falls, W. T.

"We, the undersigned chiefs and headmen of the Spokane tribe of Indians for ourselves and our people hereby agree to accept the following described land for our reservation: Beginning at the source of the Chimokan creek in Washington Territory, thence down said creek to the Spokane river, thence down said river to the Columbia river, thence up the Columbia river to the mouth of Nimchin creek, thence easterly to the place of beginning.

"And we do further agree to go upon the same by the first of November next with a view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the government and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder."

On August 23 Col. Watkins reported the result of the Council to his superior officer, the Commissioner of Indian Affairs, and sent him a copy of the executed agreement, with his recommendation that the territory described therein should be set apart and reserved for the Spokane tribe.

Immediately after the signing of this agreement and prior to November 14th of the same year, Col. Watkins, still "acting in his official capacity, located such of the Spokane Indians as were not already residing thereon, upon said reservation" described in the agreement, and on November 26, 1877, he reported this action to his superior, the Commissioner of Indian Affairs, who communicated it to the Secretary of the Interior, with his approval, on December 29, 1877, who, in turn, communicated it to the United States Senate on January 23, 1878.

The Indians remained at peace with the United States and continued in the use and occupancy of the lands described in the agreement and claimed the same "as their reservation" until the year 1910.

The encroachment of squatters upon the land thus reserved, resulted in an order by Brig. Gen. Howard on September 3, 1880, directing that the military force under his command should protect the territory described in the agreement of August, 1877, against settlement by others than the Spokane Indians until survey of the land should be made or until further instructions.

On January 18, 1881, President Hayes, by executive order, formally set aside and reserved the territory described in the agreement of August, 1877, for the use and occupancy of the Spokane Indians.

The Indians occupied the reservation until after the Act of May 29, 1908, was passed (35 Stat. 458, c. 217) directing that the Secretary of the Interior should cause allotments to be made, under the allotment laws, to all Indians having tribal rights and belonging to the Spokane Indian reservation who had not theretofore received allotments, and providing that the surplus agricultural lands should be opened for settlement and entry under the homestead laws, and that the net

proceeds derived from the sale of such lands should be deposited in the United States Treasury to the credit of the Indians of the Spokane reservation. It was under the provisions of this act that the decedent of the defendant in error obtained his patent.

This summary of the stipulated facts points to the inevitable decision of the case.

[1, 2] The Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, was charged with the management of all Indian affairs and matters arising out of Indian relations (R. S. §§ 441, 463, 2058, 2149 [Comp. St. 1916, §§ 681, 716, 4000, 4152]), and clearly he commissioned Col. Watkins in advance to treat with the Spokane tribe for the setting apart to them of a permanent reservation through an agreement such as that of August, 1877. The plaintiff in error concedes, as it must, that if the Secretary of the Interior approved the action taken by Col. Watkins prior to the filing of the plat of its line on October 4, 1880, the reservation must be considered as lawfully established and the lands thereby removed beyond the scope of the grant to the railroad company. Wilcox v. Jackson, 13 Pet. 498, 512, 10 L. Ed. 264; Wolsey v. Chapman, 101 U. S. 755, 769, 25 L. Ed. 915; Wood v. Beach, 156 U. S. 548, 15 Sup. Ct. 410, 39 L. Ed. 528; United States v. Mid West Oil Co., 236 U. S. 459, 35 Sup. Ct. 309, 59 L. Ed. 673; C., M. & St. P. Ry. Co. v. United States, 244 U. S. 351, 357, 37 Sup. Ct. 625, 61 L. Ed. 1184. And reservations made by heads of bureaus, such as the Commissioner of the General Land Office, or the Commissioner of Indian Affairs, in the administration of the matters committed to their charge stand upon the same footing, where the Secretary of the Interior is informed of their action and where, as in this case, he either expressly or tacitly approves the same. Spencer v. McDougal, 159 U. S. 62, 15 Sup. Ct. 1026, 40 L. Ed. 76.

Such being the law, we cannot doubt that the sound inference from the stipulated facts as we have stated them is that, with full understanding of the situation the Secretary of the Interior and the Commissioner of Indian Affairs approved the action of Col. Watkins not later, certainly, than the sending of his report to the Senate on January 23, 1878, which was almost three years prior to the filing of the railway company's plat, and that the executive order of the President on January 18, 1881, simply continued and gave formal sanction to what had been done before.

That the reservation was in fact made and the lands exclusively devoted to the use of the Indians from the date of the agreement of August, 1877, is beyond controversy; that no objection was ever made by his superiors to the action taken by Col. Watkins is equally clear, and to hold that for want of a formal approval by the Secretary of the Interior, all of the conduct of the government and of the Indians in making and ratifying and in good faith carrying out the agreement between them, even to the extent of protecting the reservation by military forces from intrusion, is without effect, would be to subordinate the realities of the situation to mere form, for the delay in the issuing of the formal executive order of the President under the circumstances can be attributed only to the exigencies of the public business; by his representative, the Secretary of the Interior, he had approved the setting apart of the lands to the use of the Indians almost three years before.

The judgment of the Circuit Court of Appeals will be affirmed, for the reason that the Spokane Indian reservation was lawfully created prior to the filing of the plat of the line of the plaintiff company on October 4, 1880.

Affirmed.

(246 U. S. 231)

BOARD OF TRADE OF CITY OF CHICAGO et al. v. UNITED STATES.

(Argued Dec. 18 and 19, 1917. Decided March 4, 1918.)

No. 98.

1. MONOPOLIES ⇐24(2)—PLEADING ⇐362(1) — SUITS TO PREVENT OR RESTRAIN — EVIDENCE—STRIKING OUT MATTER.

In a suit to restrain a board of trade from enforcing a rule prohibiting its members from purchasing or offering to purchase grain between sessions of the board at a price other than the closing bid, as in violation of the Anti-Trust Act, July 2, 1890, c. 647, 26 Stat. 209, it was error to strike from the answer allegations concerning the history and purpose of such rule, and to exclude evidence on that subject, as the legality of an agreement or regulation does not depend on whether it restrains competition, and the true test of legality is whether the restraint imposed is such as merely regulates or such as may suppress or even destroy competition, and to determine that question the court must consider the facts peculiar to the business, its conditions before and after the restraint was imposed, the nature of the restraint, and its effect actual or probable.

2. MONOPOLIES ⇐17(1) — COMBINATIONS PROHIBITED—RULES OF BOARD OF TRADE.

Such rule was a reasonable regulation consistent with the provisions of the Anti-Trust Act, where it merely restricted the period of price-making by prohibiting price-making after the close of the session, and was restricted in its operation to the purchase of grain "to arrive" or grain already in transit, which constituted a small part of the day's sales of grain, and applied only during a small part of the business day and only to grain shipped to Chicago, and not to other markets to which most of the territory tributary to Chicago was also tributary, and where it had no appreciable effect on general market prices, but helped to improve market conditions by creating a public market for grain "to arrive" in the place of private bids, by bringing more of the trading in such grain into the regular market hours, by bringing buyers and sellers into more direct relations, by distributing the business in such grain among a larger number of receivers and commission mer-

chants, by increasing the number of country dealers, supplying them more regularly with bids, and increasing the number of bids received by them from competing markets, by eliminating risks necessarily incident to a private market and enabling country dealers to do business on a smaller margin by enabling them to sell grain "to arrive" which they would otherwise have been obliged to ship to commission markets or sell for future delivery, by enabling Chicago grain merchants to trade on a smaller margin, and by enabling those engaged in trading in grain to arrive to fulfill their contracts by tendering grain to arrive on any railroad, whereas formerly shipments had to be made over the particular railroad designated by the buyer.

Appeal from the District Court of the United States for the Northern District of Illinois.

Suit by the United States against the Board of Trade of the City of Chicago and others. From a decree in favor of the government, defendants appeal. Reversed, with directions.

Mr. Henry S. Robbins, of Chicago, Ill., for appellants.

Mr. G. Carroll Todd, Asst. Atty. Gen., for the United States.

*Mr. Justice BRANDEIS delivered the opinion of the Court.

Chicago is the leading grain market in the world. Its Board of Trade is the commercial center through which most of the trading in grain is done. The character of the organization is described in Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031. Its 1600 members include brokers, commission merchants, dealers, millers, maltsters, manufacturers of corn products and proprietors of elevators. Grains there dealt in are graded according to kind and quality and are sold usually "Chicago weight, inspection and delivery." The standard forms of trading are: (a) Spot sales; that is, sales of grain already in Chicago in railroad cars or elevators for immediate delivery by order on carrier or transfer of warehouse receipt. (b) Future sales; that is, agreements for delivery later in the current or in some future month. (c) Sales "to arrive"; that is, agreements to deliver on arrival grain which is already in transit to Chicago or is to be shipped there within a time specified. On every business day sessions of the Board are held at which all bids and sales are publicly made. Spot sales and future sales are made at the regular sessions of the Board from 9:30 a. m. to 1:15 p. m., except on Saturdays, when the session closes at 12 m. Special sessions, termed the "call," are held immediately after the close of the regular session, at which sales "to arrive" are made. These sessions are not limited as to duration, but last usually about half an hour. At all these sessions transactions are between members only; but they may trade either for themselves or on behalf of others. Members may also trade privately with one another at any place, either during the sessions or after, and they may trade with nonmembers at any time except on the premises occupied by the Board.[1]

Purchases of grain "to arrive" are made largely from country dealers and farmers throughout the whole territory tributary to Chicago, which includes besides Illinois and Iowa, Indiana, Ohio, Wisconsin, Minnesota, Missouri, Kansas, Nebraska, and even South and North Dakota. The purchases are sometimes the result of bids to individual country dealers made by telegraph or telephone either during the sessions or after; but most *purchases are made by the sending out from* Chicago by the afternoon mails to hundreds of country dealers, offers to buy at the prices named, any number of carloads, subject to acceptance before 9:30 a. m. on the next business day.

In 1906 the Board adopted what is known as the "call" rule. By it members were prohibited from purchasing or offering to purchase, during the period between the close of the call and the opening of the session on the next business day, any wheat, corn, oats or rye "to arrive" at a price other than the closing bid at the call. The call was over, with rare exceptions, by 2 o'clock. The change effected was this: Before the adoption of the rule, members fixed their bids throughout the day at such prices as they respectively saw fit; after the adoption of the rule, the bids had to be fixed at the day's closing bid on the call until the opening of the next session.

In 1913 the United States filed in the District Court for the Northern District of Illinois, this suit against the Board and its executive officers and directors, to enjoin the enforcement of the call rule, alleging it to be in violation of the Anti-Trust Law of July 2, 1890, c. 647, 26 Stat. 209. The defendants admitted the adoption and enforcement of the call rule, and averred that its purpose was not to prevent competition or to control prices, but to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago. On motion of the government the allegations concerning the purpose of establishing the regulation were stricken from the record. The case was then heard upon evidence; and a decree was entered which declared that defendants became parties to a combination or conspiracy to restrain interstate and foreign trade and commerce "by adopting, acting upon and enforcing" the "call" rule; and enjoined them from *acting upon the same or from adopting or acting upon any similar rule.

[1, 2] No opinion was delivered by the District Judge. The government proved the ex-

[1] There is an exception as to future sales not here material.

istence of the rule and described its application and the change in business practice involved. It made no attempt to show that the rule was designed to or that it had the effect of limiting the amount of grain shipped to Chicago; or of retarding or accelerating shipment; or of raising or depressing prices; or of discriminating against any part of the public; or that it resulted in hardship to any one. The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the call rule and in later excluding evidence on that subject. But the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law.

First. The nature of the rule: The restriction was upon the period of price-making. It required members to desist from further price-making after the close of the call until 9:30 a. m. the next business day; but there was no restriction upon the sending out of bids after close of the call. Thus it required members who desired to buy grain "to arrive" to make up their minds before the close of the call how much they were willing to pay during the interval before the next session of the Board. The rule made it to their interest to attend the call; and if they did not fill their wants by purchases there, to make the final bid high enough to enable them to purchase from country dealers.

Second. The scope of the rule: It is restricted in operation to grain "to arrive." It applies only to a small part of the grain shipped from day to day to Chicago, and to an even smaller part of the day's sales; members were left free to purchase grain already in Chicago from any one at any price throughout the day. It applies only during a small part of the business day; members were left free to purchase during the sessions of the Board grain "to arrive," at any price, from members anywhere and from non-members anywhere except on the premises of the Board. It applied only to grain shipped to Chicago; members were left free to purchase at any price throughout the day from either members or non-members, grain "to arrive" at any other market. Country dealers and farmers had available in practically every part of the territory called tributary to Chicago some other market for grain "to arrive." Thus Missouri, Kansas, Nebraska, and parts of Illinois are also tributary to St. Louis; Nebraska and Iowa, to Omaha; Minnesota, Iowa, South and North Dakota, to Minneapolis or Duluth; Wisconsin and parts of Iowa and of Illinois, to Milwaukee; Ohio, Indiana and parts of Illinois, to Cincinnati; Indiana and parts of Illinois, to Louisville.

Third. The effects of the rule: As it applies to only a small part of the grain shipped to Chicago and to that only during a part of the business day and does not apply at all to grain shipped to other markets, the rule had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago. But within the narrow limits of its operation the rule helped to improve market conditions thus:

(a) It created a public market for grain "to arrive." Before its adoption, bids were made privately. Men had to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all concerned, but particularly so to country dealers and farmers.

(b) It brought into the regular market hours of the Board sessions, more of the trading in grain "to arrive."

(c) It brought buyers and sellers into more direct relations; because on the call they gathered together for a free and open interchange of bids and offers.

(d) It distributed the business in grain "to arrive" among a far larger number of Chicago receivers and commission merchants than had been the case there before.

(e) It increased the number of country dealers engaging in this branch of the business; supplied them more regularly with bids from Chicago; and also increased the number of bids received by them from competing markets.

(f) It eliminated risks necessarily incident to a private market, and thus enabled country dealers to do business on a smaller margin. In that way the rule made it possible for them to pay more to farmers without raising the price to consumers.

*(g) It enabled country dealers to sell some grain to arrive which they would otherwise have been obliged either to ship to Chicago commission merchants or to sell for "future delivery."

(h) It enabled those grain merchants of Chicago who sell to millers and exporters, to trade on a smaller margin and by paying more for grain or selling it for less, to make the Chicago market more attractive for both shippers and buyers of grain.

(i) Incidentally it facilitated trading "to arrive" by enabling those engaged in these transactions to fulfill their contracts by tendering grain arriving at Chicago on any railroad, whereas formerly shipments had to be made over the particular railroad designated by the buyer.

The restraint imposed by the rule is less severe than that sustained in Anderson v. United States, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300. Every Board of Trade and nearly every trade organization imposes some restraint upon the conduct of business by its members. Those relating to the hours in which business may be done are common; and they make a special appeal where, as here, they tend to shorten the working day or, at least, limit the period of most exacting activity. The decree of the District Court is reversed with directions to dismiss the bill.

Reversed.

Mr. Justice McREYNOLDS took no part in the consideration or decision of this case.

(246 U. S. 242)

SEARS v. CITY OF AKRON.

(Argued Jan. 21 and 22, 1918. Decided March 4, 1918.)

No. 105.

1. CONSTITUTIONAL LAW ⊂⊃125—IMPAIRMENT OF OBLIGATION OF CONTRACTS—RIGHTS OF CORPORATIONS.

Gen. Code Ohio 1910, § 10128, provides that any company organized to build dams or for constructing and maintaining canals, etc., to carry water to any plant or power house where electricity is generated or for erecting and maintaining lines to carry and transmit electricity, etc., may appropriate so much private land as is deemed necessary for its pipes, poles, reservoir, etc., as well as land overflowed and for the erection of tanks and reservoirs for the storage of water, etc. *Held*, that a corporation organized under the general laws to construct and operate a power system acquired by its incorporation no contract right protected from impairment by Const. U. S. art. 1, § 10, to have the quantity of water available for development by it undiminished.

2. CONSTITUTIONAL LAW ⊂⊃129 — IMPAIRMENT OF OBLIGATION OF CONTRACTS—RIGHTS OF CORPORATIONS.

If a power company by eminent domain or otherwise acquires riparian lands or specific rights in the use and flow of water from riparian owners, these constitute property acquired under its charter, and not contract rights expressed or implied in the grant of the charter.

3. CONSTITUTIONAL LAW ⊂⊃126—IMPAIRMENT OF OBLIGATION OF CONTRACTS—AMENDMENT OR REPEAL OF CHARTERS.

Under Const. Ohio art. 13, § 2, providing that corporations may be formed under general laws but that all such laws may from time to time be altered or repealed, the contract inhering in the charter of a power company as distinguished from its property acquired under the charter was subject to the state's reserved power to amend or repeal, and, if necessary to justify a city's acts in appropriating water from certain rivers under Act May 17, 1911 (102 Ohio Laws, p. 175), authorizing it to do so, such act may be treated as an amendment of the power company's charter making its rights subject to those of the city.

4. CONSTITUTIONAL LAW ⊂⊃126 — REVOCATION OF RIGHTS OF CORPORATIONS.

Whether or not, under the general laws of Ohio, the adoption of a plan of water power development by a power company vested in it a preferential right as against rival power companies or municipalities to appropriate the property embraced in such plan, the state, under Const. Ohio art. 13, § 2, retained the power to revoke any such right to appropriate property until it had been acted upon by acquiring the property authorized to be taken.

5. MUNICIPAL CORPORATIONS ⊂⊃323(1)—PUBLIC IMPROVEMENTS — INJUNCTION—PERSONS ENTITLED.

The riparian rights of a power company consisting of a small parcel of land extending to high-water mark below a dam and reservoir constructed by a city for water supply purposes, a contract with a riparian owner below the dam for a portion of the river bed with a right to regulate flowage, and options for other lands and rights, all of which were apparently acquired after the city's water development was practically completed, did not entitle such company to relief by injunction against the further construction of the dam and reservoir and the diversion of water.

6. CONSTITUTIONAL LAW ⊂⊃118, 281 — EMINENT DOMAIN ⊂⊃167(2) — DETERMINATION OF NECESSITY—DUE PROCESS OF LAW—IMPAIRING OBLIGATIONS OF CONTRACT.

Gen. Code Ohio 1910, §§ 3677–3697, so far as it authorizes municipalities to determine the necessity for the taking of private property for water supply purposes without the owners having an opportunity to be heard as to such necessity, does not violate Const. U. S. art. 1, § 10, or Amendment 14.

7. EMINENT DOMAIN ⊂⊃67 — NECESSITY OF TAKING—DETERMINATION.

While the question whether the purpose of a taking is a public one is judicial, the necessity and the proper extent of a taking is a legislative question, though the Legislature may refer such issues, if controverted, to the court for decision.

8. CONSTITUTIONAL LAW ⊂⊃24—ADOPTION OF CONSTITUTION — REPEAL OF PRIOR ORDINANCES.

A city ordinance appropriating water from a river for the purpose of a water supply, providing for a proceeding for the assessment of compensation, and providing for the issuance of bonds for the payment of the costs and expenses of the appropriation, which became effective September 10, 1912, was not repealed by the new Constitution of Ohio adopted September 3, 1912, but not effective until November 15, 1912, and which, in article 18, § 5, provides a right to a referendum on such ordinances, as the ordinance was a valid existing law when the new Constitution became operative though no action had been taken under it.

9. Municipal Corporations ⇐323(1)—Public Improvements — Injunction—Persons Entitled.

If a city's development of the water of a river for a water supply was unauthorized, its act in damming the river and diverting the water was that of an ordinary wrongdoer, and a power company owning riparian lands and rights and which had adopted a plan of development had only the usual remedy for a tort by an action at law for damages unless exceptional circumstances rendered resort to a court of equity appropriate, which was not the case where the company could not, for the present, be injured and might never be substantially affected by the diversion of the water.

Appeal from the District Court of the United States for the Northern District of Ohio.

Suit by John H. Sears against the City of Akron. From a decree dismissing the bill, complainant appeals. Affirmed.

Mr. George W. Wickersham, of New York City, for appellant.

Mr. John E. Morley, of Cleveland, Ohio, for appellee.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Akron, Ohio, lies on Little Cuyahoga river a short distance above its confluence with the Big Cuyahoga. In May, 1911, the Legislature of Ohio granted to the city, by special act, "the right to divert and use forever" for the purposes of its water supply "the Tuscarawas river, the Big Cuyahoga and Little Cuyahoga rivers and the tributaries thereto, now wholly or partly owned or controlled by the State."[1] The city already possessed, under the general laws of Ohio, power to appropriate for this purpose, by condemnation proceedings, the property of any private corporation.[2] Acting specifically in exercise of the power conferred by the special act and of every other power thereunto enabling, the city, by resolution of its council, passed May 27, 1912, declared its intention to appropriate all the waters, above a point fixed, of the Cuyahoga river and tributaries; and by an ordinance, passed August 26, 1912, it appropriated the same, directed its solicitor to apply to the courts to assess the compensation to be paid, and provided for the payment of "the costs and expenses of said appropriation" out of an issue of bonds theretofore authorized. The city then constructed a dam and reservoir at the place specified and announced its intention of diverting the water before or by August 1, 1915.

On July 24, 1915, John H. Sears, a citizen of New York, filed in the Federal District Court for the Northern District of Ohio this suit, praying that the further construction of dam and reservoir and the diversion of the water of the river be enjoined, and alleged, in substance, the following facts: The Cuyahoga River Power Company, a hydro-electric corporation was organized under the general laws of Ohio,[3] in 1908. The character of the company's enterprise is described in Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 37 Sup. Ct. 643, 61 L. Ed. 1153; and its possible rights were considered in Cuyahoga River Power Co. v. Akron, 240 U. S. 462, 36 Sup. Ct. 402, 60 L. Ed. 743. On July 15, 1915, the company delivered to him as trustee a deed of trust of all its property to secure an issue of $150,000 of bonds. The property rights or interests which it is alleged the city was about to appropriate and for which it had not paid and proposed not to pay, arose from these transactions of the company:

It caused to be made and had, on or about

[1] Act (House Bill No. 357) of May 17, 1911, Ohio Laws, vol. 102, p. 175:

An act to provide for granting to the City of Akron, Ohio, the right to use and occupy certain waters and lands of the State for water works and park purposes.

Section 1. That there is hereby granted to the city of Akron, in the county of Summit, and state of Ohio, the right to divert and use forever for the purpose of supplying water to said city of Akron and the inhabitants thereof, the Tuscarawas river, the big Cuyahoga and little Cuyahoga rivers, and the tributaries thereto, now wholly or partly owned or controlled by the state and used for the purpose of supplying water to the northern division of the Ohio canal, provided, however, and this grant is upon the condition that at no time shall said city use the waters of any such stream, to such extent or in such manner as to diminish or lessen the supply now necessary, to maintain the flow in and through the canal, as said canal now exists or as hereafter may become necessary for navigation purposes for an enlarged canal and upon the further condition that the city of Akron shall at all times save the state harmless from all claims arising from such grant and construction thereunder.

[2] General Code of Ohio (1910) §§ 3677–3697.

[3] Now General Code of Ohio (1910) §§ 10128–10134.

The bill recites:

"Said corporation was formed for the purpose of acquiring, erecting, building, maintaining, and operating dams in the Cuyahoga river in the State of Ohio to raise and maintain a head of water; of constructing and maintaining canals, locks and raceways to regulate and carry said head of water to any plant or powerhouse where electricity is to be generated; of erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity; of acquiring, producing, manufacturing, generating and selling electricity for light, heat, power and other purposes; of acquiring, holding, and selling franchises and privileges to supply the same to municipal corporations; of acquiring by condemnation, lease, purchase or otherwise, and of possessing, holding and selling such real estate and personal property as may be necessary or convenient for the proper conduct of said business, and of doing any and all things necessary and incident to any of said purposes.

"The original articles of incorporation of said company provided that the improvements of said company should begin at the confluence of the Big Cuyahoga River and the Little Cuyahoga river below the City of Akron, Summit County, Ohio, and extend along said Big Cuyahoga river through the County of Summit to a point where said Big Cuyahoga river crosses the line between Summit and Portage Counties."

June 3, 1908, adopted by resolution of its board of directors, surveys, maps and plans known as the "Roberts-Abbot Plan." Later it caused to be made and, about April 23, 1909, adopted by resolution of its board of directors, supplemental surveys, maps and a plan, known as the "Von Schon Plan," together with description of the several parcels of land required for carrying it out. The first plan provided for development, on the Big Cuyahoga, above the confluence of the Big and Little Cuyahoga rivers, within the limits of the location and plan of development set forth in its certificate of incorporation; and the papers also described the various parcels of land which the company would require for the purpose. The supplemental plan called for an extensive development including most of the rivers of northeastern Ohio, and provided, among other things, for a dam on the Big Cuyahoga above that of the city. It was confessedly beyond the powers conferred by the original certificate of incorporation. That certificate was not amended to include the necessary additional powers until after the passage of the Act of 1911. No public record or filing was made of either of those plans; and the law of Ohio makes no provision for such filing or for any record except that involved in condemnation proceedings. No condemnation proceeding was taken except that instituted June 5, 1908, under the original plan. It does not appear that any property was acquired under these proceedings. Shortly before the commencement of this suit, the company acquired, at a point *247 some distance below the city's dam, a small parcel of land, which however, extended only to high-water mark. It also acquired at another place below defendant's dam from another riparian owner, a contract for a portion of the river bed and the right to regulate, as to this land, the flow of the river; and acquired options for certain other properties. But the company has not commenced anywhere on the river any part of the proposed water-power development.

The right or property which the bill seeks to protect is mainly, if not wholly, the alleged right to construct and operate in places designated in the certificate of incorporation, the power system described, without danger of impairment by any act of defendants. The bill alleges that the company "became possessed of and vested with the right to exercise the State's power of eminent domain in order to appropriate and acquire for its own corporate purposes such private property as it deemed necessary for carrying out and performing the matters and things set forth in its said articles of incorporation"; and that the city's proposed action would impair contract rights of the company and also take its property without compensation in violation of the Federal Constitution. The city moved to dismiss the bill, contending that it did not appear from plaintiff's allegations that any contract rights of the company had been impaired or that the city had taken or used, or threatened or proposed to take or use any property of the company; that, on the contrary, the bill showed that the company had no property right which the city's action taken or proposed would involve appropriating; and that, for this reason, it had refrained from including in the condemnation proceedings instituted by it, any alleged property rights of the company, and had not given to it any notice of the city's takings.

The motion to dismiss the bill was sustained by the District Court, on the ground that the company did not possess any such *248 contract right or property as the city was alleged to have impaired or invaded or threatened to appropriate; and also on the ground that the bill did not set forth facts entitling plaintiff to seek relief in equity and did disclose laches. A decree was entered dismissing the bill; and a direct appeal to this court was taken under section 238 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. 1916, § 1215]).

[1-3] First. As to the alleged impairment of contract: Plaintiff contends that the incorporation of the company in 1908 under the general laws constituted a contract by which the State granted it the right to construct and operate a power system in the places designated in the certificate and the right to take property for that purpose and to have the water flow past that property uninterrupted and undiminished; and that the ordinance of 1912 is a law which impairs that contract in violation of article 1, § 10, of the Federal Constitution. It is clear that the contract right created by incorporation alone was not illegally impaired by the ordinance, because there was no contract by the State with reference to the water rights. Incorporation did not imply an agreement that the quantity of water available for development by the company would not be diminished. St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners, 168 U. S. 349, 371, 18 Sup. Ct. 157, 42 L. Ed. 497. The so-called charter simply conferred upon the company the power to take lands necessary for and to construct thereon, the dams, locks, and other parts of its plant.[4] If by purchase

[4] General Code of Ohio (1910):

"Section 10128. Any company or companies organized for the purpose of erecting or building dams across rivers or streams in this state to raise and maintain a head of water, or for constructing and maintaining canals, locks, and raceways to regulate and carry such head of water to any plant or power house where electricity is to be generated, or for erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity, or for transporting natural gas, petroleum, water or electricity, through tubing, pipes or conduits, or by means of wires, cables or conduits, or for storing, transporting or transmitting water, natural gas or petroleum, or for generating and transmitting electricity, may enter upon any private land for the purpose of examining or surveying a line or lines

*249 or by right of eminent *domain under the charter powers, the company becomes the owner of riparian lands, it acquires the riparian rights of former owners; or it may otherwise acquire from the owners specific rights in the use and flow of the water. But these would be property acquired under the charter, not contract rights expressed or implied in the grant of the charter. Furthermore, the contract inhering in the charter (as distinguished from property acquired under the charter) was subject to the State's reserved power to amend or repeal, as provided in article 13, § 2, of the Ohio Constitution. Ramapo Water Co. v. City of New York, 236 U. S. 579, 583, 35 Sup. Ct. 442, 59 L. Ed. 731. The Act of 1911, under which the city proceeded, may be treated as an amendment of the company's charter making its rights subject to those of the city, if that if necessary to justify the proceeding of the city, which the act authorized. See State v. City of Hamilton, 47 Ohio St. 52, 74, 23 N. E. 935; Hamilton Gas Light Co. v. Hamilton City, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; Berea College v. Kentucky, 211 U. S. 45, 57, 29 Sup. Ct. 33, 53 L. Ed. 81.

*250 [4] Second. As to the alleged property rights: It follows from what has been said above, that at least until something more had occurred than incorporation, the city was free as against the Cuyahoga Company to appropriate *any of the land or any of the water rights which might otherwise have come under the development described in its certificate of incorporation. Plaintiff contends, however, that it became vested with an indefeasible property right to proceed with its development (a) when by resolution the board of directors adopted the plan or (b) when condemnation proceedings were begun. Whether the adoption of a plan by the company would, under the general laws of Ohio, have vested in it such a preferential right as against rival power companies or other municipalities, we have no occasion to consider. For it is clear that Ohio retained the power as against one of its creatures, to revoke any such right to appropriate property until it had been acted upon by acquiring the property authorized to be taken. Adirondack Railway v. New York State, 176 U. S. 335, 20 Sup. Ct. 460, 44 L. Ed. 492; and the Act of 1911 and the ordinance were both passed before the company had acquired any property. Nor are we called upon to determine to what extent the commencement of the acquisition of needed property in preparation for the power development, or even actual commencement of construction, would have vested in the company the right to complete the development. For the property alleged to be now owned by the company was not acquired by it until after the city's development had been practically completed; and no work of construction has ever been commenced by the company.

[5] Third. As to the alleged riparian rights: These consist of (a) the small parcel of land extending to high-water mark, which was acquired nearly three years after the ordinance of August 26, 1912 was passed; and (b) a contract with one Boettler for a portion of the river bed with a right to regulate flowage; and (c) certain options for other lands and rights, all of which also seem to have been acquired after the city's water development was practically completed. The city insists that the bill fails to show that it has taken or proposes to take or will injure *any of these, and also that it does not appear* that the company has, in respect to any of these properties, any riparian right which conceivably could be taken or injured. This contention, which involves matters of state law, may possibly raise some questions presented to the state courts in Boettler v. Akron, 93 Ohio St. 490, 113 N. E. 1069. But whether it is in all respects sound, we need not determine; for it is clear that, upon the facts alleged in the bill, the rights of the plaintiff in this property and the injury thereto, if any, are not such as to entitle him to relief in equity.

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[6, 7] Fourth. Plaintiff contends that the ordinance is void because the general statute which authorized the appropriation violates both article 1, § 10, of the Federal Constitution and the Fourteenth Amendment, in that it authorizes the municipality to determine the necessity for the taking of private property without the owners having an opportunity to be heard as to such necessity; that in fact no necessity existed for any taking which would interfere with the company's project; since the city might have taken water from the Little Cuyahoga or the Tuscarawas rivers; and furthermore that it has taken ten times as much water as it can legitimately use. It is well settled that while the question whether the purpose of a taking is a public one is judicial, Hairston v. Danville & Western Railway, 208 U. S. 598, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008, the necessity and the proper extent of a taking is a legislative question. Shoemaker v. United States, 147 U. S. 282, 298, 13 Sup. Ct. 361, 37 L. Ed. 170; United States v. Gettysburg Electric Ry. Co., 160 U. S. 668, 685, 16 Sup. Ct. 427, 40 L. Ed. 576; United States v. Chandler-Dunbar Co., 229 U. S. 53, 65, 33 Sup. Ct. 667, 57 L. Ed. 1063. The Legislature may refer

for its tubing, pipes, conduits, poles and wires, or for a reservoir, dams, canals, raceways, plant or power house, and for ascertaining the number of acres overflowed by reason of the construction of such dam or dams, and may appropriate so much thereof as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant and power house, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such line or lines, and the erection of such building as may be necessary for the purpose aforesaid."

such issues, if controverted, to the court for decision. P. C. C. & St. L. Ry. Co. v. City of Greenville, 69 Ohio St. 487, 69 N. E. 976.

[8] Fifth. As a further ground for relief, plaintiff asserts that the whole water development of the city has been carried on without authority in law. The contention is, that the general statute on which the ordinance rests is*inconsistent with the new constitution, adopted September 3, 1912; that though the ordinance was passed before the new constitution took effect, it was not acted upon until after; and that therefore it was not within the saving clause and was repealed. Inconsistency is asserted for the reason that under the statute the city council possessed the full power to determine whether the city should undertake the water development, whereas the new constitution provided a right to a referendum on the subject, upon filing, within thirty days from the passage of the ordinance, a petition "signed by ten per centum of the electors of the municipality." Article 18, § 5. The bill alleges that the ordinance did not take effect until September 10, 1912; but the new constitution did not become effective until November 15, 1912. The ordinance was therefore, a valid existing law when the new constitution became operative and was not repealed by it. The fact that no action may have been taken under the ordinance is immaterial. We need not, therefore, inquire whether plaintiff is in a position to avail himself of the alleged inconsistency.

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[9] Sixth. The city insists that it has not appropriated and does not intend to appropriate any property of plaintiff, and that, as to plaintiff, it is not exercising the power of eminent domain. If, as plaintiff contends, the city's whole water development is unauthorized, plaintiff clearly is not entitled to equitable relief. For then, the city's act in damming and diverting water would be that of an ordinary wrongdoer, for which riparian proprietors above or below, who are injured, would have only the usual remedy for a tort by an action at law for damages, unless exceptional circumstances render resort to a court of equity appropriate. Parker v. Winnipiseogee Lake Cotton & Woolen Co., 2 Black, 545, 17 L. Ed. 333; Osborne v. Missouri Pacific Railway, 147 U. S. 248, 259, 13 Sup. Ct. 299, 37 L. Ed. 155. No such circumstances exist here. The bill shows clearly that, at least for the present,*the company cannot, by any conceivable diversion, be injured in any riparian properties and rights it may have; for it has not even commenced the construction of its projected power system, nor otherwise utilized the small parcel which it acquired shortly before this suit was instituted. Even if the company had riparian rights and should hereafter proceed with its development it might prove that defendant's diversion was of such a character that it would not substantially affect the company's use, McElroy v. Goble, 6 Ohio St. 187; or the circumstances might conceivably be such that the city would be held not to have exceeded its legal rights as riparian owner. City of Canton v. Shock, 66 Ohio St. 19, 63 N. E. 600, 58 L. R. A. 637, 90 Am. St. Rep. 557; Moody & Thomas Milling Co. v. City of Akron, 93 Ohio St. 484, 113 N. E. 835; Cleveland-Akron Bag Co. v. City of Akron, 93 Ohio St. 486, 113 N. E. 835.

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The absence of facts entitling plaintiff to equitable relief is not supplied by such general allegations of fraud and insolvency as the plaintiff has made.

Decree affirmed.

Mr. Justice DAY and Mr. Justice CLARKE took no part in the consideration or decision of this case.

(246 U. S. 273)

ANDREWS v. JOHN NIX & CO.
SAME v. HENDRICKSON.

(Argued Jan. 22, 1918. Decided March 4, 1918.)

(Nos. 140, 141.)

BANKRUPTCY ⊂⊃341 — NONPARTICIPATING CREDITORS—JUDGMENT IN STATE COURT.

Under Bankruptcy Act July 1, 1898, c. 541, § 70a, subd. 5, 30 Stat. 565 (Comp. St. 1916, § 9654), declaring that, when any bankrupt shall have any policy of insurance which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within 30 days after such value has been ascertained and stated, pay or secure to the trustee such sum, and continue to own, hold, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, creditors who proved their claims and were represented at the meeting of creditors may, their claims having been withdrawn and expunged from the list of claims and excluded from participating in the distribution of the estate, subject to judgments thereafter recovered in the state court the proceeds of life policies payable to the estate, or administrators, executors, and assigns of the bankrupt, who died shortly after the filing of the petition, notwithstanding the surrender value of such policies had been paid to the trustee in bankruptcy, for such creditors did not participate in the distribution of the estate.

In Error to the Court of Errors and Appeals of the State of New Jersey.

Case between John Nix & Co. and Hannah L. Andrews, executrix of Benajah D. Andrews, deceased. A judgment for plaintiff was affirmed (88 N. J. Law, 721, 96 Atl. 1012) by the Court of Errors and Appeals of the state of New Jersey, and defendant brings error. Consolidated with writ of error to review a similar judgment on an agreed case between Joseph D. Hendrickson and the same defendant, in which judgment for plaintiff was affirmed (88 N. J. Law, 718, 96 Atl. 1013). Affirmed.

Messrs. Samuel H. Richards and Thomas E. French, both of Camden, N. J., for plaintiff in error.

Messrs. Henry F. Stockwell and Edwin G.

C. Bleakly, both of Camden, N. J., for defendants in error.

*274 *Mr. Justice CLARKE delivered the opinion of the Court.

These two cases presenting the same question for decision, were argued and will be decided together.

On February 3, 1910, the defendant in error, John Nix & Co., and two other creditors, filed an involuntary petition in bankruptcy against Benajah D. Andrews. On the 15th day of the same month Andrews died and the plaintiff in error was duly appointed executrix of his will. On the 4th of the following April the estate of Andrews was adjudicated bankrupt by the District Court and on the 28th day of the same month a trustee was appointed. Each of the defendants in error, promptly made proof of a claim against the bankrupt estate, and both claims were forthwith allowed.

On February 13, 1914, almost four years after these claims were allowed. on the application of Nix & Co. and of Hendrickson, the District Court ordered that the claim of each of them "be wholly withdrawn from said bankruptcy proceeding and expunged from the list of claims upon the record in this case and excluded from participating in the distribution of the estate * * * of the bankrupt." After the entry of this order a dividend was declared and paid by the trustee, in which Nix & Co. and Hendrickson did not participate. No order for the discharge of the bankrupt estate was applied for or granted.

At the time of his death Andrews owned two policies of insurance upon his life, one payable to his estate and the other payable to his executors, administrators, and assigns. The proceeds of these two policies, less loans secured by them and less their surrender value, which was paid to the trustee in bankruptcy, were paid to the plaintiff in error as executrix, and the money is held by her subject to the decision of this case.

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The defendants in error instituted suits in the Supreme Court of the state of New Jersey to recover judgments on the same claims which had been allowed by the trustee but were subsequently withdrawn. The cases were submitted to the court upon a stipulation as to the essential facts substantially as we have stated them, and each recovered a judgment which was affirmed by the Court of Errors and Appeals of the state of New Jersey, which judgments are before us for review.

The case is in very narrow compass and calls upon us to consider the proviso of subdivision 5 of section 70a of the Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. 1916, § 9654]) and to decide whether the defendants in error "participated in the distribution" of the bankrupt's estate under the bankruptcy proceedings, within the meaning of that proviso, which reads as follows:

"Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representative, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy *free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings*, otherwise the policy shall pass to the trustee as assets."

The argument of the plaintiff in error is that these defendants are brought within the purpose, if not within the express terms, of this statutory proviso and should not recover, for the reason that they participated in the election of the trustee in bankruptcy, proved their claims, and were represented in the meeting of creditors at which important action was taken involving expense to the bankrupt estate.

*276 Unfortunately for the validity of this argument the provision of the statute is not that the proceeds of the insurance policies may be held "free from the claims" of creditors *who participated in the bankruptcy proceedings*, but only from the claims of creditors "*participating in the distribution of the estate in the bankruptcy proceedings.*"

Whether a line of discrimination between such two classes of creditors is wise or logical is not for us to decide. It is enough that it lies plainly obvious upon the face of the statute. No dividend was paid creditors until after the defendants in error by order of the court had been excluded from participation in the distribution of the estate, and it is stipulated in the agreed case that no payment was made to either of them. The meaning of the proviso is too plain for discussion or interpretation and that the defendants in error did not "participate in the distribution of the estate in the bankruptcy proceedings" is clear. The judgment of the Court of Errors and Appeals of the state of New Jersey must be

Affirmed.

(246 U. S. 257)

BROGAN v. NATIONAL SURETY CO.

(Argued Jan. 30 and 31, 1918. Decided March 4, 1918.)

No. 171.

1. UNITED STATES ⇐67(1) — CONTRACTORS' BONDS—STATUTE.

Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1916, § 6923), providing that contractors doing work for the United States give bond to insure payment for labor or materials used in such work, will be liberally construed to protect those furnishing labor and materials.

2. UNITED STATES ⊂⊃67(2) — CONTRACTORS' BONDS—CLAIMS SECURED.

Under Act Aug. 13, 1894, requiring contractors for the United States to give bond for prompt payment for materials, as amended by Act Feb. 24, 1905, allowing recovery for materials used in the work, recovery may be had upon a bond for provisions used by a contractor in feeding his employés, where the location of the work rendered necessary such furnishing of board.

Mr. Justice McKenna, Mr. Justice Pitney, and Mr. Justice McReynolds, dissenting.

In Error to the United States Circuit Court of Appeals for the Sixth Circuit.

Action by the United States, for use of the Pittsburgh & Buffalo Company and others, against the National Surety Company. A judgment in favor of the claimants was reversed as to John P. Brogan, an intervening petitioner, by the Circuit Court of Appeals for the Sixth Circuit (National Surety Co. v. United States, 228 Fed. 577, 143 C. C. A. 99, L. R. A. 1917A, 336), and said claimant brings error. Reversed.

Mr. John A. Cline, of Cleveland, Ohio, for plaintiff in error.

Messrs. John M. Garfield and Thomas H. Hogsett, both of Cleveland, Ohio, for defendant in error.

*259 * Mr. Justice BRANDEIS delivered the opinion of the Court.

This is an action against the surety on a bond given under the Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by the Act of February 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1916, § 6923). The claim of Brogan, an intervening petitioner, was allowed by the District Court; but the judgment was reversed by the Circuit Court of Appeals and judgment entered against him upon the undisputed facts (National Surety Co. v. United States, 228 Fed. 577, 143 C. C. A. 99, L. R. A. 1917A, 336). The case comes here on writ of error under section 241 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. 1916, § 1218]).

*260 * The facts undisputed or as found by the lower court and accepted by the Court of Appeals were these: The Standard Contracting Company undertook to deepen the channel in a portion of St. Mary's river, Michigan, located "in a comparative wilderness at some distance from any settlement. There were no hotels or boarding houses" and the contractor "was compelled to provide board and lodging for its laborers." Groceries and provisions of the value of $4,613.87 furnished it by Brogan, were used by the contractor in its boarding house; and were supplied "in the prosecution of the work provided for in the contract and the bond upon which this suit is based. They were necessary to and wholly consumed in such work." The number of men employed averaged 80. They were "boarded" partly on the dredges, partly in tents supplied by the contractor; all under an arrangement made with the labor unions —by which the contractor was to board the men and deduct therefor $22.50 a month from their wages. The contract and the bond executed by the National Surety Company bound the contractor to "make full payment to all persons supplying him with labor or materials in the prosecution of the work provided for in" the contract.

The supplies furnished by Brogan under these circumstances were clearly used in the prosecution of the work, just as supplies furnished for the soldiers' mess are used in the prosecution of war. In each case the relation of food to the work in hand is proximate. But the surety contends that the words "in the prosecution of" the work are not used in the bond and the act in their natural sense, but should be given a conventional meaning so as to exclude labor and materials which contribute to construction only indirectly, as do the supplies consumed by a contractor in operating his plant. In support of this position, attention is called to the fact that while the Act of 1894 provided that the bond should have "the additional *261 obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work," and that suit might be brought and recovery had upon this bond by any person who had supplied "labor or materials for the prosecution of such work," the Act of 1905 specified that recovery could be had by the persons who had "furnished labor or materials used in the construction or repair" of the work. But the change in phraseology is not significant. The purpose of the amendment was merely to secure to the United States preference over others in the satisfaction of its claim against the contractor. Illinois Surety Co. v. Peeler, 240 U. S. 214, 218, 36 Sup. Ct. 321, 60 L. Ed. 609. See Report of Committee on H. R. 13,626, 58th Congress, Second Session, No. 2360. It was pointed out in Mankin v. Ludowici-Celadon Co., 215 U. S. 533, 538, 30 Sup. Ct. 174, 176 (54 L. Ed. 315) that "in respect to the condition of the bond required to be given, the language of the amended act is precisely the same as that contained in the act of August 13, 1894"; and in Hill v. American Surety Co., 200 U. S. 197, 201, 26 Sup. Ct. 168, 169 (50 L. Ed. 437) that "in respect to the persons entitled to the benefit of the bond there has been no material change in the act." Illinois Surety Co. v. Peeler, supra, 240 U. S. p. 224, 36 Sup. Ct. 321, 60 L. Ed. 609.

[1, 2] This court has repeatedly refused to limit the application of the act to labor and materials directly incorporated into the public work. Thus in Title Guaranty & Trust Co. v. Crane Co., 219 U. S. 24, 34, 31 Sup. Ct. 140, 55 L. Ed. 72, the claims for which recovery was allowed under the bond included not only cartage and towage of material, but

also claims for drawings and patterns used by the contractor in making molds for castings which entered into the construction of the ship. In United States Fidelity Co. v. Bartlett, 231 U. S. 237, 34 Sup. Ct. 88, 58 L. Ed. 200, where the work contracted for was building a breakwater, recovery was allowed for all the labor at a quarry opened 50 miles away. This included, as the record shows, *263 the labor not only of men who stripped the earth*to get at the stone and who removed the débris, but carpenters and blacksmiths who repaired the cars in which the stone was carried to the quarry dock for shipment, and who repaired the tracks upon which the cars moved. And the claims allowed included also the wages of stablemen who fed and drove the horses which moved the cars on those tracks. In Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206, recovery was allowed not only for the rental of cars, track and other equipment used by the contractor in facilitating his work, but also the expense of loading this equipment and the freight paid thereon to transport it to the place where it was used. As shown by these cases, the act and the bonds given under it, must be construed liberally for the protection of those who furnish labor or materials in the prosecution of public work.

The Circuit Court of Appeals deemed immaterial the special circumstances under which the supplies were furnished and the findings of fact by the trial court that they were necessary to and wholly consumed in the prosecution of the work provided for in the contract and bond. In our opinion these facts are not only material, but decisive. They establish the conditions essential to liability on the bond. The bare fact that the supplies were furnished to the contractor and were consumed by workmen in its employ would have been immaterial. A boarding house might be conducted by the contractor (like some company stores concerning which states have legislated, Keokee Coke Co. v. Taylor, 234 U. S. 224, 34 Sup. Ct. 856, 58 L. Ed. 1288) as an independent enterprise undertaken solely in order to utilize the opportunity for separate and additional profit afforded by the congregation of many laborers in the particular locality where the public work is being performed. The laborers might resort to such a boarding house in the exercise of individual choice in the selection of an eating place. Under such circumstances the furnishing of supplies would clearly be a *263 matter independent of the work provided for in the *contract and would not entitle him who had furnished the groceries used in the boarding house to recover on the bond. But here, according to the undisputed facts and the findings of the trial court, the furnishing of board by the contractor was an integral part of the work and necessarily involved in it. Like the supplying of coal to operate engines on the dredges, it was indispensable to the prosecution of the work, and it was used exclusively in the performance of the work. Groceries furnished to a contractor under such circumstances and consumed by the laborers, are materials supplied and used in the prosecution of the public work. The judgment of the Circuit Court of Appeals is therefore reversed and that of the District Court affirmed.

Reversed.

Mr. Justice McKENNA, Mr. Justice PITNEY, and Mr. Justice McREYNOLDS, dissent.

(246 U. S. 214)

LANE, Secretary of the Interior, et al. v. MORRISON.

(Argued Jan. 30, 1918. Decided March 4, 1918.)

No. 169.

INDIANS ⟸7—APPROPRIATIONS—CONTINUATION.

Joint Resolution March 4, 1915 (38 Stat. 1228), continuing for the fiscal year 1916 appropriations for current and contingent Indian expenses and for fulfilling treaty stipulations, but not authorizing the duplication of special payments, made again available the appropriation in Act Aug. 1, 1914, c. 222, 38 Stat. 590, for promoting civilization and self-support among the Minnesota Chippewa Indians, in view of the long-continued practice to make annual appropriations for such purposes, the use of language incorporated in former appropriation acts, etc.

Mr. Justice McKenna, dissenting.

Appeal from the Court of Appeals of the District of Columbia.

Bill by John G. Morrison, Jr., for and on behalf of himself and all other members of the Chippewa Tribe of Indians in Minnesota similarly situated, against Franklin K. Lane, Secretary of the Interior, Cato Sells, Commissioner of Indian Affairs, and John Burke, Treasurer of the United States. A decree dismissing the bill was reversed by the Court of Appeals of the District of Columbia (45 App. D. C. 79), and the defendants appeal. Reversed, and decree dismissing the bill affirmed.

Mr. Assistant Attorney General Warren, and Messrs. Alexander T. Vogelsang, of San Francisco, Cal., and C. Edward Wright, Asst. Atty. Gen., for appellants.

Mr. Webster Ballinger, of Washington, D. C., for appellee.

*215 *Mr. Justice McREYNOLDS delivered the opinion of the Court.

Appellee by bill in Supreme Court, District of Columbia, sought to prevent officers of the Interior Department from disbursing during fiscal year ending June 30, 1916, $160,000 out of trust funds belonging to Chippewa Indians of Minnesota on deposit in United States Treasury.

"An act making appropriations for the current and contingent expenses of the Bureau

of Indian Affairs for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and fifteen" approved August 1, 1914 (chapter 222, 38 Stat. 582, 590) provided:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and in full compensation for all offices the salaries for which are provided for herein for the service of the fiscal year ending June thirtieth, nineteen hundred and fifteen, namely:

* * * * * * * * * * * * * * * * * *

"Sec. 8. * * * The Secretary of the Interior is hereby authorized to withdraw from the Treasury of the United States, at his discretion, the sum of $205,000, or so much thereof as may be necessary, of the principal sum on deposit to the credit of the Chippewa Indians in the state of Minnesota, arising under section seven of the Act of January fourteenth, eighteen hundred and eighty-nine, entitled 'An act for the relief and civilization of the Chippewa Indians in the state of Minnesota,' and to use the same for the purpose of promoting civilization and self-support among the said Indians in manner and for purposes provided for in said act," provided [not more than $45,000 of this amount may be used for purchase of lands and removal of bodies of certain deceased Indians].

The annual appropriation bill for current and contingent expenses of the Bureau of Indian Affairs, etc., for fiscal year ending June 30, 1916, failed of passage and in lieu of it Congress passed the Joint Resolution approved March 4, 1915, which follows:

"Joint Resolution making appropriations for current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and sixteen.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that all appropriations for the current and contingent expenses of the Bureau of Indian Affairs and for fulfilling treaty stipulations with various Indian tribes, which shall remain unprovided for on June thirtieth, nineteen hundred and fifteen, are continued and made available for and during the fiscal year nineteen hundred and sixteen to the same extent, in detail, and under the same conditions, restrictions, and limitations for the fiscal year nineteen hundred and sixteen as the same were provided for on account of the fiscal year nineteen hundred and fifteen in the Indian Appropriation Act for that fiscal year. For all of such purposes a sufficient sum is appropriated, out of any money in the treasury not otherwise appropriated, or out of funds to the credit of Indians as the same were respectively provided in the Indian Appropriation Act for the fiscal year nineteen hundred and fifteen: Provided, that the appropriations from the treasury of the United States or from Indian funds shall not exceed in the aggregate the amounts of such appropriations for the fiscal year nineteen hundred and fifteen: Provided further, that this joint resolution shall not be construed as providing for or authorizing the duplication of any special payment or for the execution of any purpose provided for in said Appropriation Act that was intended to be paid only once or done solely on account of the fiscal year nineteen hundred and fifteen. * * *" 38 Stat. 1228.

The original bill alleged that no part of the $205,000 appropriated by Act of August 1, 1914, was for expenses of the Bureau of Indian Affairs or for fulfilling treaty stipulations with Chippewa Indians of Minnesota, but all (except the $40,000 item not here involved) was for special payments and limited to fiscal year ending June 30, 1915; that it was not intended as a regular annual appropriation and the Joint Resolution of 1915 in express language excluded such items in Act of 1914 from being re-expended during 1916; that notwithstanding this the Comptroller of the Treasury had ruled the Joint Resolution did reappropriate $160,000, and the Secretary of the Interior and Commissioner of Indian Affairs were preparing to expend such sum out of Indians' trust funds; and that unless enjoined they would draw warrants therefor upon the treasury which would be honored. Upon motion, the trial court dismissed the bill for want of equity. The Court of Appeals reversed the decree, holding the Joint Resolution did not reappropriate $160,000 and the relief prayed should have been granted. Treating this as final and conclusive of issues involved the cause was brought here by appeal.

The only point presented for decision is whether by the language used Congress has sufficiently indicated an intent to appropriate the money in question. The bill does not challenge its power.

Under an act approved January 14, 1889 (25 Stat. 642, c. 24), lands in Minnesota occupied by Chippewa Indians were disposed of and proceeds deposited to their credit in the United States treasury, it being agreed that the fund should bear 5 per cent. interest to be paid directly to the Indians or used for their schools, and further "that Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof." For many years subsequent to 1889, under the general head of "Current and contingent expenses of the Indian Department * * * and fulfilling treaty stipulations with various Indian tribes," appropriations were made for general benefit of Chippewas "to be reimbursed to the United States out of the proceeds of sales of their lands." In 1911 their funds derived from land sales had become very large; and beginning then and continuing down to 1914 the annual Indian appropriations bill contained an item essentially similar (except as to amounts) both in words and position to the one in section 8, Act of 1914 quoted above.

It seems clear that "civilization and self-support" among the Indians cannot be promoted effectively by disconnected efforts, but must be accomplished, if at all, by definite, permanent plans operating through many

*219 years. * And in view of the long-continued practice of Congress to provide funds for such continuous efforts by annual appropriations, the circumstances under which the Joint Resolution became law, and the studied incorporation therein of the language of former appropriation acts, we think the purpose was to authorize expenditure of $160,000 during 1916, as had been done for 1915. A different construction might have occasioned disruption of well ordered arrangements for advancing the nation's wards, to the great detriment of all concerned; and to such unfortunate consequences experienced legislators probably were not oblivious.

By construing the resolution too narrowly the court below reached an erroneous conclusion. Its decree is therefore reversed; and the decree of the Supreme Court, District of Columbia, is affirmed.

Reversed.

Mr. Justice McKENNA dissents.

(246 U. S. 199)

SUTTON et al. v. ENGLISH et al.

(Argued April 10, 1917. Decided March 4, 1918.)

No. 330.

1. COURTS ⟸317—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—REARRANGEMENT OF PARTIES.

All the heirs at law of a husband and wife, other than S., brought suit against S. and others to have a joint will of the husband and wife treated as ineffective to dispose of the community property, to set aside a judgment obtained by trustees under such will, establishing their title, to annul a separate will of the wife to the extent that it bequeathed the residuary estate to S., and to have a partition of the property. *Held* that, in determining whether there was diversity of citizenship, the court erred in aligning S. with plaintiffs, since, though her interest would be the same as theirs with respect to the prayer for partition, it was necessary first to set aside the residuary bequest in her favor, with respect to which her interest was adverse to that of plaintiffs, and her attitude towards the actual and substantial controversy was that of a defendant.

2. COURTS ⟸262(3)—JURISDICTION OF FEDERAL COURTS — EQUITABLE JURISDICTION — PROBATE MATTERS.

Since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents in rem, matters of this character are not within the ordinary equity jurisdiction of the federal courts.

3. COURTS ⟸260—JURISDICTION OF FEDERAL COURTS—PROBATE MATTERS.

As the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of the federal courts.

4. COURTS ⟸260—JURISDICTION OF FEDERAL COURTS—PROBATE MATTERS.

Where a state, by statute or custom, gives to interested parties the right to bring an action or suit inter partes at law or in equity to annul a will or set aside the probate the courts of the United States, where diversity of citizenship and a sufficient amount in controversy appear, can enforce the same remedy; but this relates only to independent suits, and not to procedure merely incidental or ancillary to the probate.

5. COURTS ⟸260—JURISDICTION OF FEDERAL COURTS—PROBATE MATTERS.

Questions relating to the interests of heirs, devisees, or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts, where diversity of citizenship exists and the requisite amount is in controversy.

6. COURTS ⟸260—JURISDICTION OF FEDERAL COURTS—PROBATE MATTERS.

Const. Tex. art. 5, § 6, and Vernon's Sayles' Ann. Civ. St. 1914, arts. 1763, 1764, 1766, 1771, 3206, give the county court the general jurisdiction of a probate court and original jurisdiction in civil cases when the matter in controversy does not exceed $1,000, but no jurisdiction of suits to recover land or enforce liens thereon. Const. art. 5, § 8, and Vernon's Sayles' Ann. Civ. St. 1914, arts. 1705, 1706, 1712, 3207, give the district court appellate jurisdiction in probate matters, original jurisdiction and general control over executors and administrators, and original jurisdiction for the trial of title to land and the enforcement of liens thereon, and of all suits when the matter in controversy exceeds $500. Article 5699 authorizes any interested person to institute suit in the proper court to contest the validity of a probated will. *Held*, that a suit by the heirs of a husband and wife to have a joint will treated as ineffective to dispose of the community property, to set aside a judgment establishing the title of trustees under such will, to annul a separate will of the wife, so far as it bequeathed her residuary estate, and for a partition of the property, was not within the jurisdiction of a federal court, since, assuming that the other relief could be obtained by an independent suit in equity in the state district court, the suit, so far as it sought to annul the will of the wife, was merely supplemental to the proceedings for the probate of the will, and cognizable only by the probate court under the Texas decisions.

Appeal from the District Court of the United States for the Eastern District of Texas, Sherman Division.

Suit by Albert E. Sutton and others against John H. C. L. English and others. From a decree dismissing the bill for want of jurisdiction, complainants appeal. Affirmed.

Mr. Allen G. Fisher, of Chadron, Neb., for appellants.

Mr. Cecil H. Smith, of Sherman, Tex., for appellees.

*200 *Mr. Justice PITNEY delivered the opinion of the Court.

The United States District Court dismissed for want of jurisdiction a bill in equity brought by appellants, and certified in substance that the dismissal was based upon the ground that the bill and its exhibits disclosed no infraction of any right arising under the Constitution or laws of the United States; that the matter was cognizable solely in the county court of Collin county, Texas, a court of probate jurisdiction; and that the record disclosed no diversity of citizenship upon which the federal jurisdic-

tion might be based, because it appeared that one of the defendants who should be considered as a plaintiff and the remainder of the defendants were in fact citizens of the same state.

The case comes to us by direct appeal, upon the jurisdictional question only, under section 238, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. 1916, § 1215]).

The bill sets up diversity of citizenship and the fact that the amount in controversy exceeds that which is requisite for jurisdiction. It asserts no federal right. It alleges that the plaintiffs (seven in number) are citizens of states other than Texas, while of those named as defendants six (including Cora D. Spencer) are citizens of Texas and residents of Collin county in the Sherman division of the Eastern district of that state, and the seventh is a municipal corporation of that state.

The averments of the bill are in substance as follows: That about the year 1866 Moses Hubbard and Mary Jane Hubbard, his wife, settled on a parcel of real estate in Collin county, Texas, and from that time continuously until the dates of their respective deaths lived as citizens and inhabitants of that county, and during their joint lifetime cohabited together as husband and wife; that the said Moses died in 1906, leaving his wife surviving, but no descendant or other heir; that she died in 1914, without children or husband, but leaving her surviving *201 the following heirs at law: A sister, Rachael E. Kirtley, two brothers, Albert E. Sutton and Delana M. Sutton, and the children of a deceased brother, Lewis Sutton, namely, Cora D. Spencer, Elizabeth E. Davis, Ida Krickbaum, George D. Sutton, and Lewis Sutton, Jr., and that afterwards the last named died intestate, unmarried, and without descendants, leaving his mother, Helen M. Marshall, and his sisters and brother, Cora D. Spencer, Elizabeth E. Davis, Ida Krickbaum, and George D. Sutton, as his heirs. The persons named are stated to be the only heirs at law of Mary Jane and Moses Hubbard. All of them are plaintiffs in the suit except Cora D. Spencer, who is made a defendant.

The bill alleges, further: That Moses and Mary Jane Hubbard accumulated community property, real and personal (specified in the bill), of the value of about $100,000 situate in Collin and Denton counties, all of which descended to the said Mary Jane as survivor of the community.

That in the year 1897 Moses Hubbard, being then "subject to a mania or unsound idea relative to the memory of his deceased daughter," attempted a disposal of his wife's community property by a purported will (executed by his wife also and in form a joint and several will), by the terms of which it was attempted to establish in the community property after it should become separate property of Mary Jane Hubbard a certain charitable trust in perpetuity, in the name of the deceased daughter. Plaintiffs allege that this trust was void, for various reasons specified, and that if the instrument had any effect in law it created a naked trust whereof the said Mary Jane Hubbard was sole beneficiary. That afterwards and in the month of January, 1913, the defendant English, joining with himself the defendants Finley, Robinson, and Foster, acting as trustees of the charity, filed a petition in the district court of Collin county against *Mary Jane Hubbard and another, wherein it was alleged that the will of 1897 was a joint will, constituting an agreement binding upon both Moses and Mary Jane Hubbard, under which she received rights, emoluments, and privileges which she would not have had otherwise, and that she had accepted the will, and at all times since its probating had accepted and exercised those rights, privileges, and emoluments, by reason whereof the will was irrevocable by her, and that a trust was thereby created in behalf of the said English, Finley, Robinson, and Foster; that said petition prayed for a citation thereon and judgment that a trust be declared in favor of the petitioners; but plaintiffs herein allege that no citation was issued, that Mary Jane Hubbard had no notice of the proceedings, and that she was deceived into signing a purported waiver and disclaimer which was without consideration and void; that the judgment was never given by any judge or person possessing judicial power within the state of Texas; and that the petition was in effect an application for the construction of the paper as the will of Moses Hubbard, of which the district court had not jurisdiction in the first instance, and for which construction there was then and yet pending in the county probate court of Collin county a petition signed by the said purported trustees whereupon the judgment of the said county court would be binding upon them without the assumption of power in the district court of said county.

That in addition to the community property, Mary Jane Hubbard accumulated real and personal property amounting in value to about $18,000 and that in her last sickness, while she was clouded in her intellect and was not of sound or disposing mind or memory, she was unduly influenced by the defendant English to execute an instrument in the form of a will purporting to dispose of her accumulations and separate property, by the 12th paragraph of which she gave and *203 bequeathed all the *residue of her property to her niece Cora D. Spencer; that this will "ought to be annulled and set aside and held for naught; nevertheless, these plaintiffs do not desire to interfere with the distribution made by the defendant, Clayton, purporting to act as executor of said will, but they bring this bill for the purpose of having it annulled to the extent only that the twelfth

paragraph * * * be decreed * * * not to be a testamentary disposition of that portion of her separate estate which had once been community estate of the said Moses Hubbard and Mary Jane Hubbard"; and that the community property should be decreed to pass to the plaintiffs pursuant to the statutes of Texas as estate not devised or bequeathed, and should be divided among the plaintiffs in certain proportions specified.

The bill avers that the defendant English has usurped and taken possession of seven tracts of real estate and certain moneys, notes, and credits particularly described, and has rented the lands and converted to his own use their annual profit.

The prayer is that the defendants English, Finley, Robinson, and Foster account concerning the rents, issues, profits and income of said real estate and personal property; that the joint will of 1897 and every claim, judgment, or right based thereon be set aside and held for naught; that the supposed will signed by Mary Jane Hubbard, dated in 1914, and the twelfth clause thereof be canceled and set aside and annulled; and that the property described in the bill and the earnings and rentals thereof be decreed to be the property of the plaintiffs as heirs at law of Mary Jane Hubbard, deceased, and be partitioned between them. There is also a prayer for general relief.

The objects of the suit, in their logical order, appear to be as follows: (1) To treat *204 the joint will of 1897 as inefficacious to dispose of the community property, either because this became the separate property of Mary Jane Hubbard at her husband's death, or because of Moses Hubbard's mental incapacity or the illegality of the terms of the trust; (2) to set aside a judgment said to have been obtained in the Collin county district court by defendant English and others, devisees under the joint will, establishing their title to the community property as against Mary Jane Hubbard; (3) to have her will annulled at least to the extent that the twelfth paragraph, which gives and bequeaths all the residue of her property to Cora D. Spencer, be decreed not to be a testamentary disposition of that portion of the estate of testatrix which had been community property; and (4) that the community property, having thus been shown to have been separate estate of Mary Jane Hubbard and not to have been devised by her, be decreed to have passed to the plaintiffs as her heirs at law and be partitioned between them.

[1] Upon this statement, it will be apparent that the court below erred in holding, as it did, that the defendant Cora D. Spencer should be treated as one of the plaintiffs and aligned with them for the purpose of determining the question of diversity of citizenship. Provided plaintiffs attained their first three objects, her interest would be the same as theirs with respect to the prayer for partition; but before this result could be reached plaintiffs must prevail as to their third object, and with respect to this her interest was altogether adverse to theirs. Therefore she was properly made a party defendant, that being her attitude towards the actual and substantial controversy. See Removal Cases, 100 U. S. 457, 468, 25 L. Ed. 593; Pacific R. R. v. Ketchum, 101 U. S. 289, 298, 25 L. Ed. 932; Barney v. Latham, 103 U. S. 205, 211, 26 L. Ed. 514; Harter v. Kernochan, 103 U. S. 562, 566, 26 L. Ed. 411; Helm v. Zarecor, 222 U. S. 32, 36, 32 Sup. Ct. 10, 56 L. Ed. 77.

This brings us to the question whether the subject matter of the suit is within the jurisdiction of a court of the United States. *205

*[2-5] By a series of decisions in this court it has been established that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents in rem, matters of this character are not within the ordinary equity jurisdiction of the federal courts; that as the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States; that where a state, by statute or custom, gives to parties interested the right to bring an action or suit inter partes, either at law or in equity, to annul a will or to set aside the probate, the courts of the United States, where diversity of citizenship and a sufficient amount in controversy appear, can enforce the same remedy, but that this relates only to independent suits, and not to procedure merely incidental or ancillary to the probate; and, further, that questions relating to the interests of heirs, devisees, or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts where diversity of citizenship exists and the requisite amount is in controversy. Broderick's Will, 21 Wall. 503, 509, 512, 22 L. Ed. 599; Ellis v. Davis, 109 U. S. 485, 494, 3 Sup. Ct. 327, 27 L. Ed. 1003, et seq.; Farrell v. O'Brien, 199 U. S. 89, 110, 25 Sup. Ct. 727, 50 L. Ed. 101; Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33, 43, 30 Sup. Ct. 10, 54 L. Ed. 80.

[6] It is the contention of appellants that the United States District Court had original jurisdiction of this cause (there being diversity of citizenship and a sufficient amount in controversy) because jurisdiction over a suit in equity of the same character would have existed in the county or district courts of the state.

In order to test this, we must consider the nature and extent of the jurisdiction of the courts referred to, as established by the Constitution of Texas and statutes passed in *206 pursuance thereof (Vernon's Sayles' Tex. Civ. Stats. 1914), the material provisions of which

are as follows: Under Const. art. 5, § 6, and Stats. arts. 3206, 1763, 1764, 1766, and 1771, the county court has the general jurisdiction of a probate court, with power to probate wills, grant letters testamentary or of administration, settle accounts of executors and administrators, etc.; exclusive original jurisdiction in civil cases when the matter in controversy exceeds $200 and does not exceed $500, and concurrent jurisdiction with the district court when the matter in controversy exceeds $500 and does not exceed $1,000, but no jurisdiction of suits for the recovery of land or for the enforcement of liens upon land; and general authority to hear and determine any case, either of law or equity, but subject to certain limitations including those just mentioned. Under Const. art. 5, § 8, and Stats. arts. 1705, 1706, 1712, and 3207, the district court has "appellate jurisdiction and general control in probate matters over the county court established in each county, for the probating of wills, granting letters testamentary or of administration, settling the accounts of executors and administrators," etc.; also "original jurisdiction and general control over executors and administrators under such regulations as may be prescribed by law"; original jurisdiction of all suits for the trial of title to land and for the enforcement of liens thereon, and of all suits, without regard to any distinction between law and equity, when the matter in controversy exceeds $500; and, subject to limitations not now pertinent, general jurisdiction over any cause cognizable by courts either of law or equity.

It will be seen that the contention must be overruled at once, so far as concerns the equitable jurisdiction of the county court, because in the case before us the title to land is involved and the matter in controversy exceeds $1,000. The jurisdiction of the district court is not thus limited, and, under local decisions (Japhet v. Pullen, 63 Tex. Civ. App. 157, 133 S. W. 441, 445, and cases cited), it may be assumed that an independent suit in equity could be entertained by that court, and therefore—under the decisions of this court to which reference has been made—might be brought in the United States District Court, for the purpose of construing the joint will of Moses and Mary Jane Hubbard as inefficacious to dispose of the community property, and to set aside, for fraud or on other grounds, the judgment recovered by the defendants English and others against Mary Jane Hubbard establishing their title to that property; and that, if the title of complainants as heirs at law of Mary Jane Hubbard could thus be shown, the jurisdiction to partition the property would follow as of course. But, as already pointed out, even could complainants succeed in showing that Mary Jane Hubbard at the time of her death was entitled to the community property, her will giving all the residue of her property to Cora D. Spencer still stands in the way of their succeeding to it as heirs at law, and hence their prayer to have that will annulled with respect to the residuary clause is essential to their right to any relief in the suit.

But it is established by repeated decisions of the Supreme Court of Texas that under the present Constitution the district courts have no jurisdiction to annul by an original proceeding the action of a county court in probating a will, their jurisdiction in the premises being confined to a review by appeal or certiorari, which are in effect but a continuation of the probate proceedings. It is further held that under a statutory provision (article 5699) reading, "Any person interested in any will which shall have been probated under the laws of this state may institute suit in the proper court to contest the validity thereof, within four years after such will shall have been admitted to probate, and not afterward," such a suit must be instituted in the court in which the will was admitted to probate, that is to say, in the county court and that it calls for an exercise of original probate jurisdiction. Franks v. Chapman, 60 Tex. 46; Franks v. Chapman, 61 Tex. 576, 579, 582, 583; Heath v. Layne, 62 Tex. 686; Fisher v. Wood, 65 Tex. 199, 204. And see Dew v. Dew, 23 Tex. Civ. App. 676, 57 S. W. 926; Hilgers v. Hilgers, 159 S. W. 851.

The present suit being, in an essential feature, a suit to annul the will of Mary Jane Hubbard, and a proceeding of this character being by the laws of Texas merely supplemental to the proceedings for probate of the will and cognizable only by the probate court, it follows from what we have said that the controversy is not within the jurisdiction of the courts of the United States.

Decree affirmed.

(246 U. S. 8)

BOSTON STORE OF CHICAGO v. AMERICAN GRAPHOPHONE CO. et al.

(Argued Jan. 16, 1918. Decided March 4, 1918.)

No. 363.

1. COURTS ⊜384 — CIRCUIT COURT OF APPEALS—CERTIFIED QUESTIONS.

Though a certificate from Circuit Court of Appeals was deficient in specification and somewhat wanting in precision, the court considers it its duty to answer the questions, where the matters not specified were not in dispute and the want of precision not so fundamental as to mislead or confuse.

2. PATENTS ⊜191—RIGHTS OF PATENTEES—CONTRACTS FIXING PRICES.

Contracts between a manufacturer of graphophones, etc., as assignee of patents, or its agents, and all dealers permitted to sell them throughout the country, which fixed the prices at which the articles might be resold, and covenanting that underselling is an infringement of the patents, though speaking of the contract as

a license, is not justified under the guise of the monopoly granted by the patent law.

3. MONOPOLIES ⊂=17(1)—CONTRACTS FIXING PRICES.
Such contract is invalid under the general law.

4. COURTS ⊂=290—UNITED STATES DISTRICT COURTS—JURISDICTION.
Assuming that a bill to enforce a price maintenance contract asserted rights under the patent law, a federal District Court had jurisdiction to determine whether the suit arose under such law, where the question had not then been conclusively settled in the negative.

Mr. Justice Holmes and Mr. Justice Van Devanter, dissenting.

On a Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

Bill by the American Graphophone Company and the Columbia Graphophone Company against the Boston Store of Chicago. From an order granting an injunction (225 Fed. 785), the defendant appealed to the Circuit Court of Appeals for the Seventh Circuit, which certified four questions to the Supreme Court. Questions answered.

Messrs. Walter Bachrach, Hamilton Moses, and Joseph W. Moses, all of Chicago, Ill., for Boston Store of Chicago.

Messrs. Elisha K. Camp, of New York City, Daniel N. Kirby, of St. Louis, Mo., James M. Beck, of New York City, and Taylor E. Brown and Clarence E. Mehlhope, both of Chicago, Ill., for American Graphophone Co.

*315 *Mr. Chief Justice WHITE delivered the opinion of the Court.

[1] The court below, before whom this case is pending, desiring instruction to the end that the duty of deciding the cause may be performed, has certified certain facts and propounded questions for solution arising therefrom. The certificate as to some matters of procedure is deficient in specification and looked at from the point of view of the questions which it asks is somewhat wanting in precision. As, however, the matters not specified are not in dispute and the want of precision referred to is not so fundamental as to mislead or confuse, we are of opinion the duty rests upon us to answer the questions and we come to discharge it, making the statements, however, which we have made as an admonition concerning *316 the duty not to be negligent and ambiguous but to be careful and *precise in preparing certificates as the basis for questions propounded to obtain our instruction.

Without in any degree changing, we rearrange and somewhat condense the case as stated in the certificate. The American Graphophone Company, a West Virginia corporation, as assignee of certain letters patent of the United States was the sole manufacturer of Columbia graphophones, grafonolas, records and blanks, and the Columbia Graphophone Company, also a West Virginia corporation, was the general agent of the American Company for the purpose of marketing the devices above stated.

"The American Company, acting through its agent, the Columbia Company, employs in the marketing of its phonographic records and its other products a system of price maintenance, by which system it has been its uniform practice to cause its agent, the Columbia Company, to enter into * * * contracts * * * in the name of the Columbia Company, with dealers in phonographic records, located in the United States and its territorial possessions, to whom the American Company delivers its product, through the Columbia Company, by which it is provided, in part, that in consideration of the prices at which prescribed quantities of the various said products of the American Company are agreed to be delivered to such dealer, the dealer, in turn, obligates himself or itself in selling such products to adhere strictly to and to be bound by and not to depart from the official list prices promulgated from time to time by the Columbia Company for said products, and further expressly covenants not in any way to dispose of any such products at less than such list prices. The American Company fixes and prescribes the prices of its said products, and said contracts when entered into cover all such products of the American Company which may thereafter from time to time be acquired by such dealers *317 from the Columbia Company, without *any new express price restriction contract being entered into at the time when each order for goods subsequent to the entering into of said contract is placed or filled by said dealers.

"In pursuance of said price maintenance system the Columbia Company, acting under said instructions and as the agent of the American Company, entered into [such] contracts with over five thousand dealers in phonographic records located in the United States and its territorial possessions."

The Boston Store, an Illinois corporation established at Chicago, dealt with the American Company through its agent, the Columbia Company, conformably to the system of business which was carried out as above stated. The contract evidencing these dealings, which was typical of those by which the business system was carried on was entered into in October, 1912, and contained the following clauses:

"No Jobbing Privileges Extended under This Contract.

"*Notice to Purchasers of 'Columbia' Graphophones, Grafonolas, Records, and Blanks.*

"All 'Columbia' Graphophones, Grafonolas, Records and blanks are manufactured by the American Graphophone Company under certain patents and licensed and sold through its sole sales agent the Columbia Phonograph Company (General), subject to conditions and restrictions as to the persons to whom and the price at which they may be resold by any person into whose hands they come. Any violation of such conditions or restrictions make the seller or user liable as an infringer of said patents.

"After reading the foregoing notice and in consideration of current dealers' discounts given to me/us by the Columbia Phonograph Company (General) I/we hereby *agree to take any *318 Columbia product received by me/us from said company, either directly or through any intermediary, under the conditions and restrictions referred to in said notice and to adhere strictly and be bound by the official list prices established from time to time by said company and that I/we will neither give away, sell, offer for

sale, nor in any way dispose of such goods, either directly or through any intermediary, at less than such list prices, nor induce the sale of such goods by giving away or reducing the price of other goods, nor sell or otherwise dispose of any of said goods, directly or indirectly, outside of the United States, and I/we understand that a breach of this agreement will amount to an infringement of said patents and subject me/us to a suit and damages therefor. I/We admit the validity of all patents under which said product is manufactured and hereby covenant and agree not to question or contest the same in any manner whatsoever. I/We further understand and agree that this license extends the right to market said Columbia product from the below mentioned address only, and that a separate contract is required to market said product from a branch store or stores, or through an agent or agencies at any other point.

"I/We acknowledge the receipt of a duplicate of the foregoing notice and contract and that no representations or guarantees have been made by the salesman on behalf of said company which are not herein expressed. I/We also acknowledge receipt of the official list prices on all Columbia product in force at the date hereof."

This contract contained a note specifying large rates of discount from the list prices for purchases made under its terms, and contained a reference to other lists of net prices covering particular transactions and to the "current Columbia catalogues for list prices on machines, records and supplies."

220 Under this contract at the time and also subsequent to its making the Columbia Company delivered to the Boston Store at Chicago a number of graphophones and appliances made by the American Company at the sums fixed in the contract as above stated. This suit arose from a disregard by the Boston Store of the rule as to maintenance of price fixed in its contract, that is, from selling the articles at a less price than that which the contract stipulated should be maintained and the bill was filed against the Boston Store by the American and Columbia Companies to enjoin the alleged violations of the contract. While the certificate is silent as to the averments of the bill, in the argument it is stated and not disputed that it was based on a right to make the contract for the maintenance of prices in and by virtue of the patent laws of the United States and the resulting right under such laws to enforce the agreement as to price maintenance as part of the remedy given by the patent law to protect the patent rights of the American Company. The court enjoined the Boston Store as prayed from disregarding the terms of the contract as to price maintenance. (D. C.) 225 Fed. 785. On appeal the court below made the certificate previously stated and propounded four questions for our decision.

In a general sense the questions involve determining whether the right to make the price maintenance stipulation in the contract stated and the right to enforce it were secured by the patent law, and if not, whether it was valid under the general law, and was within the jurisdiction of the court on the one hand because of its authority to entertain suits under the patent law or its power on the other to exercise jurisdiction because of diversity of citizenship. We at once say, despite insistence in the argument to the contrary that we are of opinion that there is no room for controversy concerning the subjects to which the questions relate, as every doctrine which is required to be decided in answering the questions is now *no longer open to dispute as the result of prior decisions of this court, some of which were announced subsequent to the making of the certificate in this case. Under this situation our duty is limited to stating the results of the previous cases, to briefly noticing the contentions made in argument concerning the nonapplicability of those results to the case in hand, and then to applying to the questions the indisputable principles controlling the subjects which the questions concern. As, however, the discharge of these duties as to each and all of the questions will require a consideration of the cases to be applied, it must result that if the questions be primarily considered separately, reiteration concerning the decided cases will inevitably take place. To avoid this redundancy of statement we therefore at once as briefly as we may, state the adjudged cases which are applicable in order that in the light afforded by one statement concerning them the questions may be considered and answered.

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In Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, it was settled that the exclusive right to vend a copyrighted book given by the copyright law did not give to the owner of the copyright and book the right to sell for a price satisfactory to him and by a notice placed in the book fix a price below which it should not be sold by all those who might subsequently acquire it; and that as such a right was not secured by the copyright law or the remedies which it afforded, a court of the United States had no jurisdiction to afford relief on the contrary theory.

In Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, it was decided that under the general law the owner of movables (in that case, proprietary medicines compounded by a secret formula) could not sell the movables and lawfully by contract fix a price at which the product should afterwards be sold, because to do so would be at one and the same time to sell and retain, to part with and yet to hold, to project the will of the seller so as to cause* it to control the movable parted with* when it was not subject to his will because owned by another, and thus to make the will of the seller unwarrantedly take the place of the law of the land as to such movables. It was decided that the power to make the limitation as to price for the future could not be exerted consistently with the prohibitions against restraint of trade and monopoly contained in the Anti-Trust Law.

In Henry v. A. B. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, it was held that the owner of a patented machine (a rotary mimeograph) and the patents which covered it had in selling the same a right to contract with the purchaser not to use materials essential for working it unless bought from the seller of the machine and to qualify the condition as a license of the use; that this right included the further right by notice on the machine of the contract to affect a third person who might deal with the purchaser with knowledge of the contract and notice so as to make him liable as a contributory infringer if he dealt with the buyer in violation of the terms of the notice. It was further decided that the right to make such contract arose from the right conferred by the patent law and that jurisdiction to enforce it as against the contributory infringer existed under that law. At the time this case was decided there was one vacancy on the bench and one member of the court was absent. There was division, four members concurring in the ruling which the court made and three dissenting.

Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, again involved the right of a seller to impose a restraint on the price of future sales. It arose on a certificate from the Court of Appeals of the District of Columbia asking whether the right asserted was within the monopoly conferred by the patent law and whether therefore the duty to enforce it under that law obtained and the
*243 power to give the remedy sought as a means of preventing an infringement of the *patent existed. Pointing out that although the restriction on future price which the certificate stated was indisputably void and unenforceable under the general law as the result of the ruling in the Miles Medical Case, supra, it was held that that ruling was not necessarily apposite because the certificate and the question presented restricted the case to determining whether the right to limit the price existed because within the monopoly granted by the patent law and whether the relief asked was within the remedy which that law afforded. Considering the case in that limited aspect, it was decided: (a) That the exclusive right to vend given by the patent law had the same significance which had been affixed to that word in the copyright law in the Bobbs-Merrill Case, supra. (b) That hence when the holder of a patented article had sold it, the article so sold passed out of the monopoly and the right to make future sales by one who bought it was not embraced by the patent law and consequently that law could not be extended so as to perpetuate its control beyond the limits to which by the operation of law it reached. In other words, the decision was that a patentee could not use and exhaust the right to sell as to which a monopoly was given him by the patent law and yet by conditions and stipulations continue that law in effect so as to make it govern things which by his voluntary act were beyond its scope. And (c) that as a result, where an article had been sold and passed beyond the monopoly given by the patent law, remedies on the theory of infringement were not applicable to acts done which could not have that character. It was hence answered that the controversy and the remedies invoked were not within the patent law. As the case dealt with the right to vend under the patent law, the court reserved any express statement concerning the scope of the right to use conferred by that law.

In Straus v. Victor Talking Machine Co., 243 U. S. 490, *37 Sup. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E, 1196, the right to fix a permanent marketing price at which phonographs should be resold after they had been sold by the patentee was considered. Basing its action upon the substance of things, and disregarding mere forms of expression as to license, etc., the court held that the contract was obviously in substance like the one considered in the Miles Medical Co. Case and not different from the one which had come under review in Bauer v. O'Donnell. Thus brushing away disguises resulting from forms of expression in the contract and considering it in the light of the patent law, it was held that the attempt to regulate the future price or the future marketing of the patented article was not within the monopoly granted by the patent law in accordance with the rule laid down in Bauer v. O'Donnell.

The general doctrines, although presented in a different aspect, were considered in Motion Picture Patents Co. v. Universal Film Manufacturing Co., 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187. The scope of the case will be at once made manifest by the two questions which were certified for solution:

"First. May a patentee or his assignee license another to manufacture and sell a patented machine and by a mere notice attached to it limit its use by the purchaser or by the purchaser's lessee, to films which are no part of the patented machine, and which are not patented? Second. May the assignee of a patent, which has licensed another to make and sell the machine covered by it, by a mere notice attached to such machine, limit the use of it by the purchaser or by the purchaser's lessee to terms not stated in the notice but which are to be fixed, after sale, by such assignee in its discretion?"

The case therefore directly involved the general question of the power of the patentee to sell and yet under the guise of license or otherwise to put restrictions which in substance were repugnant to the rights which necessarily arose from the sale which was made. In other words, it required once again
*244 a *consideration of the doctrine which had been previously announced in Henry v. Dick and of the significance of the monopoly of the right to use conferred by the patent law which had been reserved in Bauer v. O'Donnell. Comprehensively reviewing the subject,

it was decided that the rulings in Bauer v. O'Donnell and Straus v. Victor Talking Machine Co. conflicted with the doctrine announced and the rights sustained in Henry v. Dick, and that case was consequently overruled. Reiterating the ruling in the two last cases it was again decided that as by virtue of the patent law one who had sold a patented machine and received the price and had thus placed the machine so sold beyond the confines of the patent law, could not by qualifying restrictions as to use keep under the patent monopoly a subject to which the monopoly no longer applied.

[2, 3] Applying the cases thus reviewed there can be no doubt that the alleged price-fixing contract disclosed in the certificate was contrary to the general law and void. There can be equally no doubt that the power to make it in derogation of the general law was not within the monopoly conferred by the patent law and that the attempt to enforce its apparent obligations under the guise of a patent infringement was not embraced within the remedies given for the protection of the rights which the patent law conferred.

Thus concluding, it becomes we think unnecessary to do more than say that we are of opinion that the attempt in argument to distinguish the cases by the assumption that they rested upon a mere question of the form of notice on the patented article or the right to contract solely by reference to such notice is devoid of merit since the argument disregards the fundamental ground upon which, as we have seen, the decided cases must rest. Moreover, so far as the argument proceeds upon the assumption of the grave disaster *23 which must come to the holders of *patent rights and articles made under them from the future application of the doctrine which the cases establish, it must be apparent that if the forebodings are real the remedy for them is to be found not in an attempt judicially to correct doctrines which by reiterated decisions have become conclusively fixed, but in invoking the curative power of legislation. In addition, through perhaps an abundance of precaution we direct attention to the fact that nothing in the decided cases to which we have referred, having regard either to the application of the general law or of the patent law, deprives an inventor of any right coming within the patent monopoly, since the cases alone concerned whether the monopoly of the patent law can be extended beyond the scope of that law or, in other words, applied to articles after they have gone beyond its reach. The proposition so earnestly insisted upon that while this may be true, it does not fairly consider the reflex detriment to come to the rights of property of the inventor within the patent law as a result of not recognizing the right to continue to apply the patent law as to objects which have passed beyond its scope, is obviously not one susceptible of judicial cognizance. This must be since whether for the preservation of the rights which are within a law, its provisions should be extended to embrace things which it does not include typically illustrates that which is exclusive of judicial power and within the scope of legislative action.

It remains, then, only to apply the principles established by the authorities which we have stated to the answers to the questions.

[4] The first question is:

"Does jurisdiction attach under the patent laws of the United States?"

As we assume under the admissions of counsel that the bill asserted the existence of rights under the patent law, and as at the time it was filed the want of merit in such assertion had not been so conclusively settled as *24 to cause it to be frivolous, we *are of opinion that the court had jurisdiction to pass upon the case as made by the bill, that is, to determine whether or not the suit arose under the patent law and hence as thus understood the question should be answered, Yes.

Considering the second and third questions as virtually involving one consideration we state them together.

"2. If so, do the recited facts disclose that some right or privilege granted by the patent laws has been violated?

"3. Can a patentee, in connection with the act of delivering his patented article to another for a gross consideration then received, lawfully reserve by contract a part of his monopoly right to sell?"

Correcting their ambiguity of expression by treating the questions, as they must be treated, as resting upon and deducible from the facts stated in the certificate and therefore as embracing inquiries concerning the contract of sale containing the price maintenance stipulation, it follows from what we have said that the questions must be answered in the negative.

The final question is this:

"4. If jurisdiction attaches solely by reason of diversity of citizenship, do the recited facts constitute a cause of action?"

Upon the hypothesis which this question assumes there also can be no doubt that it must be answered in the negative.

The first question will be certified as answered, Yes; and the second, third and fourth as answered, No.

And it is so ordered.

Mr. Justice HOLMES and Mr. Justice VAN DEVANTER are of opinion that each of the questions should be answered in the affirmative.

Mr. Justice BRANDEIS, concurring.

Whether a producer of goods should be permitted to fix by contract, express or implied, the price at which the purchaser may resell them, and if so, under what conditions, is an economic question. To decide it wisely it is *24 *necessary to consider the relevant facts, industrial and commercial, rather than established legal principles. On that question I have expressed elsewhere views which differ

apparently from those entertained by a majority of my Brethren. I concur, however, in the answers given herein to all the questions certified; because I consider that the series of cases referred to in the opinion settles the law for this court. If the rule so declared is believed to be harmful in its operation, the remedy may be found, as it has been sought, through application to the Congress or relief may possibly be given by the Federal Trade Commission which has also been applied to.

(246 U. S. 69)

KRUEGER v. UNITED STATES.

(Submitted Dec. 20, 1917. Decided March 4, 1918.)

No. 111.

1. PUBLIC LANDS ⟸79—RAILROAD GRANTS—PREVIOUS PRE-EMPTION.

Where, to aid the construction of a proposed railroad, Congress, by Act July 1, 1862, c. 120, 12 Stat. 489, granted the company certain public lands, a parcel included within the grant did not pass where, before the company's successor located its right of way, so as to identify the lands, an individual filed a valid preemption declaratory statement, as authorized by Act Sept. 4, 1841, c. 16, 5 Stat. 453.

2. PUBLIC LANDS ⟸89(1) — RAILROAD GRANTS—RIGHT TO ACQUIRE.

Where land included in a railroad grant did not pass to the railroad company because, before it located its right of way, so as to identify the lands granted, an individual filed a valid pre-emption declaration, one who thereafter for a valuable consideration purchased the land from the railroad company, the first pre-emption filing having expired, is entitled under Act March 3, 1887, c. 376, § 5, 24 Stat. 556 (Comp. St. 1916, § 4899), and the rulings of the land department thereunder, to purchase the lands and acquire full title thereto, upon making payments to the United States for the lands at the ordinary government price for like lands.

3. PUBLIC LANDS ⟸120—SUIT FOR CANCELLATION OF PATENT—FRAUDULENT ENTRY.

A tract of land was patented under an entry which was fraudulent, in that it was supported by false affidavits that the land was unoccupied, unimproved, and not claimed adversely, whereas in fact it was then, and had been for many years, occupied under a conveyance from a railroad company as land passing under a railroad grant and was highly improved. The affidavits that the land was unoccupied were required by the rules of the Land Department, and the acceptance of the entry was based thereon. While the land did not pass under the railroad grant, because of a then subsisting valid pre-emption thereon, subsequently abandoned, the occupant under the deed from the railroad company was given by Act March 3, 1887, c. 376, § 5, a preferred right to purchase the same at the government price; but he was not notified and given an opportunity to exercise such right on the holding that the land did not pass under the grant, as required by the rules of the department, because of the false affidavits that there was no adverse claim. *Held*, that defendant, who purchased the land under the entry, was not protected as a bona fide purchaser, but was charged by the adverse occupancy, and the recorded conveyances under which it was held, with notice of the fraudulent character of the entry, and that the United States was entitled to a cancellation of the patent.

4. PUBLIC LANDS ⟸120—CANCELLATION OF PATENT—BONA FIDE PURCHASER—DEFENSE.

The defense of bona fide purchaser from a patentee is an affirmative one, and the burden of proof is upon the defendant to establish it, in order to defeat the right of the government to have canceled a patent fraudulently obtained.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States against Emma T. Krueger. A decree for defendant was reversed on complainant's appeal (228 Fed. 97, 142 C. C. A. 503), and defendant appeals. Decree affirmed.

Mr. William V. Hodges, of Denver, Colo., for appellant.

Mr. Assistant Attorney General Kearful, for the United States.

*Mr. Justice DAY delivered the opinion of the Court.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Eighth Circuit, reversing a decree of the District Court of Colorado, which dismissed a bill of complaint filed by the United States against Emma T. Krueger for the cancellation of a certain patent upon public lands in Colorado.

The government alleged in its bill that the land eighty acres, patented to William E. Moses June 6, 1910, upon a soldiers' additional homestead entry (U. S. Rev. Stats. §§ 2306, 2307 [Comp. St. 1916, §§ 4594, 4602]; Act Aug. 18, 1894, c. 301, § 1, 28 Stat. 397 [Comp. St. 1916, § 4601]), had been secured by means of false affidavits, one by the entryman, Moses, who had made oath that the land was unoccupied, unimproved, and unappropriated by any person other than himself, and the other by John A. McIntyre, that the land was not in any manner occupied adversely to the selector; whereas in truth and in fact the land had been for several years previously in the open and notorious possession of one P. C. Benson under title deraigned from the Denver Pacific Railway & Telegraph Company under a land grant of Congress made July 1, 1862. It was also charged that the fraud was perpetrated by agreement between Moses, the entryman, and one C. M. Krueger, the husband of the defendant, Emma T. Krueger. It is charged in the bill that Mrs. Krueger took the conveyance through Moses and her husband with notice of the fraud and without consideration.

Upon issue joined and the allegation of the answer that the defendant was a purchaser in good faith without notice of any fraud, the District Court found that the patent had been obtained by fraud, but that Mrs. Krueger was a bona fide purchaser without notice, and as such entitled to hold the land. The Court of Appeals took the same view of the evidence as to the fraudulent manner in which the land was acquired, and reached the conclusion that the patent should be set

aside for fraud committed against the United States unless the defendant had shown that she was an innocent purchaser without notice.

With some hesitation the Circuit Court of Appeals reached the conclusion that Mrs. Krueger at the time she purchased the land must be held to have had constructive notice of facts which, if investigated, would have led her to the knowledge of the fraud, and that she was not entitled as a bona fide purchaser to hold the land as against the government. 228 Fed. 97, 142 C. C. A. 503.

[1] It was stipulated by the parties for the purposes of the trial as follows:

"By Act of Congress of July 1, 1862 (12 Stat. 489), Congress granted to the Leavenworth, Pawnee & Western Railroad Company, a right of way over certain public lands, and also certain public lands to aid in the construction of said railroad. That under and by virtue of a certain Act of Congress of March 3, 1869, the Denver Pacific Railway & Telegraph Company became the owner of and entitled to all the rights and benefits so granted and conferred by said Act of Congress of July 1, 1862, and said company selected and definitely located its said right of way, on August 20, 1869, and so selected and definitely located and fixed its said right of way as to bring the lands involved in this suit within the primary limits of said grant. On April 13, 1866, Robert W. Woodward filed a certain valid pre-emption declaratory statement, numbered 2094, as provided for in the Act of Congress dated September 4, 1841 (5 Stat. 455), for the lands hereinabove described (unoffered lands), upon which final proof and payment was never made, that said declaratory statement was a valid and subsisting claim on August 20, 1869, and all rights under and by virtue of said pre-emption filing of said Woodward expired by operation of law on July 14, 1872, up to which date said filing was a valid and subsisting filing."

*75 * The land was part of one of the odd-numbered sections named in the land grant and was opposite the constructed part of the road. April 5, 1871, the Denver Pacific Railway and Telegraph Company sold and conveyed the land to one James Langston. Thence by mesne conveyances the land passed to Perry C. Benson, April 6, 1904.

The pendency of Woodward's filing prevented the title from vesting in the railroad company, for it caused the land to be excepted from the grant. Kansas Pacific Ry. Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122.

A copy of the abstract of title showing the chain of title from the Denver Pacific Railway & Telegraph Company to Perry C. Benson was stipulated into the record; the abstract also showing the chain of title to and including the purchase by Mrs. Krueger of one half interest in the land from C. M. Krueger.

[2] Benson paid $1,375 for the land, and both courts found that he was and continued to be in possession of the land with the title of record as stated, and that Mrs. Krueger would be held to have knowledge of his rights, certainly as between herself and Benson. We have no doubt from the facts found that Benson had such possession and occupation of the premises as gave at least constructive notice of the nature and extent of his title. Under the Act of March 3, 1887, 24 Stat. 556, c. 376, § 5 (Comp. St. 1916, § 4899) and the regulations of the Land Department he would have been entitled upon hearing in the department to purchase the lands and acquire full title thereto upon complying with the statute. Section 5 of the act, and the regulations of the Land Department are given in the margin.[1]

*76 [3] *The turning question in the case is: Was Mrs. Krueger a bona fide purchaser in such sense that she can hold the land notwithstanding the fraudulent manner in which it was acquired by the entryman Moses for the benefit of Krueger? That Krueger had actual knowledge of Benson's claim to the premises admits of no doubt. As early as August 3, 1907, Krueger wrote to Benson:

"Upon a search of the records, I find that you are the present owner of the W/2NE/4, Sec. 17, Tp. 5 N, R 69 West of the 6th P. M. (the tract in controversy), and that the title thereto is imperfect. If you are sufficiently interested, I would be pleased to correspond with you relative to the matter and assist you in curing the defect.

"My charges will be reasonable."

Krueger had been chief clerk of the United States Land Office at Denver until February 12, 1907, and thereafter practiced as an attorney in land and mining matters at Denver. Moses procured the soldier's additional homestead right upon which the entry was made, and made the entry at the request of Krueger who had bought the soldier's additional right from Moses for $780. Moses deeded the land to Krueger, and never claimed any interest in it. The Land Department's *77 regulations required *an affidavit that the * land located or selected was not in any manner occupied adversely to the locator or selector. Moses obtained a receiver's receipt upon April 8, 1910, and conveyed by deed to Krueger April 15, 1910. On April 22, 1910, Krueger conveyed to Mrs. Krueger and Mrs.

[1] Sec. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns.

Regulations promulgated by the Land Department on February 13, 1889, provided with reference to section 5 (8 Land Dec. 348, 352):

No entry will be allowed under this section until it shall have been finally determined by this department that the land was excepted from the grant.

And again on August 30, 1890 (11 Land Dec. 229):

If the applicant is not the original purchaser from the company it is immaterial what the qualifications of his immediate grantor the intervening purchasers may have been.

McIntyre, the wife of one who had made a corroborating affidavit also containing the statement that the land was not in any manner occupied adversely to the selector. The patent was issued to Moses June 6, 1910, and on April 22, 1913, Mrs. McIntyre conveyed her one-half interest in the premises to Mrs. Krueger. Mrs. Krueger testified that she paid her husband $400 in cash for the undivided one-half interest, and that she paid Mrs. McIntyre $1,500 by check for her one-half interest. She testifies that when she bought from her husband after final receipt, and before the patent issued, she had not seen the land and knew nothing about it, and did not in fact see it until March 27, 1913; that she knew nothing about the statements made in the affidavit signed by Moses or the affidavit of McIntyre; that before she purchased the interest of Mrs. McIntyre she had been upon the land and found there a Mrs. Benson, who said that her father-in law was P. C. Benson, and that she and her husband were farming the land.

But we need not dwell upon any inferences which may arise from the relationship between Mrs. Krueger and her husband and her actual knowledge of Benson's possession, for we think the Circuit Court of Appeals was right in reaching the conclusion that Mrs. Krueger had at least constructive notice of the manner in which the land had been obtained from the government. If the affidavit of Moses had truthfully stated the possession of Benson, Benson would have had an opportunity to claim his rights under the Act of March 3, 1887, and the regulations of the Land Department. From the receiver's receipt, which was the evidence of title of record when Mrs. Krueger obtained the deed from her husband, she was bound to know that the land had been obtained upon an affidavit of Moses asserting that the land was not occupied adversely. Under the decisions of this court she was chargeable with notice from Benson's possession, and his record title from the railroad company, that he had a preferential right of purchase under the Act of March 3, 1887. Gertgens v. O'Connor, 191 U. S. 237, 246, 24 Sup. Ct. 94, 48 L. Ed. 163; Ramsey v. Tacoma Land Co., 196 U. S. 360, 364, 25 Sup. Ct. 286, 49 L. Ed. 513. Having such notice of the origin of the title under which she had purchased, she was chargeable with notice of the facts shown by the records, and could not shut her eyes to these sources of information and still be an innocent purchaser without notice. This doctrine, often asserted in this court, was summarized in Ochoa v. Hernandez, 230 U. S. 139, 164, 33 Sup. Ct. 1033, 1042 (57 L. Ed. 1427) in which it was said:

"It is a familiar doctrine, universally recognized where laws are in force for the registry or recording of instruments of conveyance, that every purchaser takes his title subject to any defects and infirmities that may be ascertained by reference to his chain of title as spread forth upon the public records. Brush v. Ware, 15 Pet. 93, 111 [10 L. Ed. 672]; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 437 [12 Sup. Ct. 239, 35 L. Ed. 1063]; Northwestern Bank v. Freeman, 171 U. S. 620, 629 [19 Sup. Ct. 36, 43 L. Ed. 307]; Mitchell v. D'Olier, 68 N. J. Law (39 Vr.) 375, 384, 53 Atl. 467, 59 L. R. A. 949."

[4] If Mrs. Krueger had used these sources of information she would have ascertained that the Moses affidavit wherein it was stated that the lands were not in any manner occupied adversely was untrue, constructively she is held to have knowledge of these facts. Washington Securities Co. v. United States, 234 U. S. 76, 79, 34 Sup. Ct. 725, 58 L. Ed. 1220. And see Dellemand v. Mannon, 4 Colo. App. 262, 264, 35 Pac. 679. The defense of bona fide purchaser is an affirmative one, and the burden was upon Mrs. Krueger to establish it in order to defeat the right of the government to have a cancellation of the patent, fraudulently obtained. Wright-Blodgett Co. v. United States, 236 U. S. 397, 403, 404, 35 Sup. Ct. 339, 59 L. Ed. 637; Great Northern Railway Co. v. Hower, 236 U. S. 702, 35 Sup. Ct. 465, 59 L. Ed. 798.

We agree with the Circuit Court of Appeals that Mrs. Krueger did not sustain the burden of showing that she was a bona fide purchaser for value, and under the circumstances shown she had constructive notice of the manner in which the land had been procured from the United States. The Circuit Court of Appeals did not err in holding that the government was entitled to a cancellation of the patent.

Decree affirmed.

Mr. Justice McREYNOLDS took no part in the consideration or decision of this case.

(246 U. S. 255)

BILBY et al. v. STEWART et al.

(Submitted Jan. 25, 1918. Decided March 4, 1918.)

No. 160.

1. COURTS ⊂⊃394(1)—SUPREME COURT—FEDERAL QUESTIONS.

Where the Supreme Court of Oklahoma affirmed a judgment of the district court denying the probate of an alleged will of a full-blood Creek Indian on the ground of want of testamentary capacity, the United States Supreme Court will not review the judgment on the ground that the validity of the alleged will was governed by laws of the United States, for, since the state court rested its judgment on a nonfederal ground adequate to support it, the existence of a federal question was of no consequence.

2. COURTS ⊂⊃396(6)—SUPREME COURT—FEDERAL QUESTION—TIME OF RAISING.

Where plaintiffs in error did not raise any federal question until their second petition for rehearing, after the state Supreme Court had affirmed a judgment on an adequate nonfederal ground, the question was raised too late for consideration on writ of error sued out from the United States Supreme Court.

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

In Error to the Supreme Court of the State of Oklahoma.

Petition by Nicholas V. Bilby and another for the probate of the alleged will of one Bruner, a full-blood Creek Indian, which was contested by Albert Stewart and others. Probate was denied by the county court, and proponents appealed to the district court. A judgment of the district court in favor of the contestants was affirmed (153 Pac. 1173), and proponents bring error to the Supreme Court of the State of Oklahoma. Writ dismissed.

Mr. Lewis C. Lawson, of Holdenville, Okl., for plaintiffs in error.

Mr. George C. Crump, of Holdenville, Okl., for defendants in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

*256 This is a writ of error to the Supreme Court of Oklahoma, which affirmed on appeal the judgment of the district court declining to probate an alleged will of Bruner, a full-blood Creek Indian, who, in the year 1912, died in that state possessed of his allotment, a bachelor without surviving parent.

Act April 26, 1906, c. 1876, 34 Stat. 137, relating to the Five Civilized Tribes, by section 19, prohibits members, for a period of twenty-five years, from alienating lands allotted to them; but by section 23 as amended by section 8 of Act May 27, 1908, c. 199, 35 Stat. 312, 315, provides that:

"Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner, or a judge of a county court of the state of Oklahoma."

Section 1 of the Acts of Oklahoma for 1909, chapter 41, provides:

"That no person who is prevented by law from alienating, conveying or incumbering real property while living shall be allowed to bequeath the same by will."

[1, 2] Bilby, the main beneficiary named in the alleged will, and Moffitt, the executor, had first petitioned for its probate in the county court, where the heirs contested on the grounds of mental incapacity and undue influence and also on the ground that Bruner was by law prohibited from alienating or conveying his land. Probate was denied on the last ground; and the proponents appealed to the district court where, as provided by the state law, it was tried de novo. That court after an advisory verdict of a jury, denied probate solely on the ground of mental incapacity; and the errors assigned in the Supreme Court were substantially, that the *257 judgment of the district court was against the evidence. 153 Pac. 1173. The Supreme Court affirmed the judgment of the lower court and a petition for rehearing was denied without a statement of reasons. No federal question had been raised in the district court, nor apparently up to that time in the Supreme Court. But an application was then made for leave to file a second petition for rehearing; and in it proponents set up, among others, the claim that because Bruner was a full-blood Creek Indian "the execution of said will and the legal effect thereof and the necessity or nonnecessity of the probation of said will is thereby involved in this cause and presents federal questions." We need not, however, consider this contention. For since the Supreme Court rested its judgment upon a nonfederal ground adequate to support it, the existence of a federal question is of no significance. Cuyahoga Power Co. v. Northern Realty Co., 244 U. S. 300, 37 Sup. Ct. 643, 61 L. Ed. 1153. And, besides, the attempt to raise it comes too late. St. Louis & San Francisco R. Co. v. Shepherd, 240 U. S. 240, 36 Sup. Ct. 274, 60 L. Ed. 622. The writ of error is

Dismissed.

(246 U. S. 128)

Ex parte SLATER, Public Administrator.

(Argued Jan. 21, 1918. Decided March 4, 1918.)

No. 27 Original.

1. COURTS ⟸343—SUBSTITUTION OF PARTIES.
While formerly, on the death of one of the parties having an interest in litigation, substitution was effected through a bill of revivor or a bill of that nature, such relief, under new equity rule 45 (226 U. S. 661, 33 Sup. Ct. xxx), is now granted on motion.

2. APPEAL AND ERROR ⟸87(3)—DENIAL OF REVIVOR—REVIEW.
Where a suit is one which may be revived, revivor in the name of the proper party on the death of one of the original parties is a matter of right, and, if it be denied, the denial may be reviewed and corrected on appeal.

3. ABATEMENT AND REVIVAL ⟸76 — ORDER OF REVIVOR—COLLATERAL ATTACK — THOSE SUBJECT TO.
Where two conflicting motions for revivor of a suit in which one of the parties had died were presented, it devolved upon the court to consider and decide which, if either, of the applicants was entitled to substitution, and, a full hearing having been had in the regular course, an order granting one motion and denying the other is a judicial act, not open to collateral attack, but subject only to correction on appeal, if erroneous.

4. MANDAMUS ⟸32—RELIEF—SCOPE.
The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, and not to control his decision; therefore, where, on conflicting motions for revivor in a case in which one of the original parties had died, the court, after full hearing in the regular course, granted one and denied the other, there was an exercise of jurisdiction, and the defeated applicant is not entitled to mandamus to review the same.

Ex parte petition by Frank M. Slater, Public Administrator, for a writ of mandamus against the Judge of the District Court for

the Eastern District of Missouri, directing revivor in petitioner's name of a suit in equity. Rule to show cause discharged, and petition dismissed.

*129 *This is a petition for a writ of mandamus against the judge of the District Court for the Eastern District of Missouri directing the revivor in the petitioner's name of a suit in equity. The facts, about which there is no dispute, are these: In 1916 the District Court by a decree in a pending suit awarded $95,770, then in the registry of the court, to five solicitors as the balance due to them collectively for services in the suit, and directed that this sum be apportioned among them according to the relative amount and value of the services of each, due regard being had for payments already made. Control of the suit and fund was retained to enable the court to make the apportionment and carry it into effect. The solicitors appeared in the suit and while proceedings looking to an apportionment were pending one of the solicitors died. He was a resident of Texas and was survived by a widow and son, both living in that state. By his will, regularly presented for probate in Texas, his entire estate, excepting $1 bequeathed to the son, was devised and bequeathed to the widow, and she was named as sole executrix. The will was what is known under the laws of Texas as an "independent" will, the same containing a direction that no action should be had thereunder other than to probate it and to return an inventory and appraisement. See Tex. Civ. Stat. 1914, art. 3362 et seq. After the will was presented and while it was awaiting probate in regular course the court *130 in Texas appointed the widow *temporary administratrix and directed her in that capacity to take charge of the estate and do whatever was necessary to obtain the deceased's portion of the fund awaiting distribution in the District Court. She qualified as temporary administratrix and as such presented in the suit a motion asking that it be revived by substituting her as a party in the place of the deceased. A few days later the public administrator of St. Louis, Missouri, acting under an order of the probate court of that city, presented in the suit a motion, erroneously styled an intervening petition, asserting that he was the deceased's only legal representative in Missouri and insisting in effect that the revivor be in his name.

These conflicting motions were heard together, were argued orally and in elaborate briefs by counsel for the respective applicants for substitution, and were considered in a memorandum opinion wherein the judge, after indicating that a revivor was essential and that the question for decision was as to which of the two applicants was the proper party to be substituted in the place of the deceased, reached the conclusion that the revivor should be in the name of the widow as temporary administratrix. An order was accordingly entered granting her motion and denying that of the public administrator. That order was dated October 29, 1917.

November 6, 1917, the will was regularly admitted to probate in Texas, and the judgment by which this was done contained an express finding that there was no debt to be paid and no occasion for administration upon the estate. The widow then presented in the suit a motion setting up the probate of the will with the finding made in that connection and insisting that this and the terms of the will operated under the laws of Texas [1] to invest *her in her individual capacity with* 131 the full right, title and interest of the deceased in the fund as of the date of his death. The motion concluded by asking for an order recognizing and substituting her in her individual right as the successor in interest and title of the deceased. A hearing was had upon this motion and the same was granted November 19, 1917.

That was the date on which this court, after examining the present petition of the public administrator, granted leave to file the same and ordered that a rule to show cause issue against the defendant judge.

Mr. George B. Webster, of St. Louis, Mo., for petitioner.

Mr. Jacob Chasnoff, of St. Louis, Mo., for respondent.

*132 *Mr. Justice VAN DEVANTER, after making the foregoing statement, delivered the opinion of the Court.

It now appears that the petition gives an inadmissible coloring to the matter in respect of which it seeks relief. We say this *133 because the petition implies that the court *did not consider but summarily rejected the public administrator's motion for a revivor in his name, whereas in fact the court heard oral argument on the motion, gave time for filing and received briefs thereon, and ultimately denied the motion for reasons given in a memorandum opinion. The petition makes no reference to this; neither does it mention the conflicting motion by the temporary administratrix which was heard at the same time, dealt with in the same memorandum opinion and granted by the same order that denied the public administrator's motion. These matters and the subsequent proceedings are all brought to our attention by the return, the accuracy of which is not questioned.

[1] The reference evidently was to article 3362, supra, and to article 3235, which declares, "When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will shall vest immediately in the devisees or legatees," but shall be "subject in their hands to the payment of the debts," if any, of the testator. And see Wilkins v. Ellett, 108 U. S. 256, 258, 2 Sup. Ct. 641, 27 L. Ed. 718; also Owings v. Hull, 9 Pet. 607, 625, 9 L. Ed. 246, and Fourth National Bank v. Francklyn, 120 U. S. 747, 751, 7 Sup. Ct. 757, 30 L. Ed. 825.

When the unwarranted coloring of the petition is put aside and what actually was done is considered in its true light, it is manifest that the situation is not one in which a writ of mandamus will lie.

[1-3] Of course, the death of one of the parties having an interest in the fund operated to suspend the proceedings for its apportionment until some one legally capable of asserting and defending that interest should either come or be brought into the suit in the place of the deceased. Formerly such a substitution was effected through a bill of revivor or a bill of that nature (210 U. S. 526, 33 Sup. Ct. xxxiv, rule 56; Story's Equity Pleadings [9th Ed.] §§ 354, 356, 364); but the new equity rules provide that the court may, "upon motion, order the suit to be revived by the substitution of the proper parties" (226 U. S. 661, 33 Sup. Ct. xxx, rule 45). Whether a particular applicant for substitution is the proper party is a question for the court to determine, just as is the question whether a particular suit is brought by or against the proper party. In either case the question is to be resolved by applying recognized legal and equitable principles to the facts in hand; in other words, by an exercise of the judicial function. If the suit be one which may be revived, as where the cause of action or claim in *controversy survives, revivor in the name of the proper party is a matter of right, and, if it be denied, the denial may be reviewed and corrected upon appeal. Clarke v. Mathewson, 12 Pet. 164, 9 L. Ed. 1041; Terry v. Sharon, 131 U. S. 40, 46, 9 Sup. Ct. 705, 33 L. Ed. 94; Credits Commutation Co. v. United States, 177 U. S. 311, 315–316, 20 Sup. Ct. 636, 44 L. Ed. 782; Mackaye v. Mallory, 79 Fed. 1, 2, 24 C. C. A. 420; Minot v. Mastin, 95 Fed. 734, 739, 37 C. C. A. 234; United States Trust Co. v. Chicago Terminal Co., 188 Fed. 292, 296, 110 C. C. A. 270; Western Union Telegraph Co. v. United States & Mexican Trust Co., 221 Fed. 545, 552, 137 C. C. A. 113.

*134

When the two conflicting motions for revivor were presented it devolved upon the court to consider and decide which, if either, of the applicants was entitled to substitution. A full hearing was had and in regular course the court ruled that one applicant was and the other was not the proper party, and then entered an order reviving the suit accordingly. That was a judicial act done in the exercise of a jurisdiction conferred by law, and even if erroneous, was not void or open to collateral attack, but only subject to correction upon appeal.

[4] "The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where in regular course the decision may be reviewed upon a writ of error or an appeal." Ex parte Roe, 234 U. S. 70, 73, 34 Sup. Ct. 722, 723 (58 L. Ed. 1217); In re Rice, 155 U. S. 396, 403, 15 Sup. Ct. 149, 39 L. Ed. 198; In re Key, 189 U. S. 84, 23 Sup. Ct. 624, 47 L. Ed. 720; Ex parte Park Square Automobile Station, 244 U. S. 412, 37 Sup. Ct. 732, 61 L. Ed. 1231.

Upon the present petition therefore we cannot consider the merits of the ruling upon the conflicting motions or the relative bearing of the subsequent proceedings whereby the widow in her individual right was substituted as the successor in interest and title of the deceased.

Rule discharged; petition dismissed.

(246 U. S. 1)

ARMOUR & CO. v. COMMONWEALTH OF VIRGINIA.

(Argued Jan. 3, 1918. Decided March 4, 1918.)

No. 127.

1. CONSTITUTIONAL LAW ⊜230(3) — EQUAL PROTECTION OF LAWS—CLASSIFICATION.

Tax Law Va. (Acts Ex. Sess. 1902–04, c. 148) § 45, as amended by Acts 1915 (Ex. Sess.) c. 148, imposing a license tax upon merchants for the privilege of doing business in the state, to be graduated by the amount of purchases, and declaring that all goods, wares, and merchandise manufactured by such merchants and sold or offered for sale shall be considered as purchases, but that the section shall not be construed as applying to manufacturers taxed on capital by the state who offer for sale at the place of manufacture goods, wares, and merchandise manufactured by them, is not in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; the distinction between the two classes upon which the classification rests being obvious.

2. COMMERCE ⊜64—INTERSTATE COMMERCE—REGULATIONS.

Such act, as applicable to nonresident manufacturers who ship their products into the state of Virginia, is not invalid as a direct burden upon interstate commerce; the exclusion of manufacturers selling at their place of manufacture being open to all, whether noncitizens or nonresidents, who manufacture in Virginia, and Virginia manufacturers being absolutely liable for the tax in case they sell as merchants the goods manufactured at a place other than the place of manufacture.

3. CONSTITUTIONAL LAW ⊜206(4), 207(2)—PRIVILEGES AND IMMUNITIES—DEPRIVATION.

As such statute was within the legislative authority of the state, and was not invalid as imposing a direct burden on interstate commerce, or violating the equal protection clause of the Fourteenth Amendment of the United States Constitution, it is not subject to attack as violating the privileges and immunities clause of article 4, or the clause of the Fourteenth Amendment declaring that no state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States.

In Error to the Supreme Court of Appeals of the State of Virginia.

Bill by Armour & Co. against the Commonwealth of Virginia. A decree for com-

plainant was reversed on the Commonwealth's appeal (118 Va. 242, 87 S. E. 610), and complainant brings error to the Supreme Court of Appeals of the State of Virginia. Affirmed.

Mr. Eppa Hunton, Jr., of Richmond, Va., for plaintiff in error.

Mr. J. D. Hank, Jr., of Richmond, Va., for the Commonwealth of Virginia.

*3 *Mr. Chief Justice WHITE delivered the opinion of the Court.

This suit concerns section 45 of the Virginia general taxing statute (Acts Extra Sess. 1902–04, c. 148) as amended in 1915, which is in the margin.[1] It will be observed that the section imposes an annual license *4 tax upon all persons or corporations carrying on a *merchandise business at any place in the state, the amount being determined by the sum of the purchases during the year. It will be further seen that the amount of the purchases includes "all goods, wares and merchandise manufactured by such merchant and sold or offered for sale, in this state, as merchandise," and that the section also contains a provision excluding from the operation of the license "manufacturers taxed on capital by this state, who offer for sale at the place of manufacture, goods, wares and merchandise manufactured by them."

Armour & Co., a New Jersey corporation engaged in the packing house business, and having various establishments in several states, carried on in Virginia the merchandise business of selling packing house products at the respective agencies which they had established. For the purposes of the merchant's license in question the company was called upon to return the sum of its purchases including the amount shipped into the state for sale at its agencies whether or not manufactured by it. The corporation declined to comply and commenced this suit to enjoin the enforcement of the statute in so far as it required the inclusion in the amount of purchases of merchandise manufactured by the corporation in other states and shipped into Virginia for sale. It was charged that to the extent stated the statute was in conflict with the Constitution of the United States because of the provision excluding from liability for license persons who manufactured merchandise in Virginia and sold the same at the place of manufacture for the following reasons: (a) Because as the result of such exclusion the statute discriminated against the company to the extent that it shipped goods manufactured by it into Virginia to be sold and therefore was a direct burden on interstate commerce; (b) because the statute deprived manufacturers in other states of the benefit of section 2 of article 4 guaranteeing to the citizens of *5 each state "all privileges and immunities of citizens in the several states"; and (c) because the statute in the respects stated was repugnant to the equal protection and privilege and immunities clauses of the Fourteenth Amendment.

The trial court enjoined the enforcement of the statute to the extent complained of and its action on appeal was reversed by the court below. It was held that the statute was inherently within the state legislative power and that the difference between a manufacturer selling goods by him made at the place where they were manufactured and one engaged in a mercantile business even if his business consisted in whole or in part of the selling of goods by him manufactured at a place other than the place of manufacture was such as to afford adequate ground for their distinct classification and hence justified the provision of the statute including one in the merchant's license and excluding the other. In addition, construing the statute, it was decided that it was not discriminatory since the exclusion from the license tax of manufacturers selling at their place of manufacture was open to all whether noncitizens or even nonresidents who manufactured in Virginia and because the liability for the merchant's license embraced even those who manufactured in Virginia if they sold as merchants the goods by them manufactured at a place other than the place of manufacture. From this latter conclusion it was decided that if any disadvantage resulted to the person selling as a merchant in Virginia goods manufactured by him in another state by subjecting him to a license when such license did not include the manufacturer selling in Virginia at the place of manufacture, the disadvantage was a mere indirect consequence of a lawful and nondiscriminatory exercise of state authority and afforded no basis for holding the statute to be repugnant to the clauses of the Constitution of the United States as contended. 118 Va. 242, 87 S. E. 610.

All the constitutional grounds which were *6 thus held to be without merit are within the errors assigned and relied upon although

[1] "Every person, firm, company or corporation engaged in the business of a merchant shall pay a license tax for the privilege of doing business in this state to be graduated by the amount of purchases made by him during the period for which the license is granted, and all goods, wares and merchandise manufactured by such merchant and sold or offered for sale, in this state, as merchandise, shall be considered as purchases within the meaning of this section: Provided, that this section shall not be construed as applying to manufacturers taxed on capital by this state, who offer for sale at the place of manufacture, goods, wares and merchandise manufactured by them. To ascertain the amount of purchases it shall be the duty of such merchant, on the first day of April of each year, or within ten days thereafter, to make report in writing, under oath, to the commissioner of the revenue, for the district for which he was licensed, showing purchases as above defined, and also all goods, wares and merchandise manufactured and sold or offered for sale in this state during the next preceding twelve months; except such goods, wares and merchandise as is manufactured by persons, firms and corporations taxed on their capital by this state." Acts of 1915 (Ex. Sess.) c. 148, p. 233; Virginia Code, vol. 4, p. 594.

predominance in argument is given to the asserted repugnancy of the statute to the commerce clause of the Constitution (article 1, § 8, cl. 3); and we come briefly to consider them all.

[1] In the first place we are of opinion that the distinction upon which the classification in the statute rests between a manufacturer selling goods by him made at their place of manufacture and one engaged as a merchant in whole or in part in selling goods of his manufacture at a place of business other than where they were made is so obvious as to require nothing but a mere statement of the two classes. All question concerning the equal protection clause of the Fourteenth Amendment may therefore be put out of view.

[2] In the second place, we are also of opinion that the interpretation given by the court below to the statute excludes all basis for the contention that the provision of the statute imposing the license tax upon the one class and not upon the other gave rise to such discrimination as resulted in a direct burden upon interstate commerce. And this whether the statute be considered from the point of view of the power of the state to enact it inherently considered, or of the power as tested by the necessary operation and effect of the statute, if any, upon interstate commerce and the plenary and exclusive power of Congress to regulate the same.

[3] In the third place we also conclude that as the subject-matter of the statute was plainly within the legislative authority of the state and as the previous conclusions exclude the conception of the repugnancy of the statute to the provisions of the Constitution just considered, it necessarily follows that there is no ground for the assertion that the statute conflicted with the privileges and immunities clause of article 4 of the Constitution or of the clause in the Fourteenth Amendment providing that:

* * * "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

But, it is urged, the statute should be held to be a burden on interstate commerce and repugnant to the Constitution because of the disadvantage to which, it is insisted, it necessarily by way of a license tax subjected goods manufactured in another state when sold in Virginia by a merchant manufacturing the same, while no such tax was by the statute imposed on a manufacturer in Virginia selling his goods so manufactured at the place of their manufacture. But we have already tested the statute by its necessary operation and effect and found it not to be repugnant to the commerce clause. Hence this argument but repeats in a different form a contention already disposed of. It follows therefore that if the asserted disadvantage be real and not imaginary, it would be one not direct because not arising from the operation and effect of the statute, but indirect as a mere consequence of the situation of the persons and property affected and of the nondiscriminating exercise by the state of power which it had a right to exert without violating the Constitution—which is indeed but to say that the disadvantage relied upon, if any, is but the indirect result of our dual system of government.

In other words, to resume, the error of the argument results from confounding the direct burden necessarily arising from a statute which is unconstitutional because it exercises a power concerning interstate commerce not possessed or because of the unlawful discriminations which its provisions express or by operation necessarily bring about and the indirect and wholly negligible influence on interstate commerce, even if in some aspects detrimental, arising from a statute which there was power to enact and in which there was an absence of all discrimination, whether express or implied as the result of the necessary operation and effect of its provisions. The distinction between the two has been enforced from the beginning as vital to the perpetuation of our constitutional system. Indeed, as correctly pointed out by the court below, that principle as applied in adjudged cases is here directly applicable and authoritatively controlling. New York v. Roberts, 171 U. S. 658, 19 Sup. Ct. 58, 43 L. Ed. 323; Reymann Brewing Co. v. Brister, 179 U. S. 445, 21 Sup. Ct. 201, 45 L. Ed. 269. In saying this we have not overlooked or failed to consider the many cases cited in the argument at bar on the theory that they are to the contrary, when in fact they all rest upon the conclusion that a direct burden on interstate commerce arose from statutes inherently void for want of power or if within the power possessed were intrinsically repugnant to the commerce clause because of discriminations against interstate commerce which they contained.

Affirmed.

(246 U. S. 220)

UNITED STATES v. BATHGATE et al. SAME v. BURCKHAUSER et al. SAME v. COONS et al. SAME v. FARRELL et al. SAME v. KLAYER et al. SAME v. URICHO et al.

(Argued Jan. 16 and 17, 1918. Decided March 4, 1918.)

Nos. 575, 576, 577, 578, 579, 580.

1. CRIMINAL LAW ⟸15—STATUTES—REPEAL.
Act Feb. 8, 1894, c. 25, 28 Stat. 36, repealing all sections of Rev. St. tit. 70, c. 7, which related to offenses against the elective franchise, did not repeal Rev. St. § 5508, now Criminal Code (Act March 4, 1909, c. 321) § 19, 35 Stat. 1092 (Comp. St. 1916, § 10183), punishing conspiracies to oppress the exercise of rights secured by the federal Constitution and laws.

2. STATUTES ⟸231—CONSTRUCTION—CRIMINAL CODE.
Under Criminal Code, §§ 339, 341 (Comp. St. 1916, §§ 10513, 10515), providing that no inference of legislative construction is to be

drawn from the chapter under which a particular section is placed, and that unrepealed portions have the same force as if the codification had not been made, Criminal Code, § 19, has the same meaning as when first enacted as section 6 of Act May 31, 1870, c. 114, 16 Stat. 141 (Comp. St. 1916, § 10183).

3. Conspiracy ⟸29 — Statutes — Oppression of Personal Rights.

Criminal Code, § 19, punishing conspiracies to oppress the free exercise of rights secured by the federal Constitution or laws, etc., is inapplicable to a conspiracy to bribe voters at an election for presidential electors and members of Congress.

In Error to the District Court of the United States for the Southern District of Ohio.

Edward Bathgate and others, John J. Burckhauser and others, Harry Coons and others, William Farrell and others, Oscar Klayer and others, and Robert Uricho and others, were indicted. From the sustaining of demurrers to the indictments, the United States brings error. Affirmed.

Mr. Assistant Attorney General Fitts, for the United States.

Messrs. John R. Holmes and Sherman T. McPherson, both of Cincinnati, Ohio, for defendants in error.

*223 *Mr. Justice McREYNOLDS delivered the opinion of the Court.

Except as to parties, the indictments in these six cases are alike. Each contains three counts; the first and second undertake to allege a conspiracy to injure and oppress in violation of section 19, Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1092 [Comp. St. 1916, § 10183]), and the third a conspiracy to defraud the United States, contrary to section 37 (Comp. St. 1916, § 10201). Demurrers were sustained upon the ground that, rightly construed, neither section applies to the specified acts.

Section 37, originally part of the Act of March 2, 1867 (14 Stat. 484, c. 169, § 30), provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

*224

It was considered in United States v. Gradwell, 243 U. S. 476, 37 Sup. Ct. 407, 61 L. Ed. 857, and held not applicable in circumstances similar to those here presented. The government has accordingly abandoned the third count.

Section 19 provides:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

And the two counts based thereon charge defendants with conspiring to injure candidates for presidential electors, the United States Senate and representative in Congress at the regular election in Ohio, November 7, 1916, also qualified electors who might properly vote thereat, in the free exercise and enjoyment of certain rights and privileges secured by Constitution and laws of the United States, namely—the right (a) of being a candidate; (b) that only those duly qualified should vote; (c) that the results should be determined by voters who had not been bribed; and (d) that the election board should make a true and accurate count of votes legally cast by qualified electors and no others. The indictment further alleged the conspiracy was carried into effect as intended by purchasing votes of certain electors and causing election boards to receive them and make inaccurate returns.

The real point involved is whether section 19 denounces as criminal a conspiracy to bribe voters at a general election within a state where presidential electors, a United States Senator and a representative in Congress are to be chosen. Our concern is not with the power of Congress, but with the proper interpretation of action taken by it. This must be ascertained in view of the settled rule that "there can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute" (United States v. Lacher, 134 U. S. 624, 628, 10 Sup. Ct. 625, 33 L. Ed. 1080); and the policy of Congress to leave the conduct of elections at which its members are chosen to state law alone, except where it may have expressed a clear purpose to establish some further or definite regulation.

*225

[1] Departing from the course long observed, by Act of May 31, 1870, c. 114, 16 Stat. 140, Congress undertook to prescribe a comprehensive system intended to secure freedom and integrity of elections. Section 19 of that act declares:

"That if at any election for representative or delegate in the Congress of the United States any person shall knowingly * * * by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or otherwise unlawfully prevent any qualified voter of any state of the United States of America or of any territory thereof, from freely exercising the right of suffrage, * * * or compel or induce by any such means, or otherwise, any officer of an election in any such state or territory to receive a vote from a person not legally qualified or entitled to vote, * * * or aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, * * * every such person shall be deemed guilty of a crime, and shall for such crime be liable to prosecution in any court of the United

States of competent jurisdiction, and, on conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term not exceeding three years, or both, in the discretion of the court, and shall pay the costs of prosecution."

*226 In pursuance of a well understood policy, the Act of February 8, 1894, c. 25, 28 Stats. 36, repealed the foregoing and other kindred sections in Act of 1870 but left in effect section 6, then section 5508, Revised Statutes, and now section 19, Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1092 [Comp. St. 1916, § 10183]). See United States v. Mosley, 238 U. S. 383, 35 Sup. Ct. 904, 59 L. Ed. 1355; United States v. Gradwell, supra.

The government in effect maintains that lawful voters at an election for presidential electors, senator and member of Congress and also the candidates for those places have secured to them by Constitution or laws of the United States the right and privilege that it shall be fairly and honestly conducted; and that Congress intended by section 6, Act of 1870, to punish interference with such right and privilege through conspiracy to influence voters by bribery.

[2, 3] Section 19, Criminal Code (Comp. St. 1916, § 10183), of course, now has the same meaning as when first enacted as section 6, Act of 1870 (see Criminal Code, §§ 339, 341, [Comp. St. 1916, §§ 10513, 10515]); and considering the policy of Congress not to interfere with elections within a state except by clear and specific provisions, together with the rule respecting construction of criminal statutes, we cannot think it was intended to apply to conspiracies to bribe voters. Bribery, expressly denounced in another section of the original act, is not clearly within the words used; and the reasoning relied on to extend them thereto would apply in respect of almost any act reprehensible in itself, or forbidden by state statutes, and supposed injuriously to affect freedom, honesty, or integrity of an election. This conclusion is strengthened by express repeal of the section applicable in terms to bribery and we think is rendered entirely clear by considering the nature of the rights or privileges fairly within intendment of original section 6.

The right or privilege to be guarded, as indicated both by the language employed and context, was a definite, personal one, capable of enforcement by a court, and not the political, non-judicable one common to all that *227 the public shall be protected against harmful acts, which is*here relied on. The right to vote is personal and we have held it is shielded by the section in question. Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; United States v. Mosley, supra. The same is true of the right to make homestead entry, United States v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673; also, of the right of one held by a United States marshal to protection against lawless violence, Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429. While the opinion in United States v. Gradwell, supra, does not determine the precise question now presented, it proceeds upon reasoning which contravenes the theory urged by counsel for the government.

The court below properly construed the statute and its judgments are

Affirmed.

(246 U. S. 23)

WILLIAM CRAMP & SONS SHIP & ENGINE BLDG. CO. v. INTERNATIONAL CURTIS MARINE TURBINE CO. et al.

(Argued January 29 & 30, 1918. Decided March 4, 1918.)

No. 393.

1. PATENTS ⊂⊃210 — IMPLIED LICENSES — GOVERNMENT AND GOVERNMENT CONTRACTORS.

Act June 25, 1910, c. 423, 36 Stat. 851 (Comp. St. 1916, § 9465), entitled "An act to provide additional protection for owners of patents, * * *" provides that when a patented invention shall be used by the United States, "without license" and without a lawful right to use it, the owner may recover reasonable compensation in the Court of Claims, provided that in any such suit the United States may avail itself of all defenses which might be pleaded, in an action for infringement. *Held*, that the purpose of this act was to provide for the discrepancy resulting from the old rule under which a patentee, whose invention was used under circumstances giving rise to an implied contract, was entitled to compensation, while patentees, whose inventions were used under circumstances not justifying the implication of a contract, had no remedy against the United States, and the act does not give the government or one contracting with the government an automatic and general license to use every patented invention.

2. UNITED STATES ⊂⊃59 — POWER TO CONTRACT—POWERS OF GOVERNMENT CONTRACTORS.

The making of a contract with the United States to perform duties in its favor does not convert the contractor into an official of the United States to represent it and to entail obligations on it, which under the terms of the statute can only rest upon official action, and the discharge of official duty.

3. EMINENT DOMAIN ⊂⊃11—POWERS OF GOVERNMENT CONTRACTOR.

A contractor with the United States is bound to perform the contract in accordance with the laws of the land, and without disregarding the rights or appropriating the property of others, and is vested with no power to take the property of others.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Suit by the International Curtis Marine Turbine Company and another against William Cramp & Sons Ship & Engine Building Company. On review of an order of the trial court (232 Fed. 166), the Circuit Court of Appeals for the Third Circuit (238 Fed. 564, 151 C. C. A. 500), directed that an accounting should proceed, and retained the case for further decision. Order of the Cir-

cuit Court of Appeals affirmed in part, and decree of the District Court reversed, and case remanded.

Messrs. Clifton V. Edwards, of New York City, and Abraham M. Beitler, of Philadelphia, Pa., for petitioner.

Messrs. Frederick P. Fish, Charles Neave, and William G. McKnight, all of New York City, for respondents.

*35 *Mr. Chief Justice WHITE delivered the opinion of the Court.

The history of this suit from its commencement up to the development of the controversy now before us, will be shown by an examination of the decided cases referred to in the margin.[1] We shall therefore not recur to that which has gone before but confine our statement to the things essential to an understanding of the phase of the issue which we must now decide.

Under proposals submitted by the Navy Department the petitioner, the Cramp Company, in 1908 contracted to build two torpedo boat destroyers, Nos. 30 and 31, and in 1911 further contracted to build four such boats, Nos. 47, 48, 49 and 50. The specifications submitted by the department as to structure, engines, etc., were comprehensively detailed and the contracts were based either upon the acceptance of such specifications or upon such changes suggested by the contractor as met the approval of the Navy Department. The contracts contained an express provision, which is in the margin,[2] *36 protecting the *government against any claims which might arise from the infringement by the contractor of the rights of any patentee, if any such rights there were.

The Turbine Companies filed their bill against the Cramp Company to recover damages and profits accruing from the infringement of certain patents on turbine engines which the Cramp Company had placed in the boats built under the contract of 1908. Ultimately this claim of infringement was upheld by the Circuit Court of Appeals for the Third Circuit. 211 Fed. 124, 127 C. C. A. 522. On the hearing which then ensued before a master as to damages and profits, the Turbine Companies urged their claim and tendered their proof concerning the same, covering the four destroyers, Nos. 47, 48, 49 and 50, built under the contract of 1911, upon the ground of an infringement like that which had been committed as to the boats built under the contract of 1908. Rubber Co. v. Goodyear, 9 Wall. 805, 19 L. Ed. 828. The inquiry was objected to on the ground of its irrelevancy because liability for infringement under the contract of 1911 was to be tested by a different rule from that which was applicable to the boats contracted for in 1908 in consequence of the applicability to the 1911 contracts of the Act of Congress of June 25, 1910, c. 423, 36 Stat. 851. Under that law, it was insisted:

"The United States, by act of eminent domain, acquired a license to use the invention of all existing patents, and, therefore, the transactions under the contracts for torpedo boat destroyers Nos. 47, 48, 49 and 50, being merely the building of devices for a licensee under the patent in suit, were licensed transactions, and consequently are not within the scope of this accounting."

The master overruled the objection but thereafter on request certified the subject to *37 the District Court where his ruling was held to be wrong on its merits and reversed. On a rehearing the court sustained the view which it had previously taken of the subject by a reference to a decision of the Circuit Court of Appeals for the Second Circuit. Marconi Wireless Telegraph Co. v. Simon (D. C.) 227 Fed. 906; Id., 231 Fed. 1021, 145 C. C. A. 656; (D. C.) 232 Fed. 166. Application was then made to the Circuit Court of Appeals by certiorari to review this ruling and by mandamus to compel the master to proceed with the hearing in accordance with the claims of the Turbine Companies. Finding that the ruling in the Marconi Case was pending in this court for review, the Court of Appeals postponed deciding the issue of statutory construction to await the decision of this court, but directed the accounting to proceed as to both classes of contracts in such a manner as to enable the authoritative ruling on the statute when made by this court to be applied without confusion or delay. 238 Fed. 564, 151 C. C. A. 500. The writ of certiorari on which the case is now before us was then allowed and this and the Marconi Case referred to by the court below were argued and submitted upon the same day.

[1] The single question is, did the provisions of the Act of 1910 operate without more to confer upon the United States a license to use the patents of the Turbine Companies; and if so, was the Cramp Company as a contractor authorized to avail itself of the license by using the patent rights of the Turbine Companies without their consent?

[1] International Curtis Marine Turbine Co. v. Wm. Cramp & Sons Co. (C. C.) 176 Fed. 925; In re Grove, 180 Fed. 62, 103 C. C. A. 416; Curtis Turbine Co. v. Wm. Cramp & Sons Co., 202 Fed. 932, 121 C. C. A. 290; Wm. Cramp & Sons Co. v. Curtis Turbine Co., 228 U. S. 645, 33 Sup. Ct. 722, 57 L. Ed. 1003; Curtis Turbine Co. v. Wm Cramp & Sons Co., 211 Fed. 124, 127 C. C. A. 522; Wm. Cramp & Sons Co. v. Curtis Turbine Co., 234 U. S. 755, 34 Sup. Ct. 674, 58 L. Ed. 1578.

[2] "*Patents.* The party of the first part, in consideration of the premises, hereby covenants and agrees to hold and save the United States harmless from and against all and every demand or demands of any nature or kind for or on account of the adoption of any plan, model, design or suggestion, or for or on account of the use of any patented invention, article, or appliance that has been or may be adopted or used in or about the construction of said vessel, or any part thereof, under this contract, and to protect and discharge the government from all liability on account thereof, or on account of the use thereof, by proper releases from patentees, and by bond if required, or otherwise, and to the satisfaction of the Secretary of the Navy."

Avowedly on the very face of the act its purpose was not to weaken the rights of patentees, but to further secure them. This results not only from the title of the law (An act to provide additional protection for owners of patents of the United States, and for other purposes), but further from the report of the committee of the House of Representatives where the act originated which stated
*38 that such was the purpose intended to be accomplished *by the act. (House Report No. 1288, 61st Congress, 3d Session.) The conflict between the purpose thus intended and the construction now claimed for the act is evident unless it can be said that to confer by anticipation upon the United States by a law universally and automatically operating a license to use every patent right is a means of giving effect to a provision of a statute avowedly intended for the further securing and protecting of such patent rights.

But passing deducing the meaning of the act from its title and the report of the committee by which it was drafted, it is apparent that the significance which the contention affixes to it is directly in conflict with the text (which is in the margin [3]), since that text expressly declares that the object of the act is to secure compensation for patentees whose rights have been "used by the United States without license"—the very
*39 antithesis of a right by license to use all patents which is the purpose *attributed to the act by the argument. And this is made clearer by considering that the statute itself in directing the proceedings which must be resorted to in order to accomplish its avowed purpose, exacts the judicial ascertainment of conditions which would be wholly negligible and irrelevant upon the assumption that the statute intended to provide in favor of the United States the general license right which the argument attributes to it.

This conclusion cannot be escaped when it is considered that if the license, which it is insisted the act in advance created, obtained in favor of the United States, the inquiry into the question of infringement by the United States for which the statute provides would be wholly superfluous and indeed inconsistent with the assumption of the existence of the supposed license.

But let us in addition pass these latter considerations and come not only to demonstrate the error of the construction asserted but to make manifest the true meaning of the statute from a twofold point of view; that is, first, from an analysis of the context of the statute as elucidated by the indisputable principles which at the time of the adoption of the act governed the subjects with which it dealt, and, second, from the consideration of the context and the effect upon it of the ruling in Crozier v. Krupp, 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771.

At the time of the enactment of the law of 1910 the following principles were so indisputably established as to need no review of the authorities sustaining them, although the leading cases as to all the propositions are referred to in the margin.[4]

(a) That rights secured under the grant *40 of letters *patent by the United States were * property and protected by the guarantees of the Constitution and not subject therefore to be appropriated even for public use without adequate compensation.

(b) That although the United States was not subject to be sued and therefore could not be impleaded because of an alleged wrongful taking of such rights by one of its officers, nevertheless a person attempting to take such property in disregard of the constitutional guarantees was subject as a wrongdoer to be controlled to the extent necessary to prevent the violation of the Constitution. But it was equally well settled as to patent rights, as was the case with all others, that the right to proceed against an individual, even although an officer, to prevent a violation of the Constitution did not include the right to disregard the Constitution by awarding relief which could not rightfully be granted without impleading the United States, or, what is equivalent thereto, without interfering with the property of the United States possessed or used for the purpose of its governmental functions.

(c) That despite the want of authority to

[3] "An act to provide additional protection for owners of patents of the United States, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims: Provided, however, that said Court of Claims shall not entertain a suit or reward (sic) compensation under the provisions of this act where the claim for compensation is based on the use by the United States of any article heretofore owned, leased, used by, or in the possession of the United States: Provided further, that in any such suit the United States may avail itself of any and all defenses, general or special, which might be pleaded by a defendant in an action for infringement, as set forth in title sixty of the Revised Statutes, or otherwise: And provided further, that the benefits of this act shall not inure to any patentee, who, when he makes such claim is in the employment or service of the government of the United States; or the assignee of any such patentee; nor shall this act apply to any device discovered or invented by such employé during the time of his employment or service."

[4] United States v. Palmer, 128 U. S. 262, 9 Sup. Ct. 104, 32 L. Ed. 442; Schillinger v. United States, 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108; United States v. Berdan Firearms Mfg. Co., 156 U. S. 552, 15 Sup. Ct. 420, 39 L. Ed. 530; Belknap v. Schild, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599; Russell v. United States, 182 U. S. 516, 21 Sup. Ct. 899, 45 L. Ed. 1210; International Postal Supply Co. v. Bruce, 194 U. S. 601, 24 Sup. Ct. 820, 48 L. Ed. 1134; Harley v. United States, 198 U. S. 229, 25 Sup. Ct. 634, 49 L. Ed. 1029.

implead the United States, yet where an officer of the United States, within the scope of an official authority vested in him to deal with a particular subject, having knowledge of existing patent rights and of their validity, appropriated them for the benefit of the United States by the consent of the owner, express or implied, upon the conception that compensation would be thereafter provided, the owner of the patent right taken under such circumstances might, under the statute law of the United States permitting suits against the United States on contracts express or implied, recover by way of implied contract the compensation which might be rightly exacted because of such taking.

(d) That where an officer of the United States in dealing with a subject within the scope of his authority infringed patent rights by a taking or use of property for the benefit of the United States without the conditions stated justifying the implication of a contract, however serious might be the infringement or grave to the holder of the rights the consequences of such infringement, the only redress of the owner was against the officer, since no ground for implying a contract and securing compensation from the United States obtained.

[2, 3] Coming to consider the statute in the light of these principles, there would seem to be no room for controversy that the direct and simple provision, "that whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims," embraces and was intended alone to provide for the discrepancy resulting from the divergence between the right in one case to sue on an implied contract and the non-existence of a right to sue in another. And this meaning becomes irresistible when the concordance which it produces between the title and the report of the committee is considered on the one hand, and the discord which would arise on the other from reading into the statute the theory of automatic and general license as to every patent which the argument presses. Observe that the right to recover by implied contract as existing prior to 1910 and the right to recover given by that act both rest upon the possession and exertion of official authority, although from the absence of definition in the statute the precise scope of the official power possessed in order to bring the authority into play is not specified but is left to be deduced from the application of general principles. Observe further that, resting thus upon the exercise of official power it was not assumed before the act of 1910 or under that act, that the official authority would consciously and intentionally be exerted so as to violate the Constitution by wrongfully appropriating private property. This follows from a twofold point of view: First, because the basis of the right to sue on implied contract is the fact that official power recognizing the patent right and the at least implied assent of the owner, had acted in reliance upon the fact that adequate compensation would follow the taking. And second, because in conferring the right to prove infringement, the act of 1910 obviously contemplates the possibility of the commission of official error or mistake on that subject and afforded a remedy for its correction and resulting compensation. Thus it is true to say that under both views the theory of its universal and automatic appropriation by the United States of a license to use all patent rights is unsupported, since both views assume that official authority would not be willfully exerted so as to violate the Constitution, and this although it be that the act of 1910 embraces the exceptional case where, because of some essential governmental exigency or public necessity, the authority of the United States is exerted to take patent rights under eminent domain in reliance upon the provision to recover the adequate compensation which the act of 1910 affords. And this fundamental characteristic at once exposes the want of foundation for the contention that because the statute made provision for giving effect to acts of official power in taking patent rights under the conditions stated and even when necessary of curing defects in the exertion of such power, therefore it is to be assumed that the statute conferred upon all who contracted with the United States for the performance of work a right to disregard and take without compensation the property of patentees. This must be, since the making of a contract with the United States to perform duties in favor of the United States does not convert the contractor into an official of the United States qualified to represent it and to entail obligations on it which under the terms of the statute can alone rest upon official action and the discharge of official duty. The making of a contract with the United States and the resulting obligation to perform duties in favor of the United States by necessary implication impose the responsibility of performance in accordance with the law of the land; that is, without disregarding the rights or appropriating the property of others. A contractor with the United States, therefore, is in the very nature of things bound to discharge the obligation of his contract without violating the rights of others, and merely because he contracts with the United States is not vested with the power to take the property of others upon the assumption that as a result of the contract with the United States he enjoys the right to exercise public and governmental powers possessed by the United States.

Nor is there any foundation for the as-

sumption that the ruling in Crozier v. Krupp, 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771, is in conflict with these self-evident propositions and by necessary implication sanctions the theory of universal license in favor of the United States as to all patent rights and the asserted resulting authority in contractors with the United States for the purpose of the execution of their contracts to disregard and appropriate all such rights.

Stated as briefly as we possibly can the case was this: In the arsenals of the United States guns and gun carriages were constructed containing appliances which it was asserted infringed patent rights of the Krupp Company. A bill was filed against Crozier, who was Chief of Ordinance of the United States, to enjoin the alleged violation of the asserted patent rights. Crozier demurred to the amended bill on the ground that the court had no jurisdiction because the suit was one against the United States. The trial court dismissed the bill. The Court of Appeals of the District of Columbia reversed because, although it fully conceded there was no
*44 jurisdiction over the United States and no
* power to interfere with its public property or duties, it yet considered that there was jurisdiction to restrain the individual, although an officer, from continuing to take property without compensation in violation of the Constitution. A certiorari was granted. It was stipulated in the cause that the structures complained of had been made in all the arsenals of the United States by Crozier, the Chief of Ordinance, and by the United States, and that the United States had asserted the right, and proposed to continue, to make the guns and gun carriages in the future for its governmental purposes and denied the violation of any patent right. It was also stipulated that the Chief of Ordinance had made no profits and that all claims were waived except the claim of right to a permanent injunction at the termination of the suit to prevent the use of the appliances in the future. And that was the solitary issue which here arose for decision.

It was held that in view of the admission as to the nature and character of the acts done by the United States and further in view of the power of the United States to take under eminent domain the patent rights asserted, the provisions of the statute affording a right of action and compensation were adequate to justify the exercise of such power. In accordance with this ruling it was decided that there was no right to an injunction against the Chief of Ordinance as an individual and the parties if their rights had been infringed were relegated to the compensation provided under the act of 1910. In reaching this conclusion the statute was critically considered principally for the purpose of determining whether the right to recover compensation which the act afforded was adequate to fulfill the requirements of compensation for rights taken as protected by the Constitution. It is true in the analysis which was made of the statute for this purpose it was said that the consummated result of the act of 1910 in any particular case was to confer upon the United States a license to use the patent right
45 (page 305).* But the use of the word 'license'* affords no room for holding that it was decided that the statute provided for the appropriation by anticipation and automatically of a license to the United States to use the rights of all patentees as to every patent. And clearer yet is it that the use of the word 'license' affords no ground for the proposition that the statute invested every person contracting with the United States for the furnishing of material or supplies or for doing works of construction with public powers and transferred to them the assumed license to violate patent rights to the end that they might be relieved of the obligations of their contracts and entail upon the United States unenumerated and undetermined responsibility upon the assumption that the United States would be ultimately liable for the patent rights which the contractors might elect to take. Through abundance of precaution, however, we say that if any support for such contentions be susceptible of being deduced from the use of the word 'license' in the passage referred to, then the word must be and it is limited, as pointed out by the context of the opinion and by what we have said in this case, to the nature and character of use which was contemplated by the statute and which is consonant with the execution of its limited though beneficent purpose and not destructive of the same.

Under the view which we have stated it follows that the court below did not err in ordering the accounting under the 1911 contracts to proceed so that the statute when correctly construed might be applied. To the end, therefore, that effect may be given to such accounting as ordered by the court below our decree will be

The order of the Circuit Court of Appeals to the extent that it directed the accounting to be made on the basis therein stated is affirmed and the decree of the District Court is reversed and the case is remanded to the District Court for further proceedings in conformity with this opinion.

(246 U. S. 46)

MARCONI WIRELESS TELEGRAPH CO. OF AMERICA v. SIMON.

(Argued Jan. 29, 1918. Decided March 4, 1918.)

No. 168.

1. PATENTS ⇐287 — APPROPRIATION OF LICENSE BY UNITED STATES—LIABILITY FOR INFRINGEMENT—CONTRACTORS.

Under Act June 25, 1910, c. 423, 36 Stat. 851 (Comp. St. 1916, § 9465), declaring that,

whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right, such owner may recover reasonable compensation for such use by suit in the Court of Claims, one who, in performance of a contract with the United States to furnish appliances, incidentally infringes a patent, is not subject to suit as an infringer, even though the use of such appliances by the United States be an infringement; but, if the manufacture of such appliances furnished the United States is a per se infringement, he is liable notwithstanding the statute.

2. PATENTS ⟸324(6) — INFRINGEMENT — REVIEW—DETERMINATION.

Where the lower court, in a suit for infringement of a patent, dismissed the bill on the theory that, as defendant was manufacturing the articles under contract for the United States, he was not subject to liability, regardless of whether the infringement was incidental or per se, and did not determine that question, the Supreme Court should, on certiorari, reverse and remand for a determination of that question, for, if the defendant's infringement was only incidental, he was not liable, though liable if the infringement was such per se.

Mr. Justice McKenna dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals of the Second Circuit.

Suit by the Marconi Wireless Telegraph Company of America against Emil J. Simon. Plaintiff's motion for a preliminary injunction was denied, and defendant's motion to dismiss sustained, subject to condition (227 Fed. 906), and, the decree being affirmed on appeal to the Circuit Court of Appeals (231 Fed. 1021, 145 C. C. A. 656), plaintiff petitions for certiorari. Reversed and remanded.

Messrs. L. F. H. Betts, John W. Griggs, Richard A. Ford, and James R. Sheffield, all of New York City, for petitioner.

Messrs. Walter H. Pumphrey, Zell G. Roe and Harry Lea Dodson, all of New York City, for respondent.

*53 *Mr. Chief Justice WHITE delivered the opinion of the Court.

In the spring or early summer of 1915 the Navy Department submitted its call for proposals to furnish 25 wireless telegraph transmitting sets. The call contained a specification describing the apparatus desired and provided that no bid would be entertained unless the bidder in advance or at the time of his bid submitted a sample of the apparatus which he would furnish under his bid if accepted. Simon, the respondent, who had no manufacturing establishment, employed a manufacturer of electrical apparatus to make for him a wireless telegraph transmitting set and when it was made submitted it to the Navy Department in accordance with the call. He also submitted a bid to furnish the appliances called for conformably to the sample and his bid was accepted by the Navy Department in August, 1915. Before the contract, however, was formally completed, in September following the Marconi Wireless Telegraph Company, the petitioner, as assignee of the Marconi patents on apparatus for wireless telegraphy, filed its bill against Simon seeking an injunction preventing him from making or delivering the apparatus described in his bid on the ground that his doing so would be an infringement of the rights secured by the Marconi patents. The complainant moved for a preliminary injunction in accordance with the prayer of the bill, supporting its motion by affidavits, and the *54 *defendant made a counter motion to dismiss the bill, the motion not being in the record but the ground thereof being persuasively shown by an affidavit submitted in its support, as well as by the reasons given by the court when it came to pass upon the motion. The ground stated in the affidavit was as follows:

"That affiant, in supplying the United States navy with wireless sets constructed in accordance with Navy specifications in the present instance for use on submarines, understood that he would be free of any and all liability for profits and damages for alleged infringement of patents, in view of the law as established by many recent decisions of the United States courts holding that the government, in the exercise of the right of eminent domain, may impose a license on any patent, the subject-matter of which it elects to use, and if the apparatus supplied by affiant to the Navy comes within the claims of the patent in suit, affiant has only assisted the government, a licensee, in carrying out its license."

On the hearing of the motions there was contention as to whether the transmitting sets furnished by Simon were merely an indirect or contributory infringement of the Marconi patents because they were not complete and could not become so until they were adjusted for use and used by the Navy Department, or whether they were so complete without reference to such subsequent adjustment and use as to be a direct infringement. In passing at the same time upon the motion for injunction and the motion to dismiss the bill, the court, not doubting that the bill and the affidavits supporting the motion for an injunction established that the making and furnishing of the apparatus by Simon in an abstract sense infringed the Marconi patents either directly or indirectly by contribution, did not find it necessary to determine which one of the two characters of infringement had resulted because it concluded that such *55 determination in the concrete was wholly irrelevant as under the view taken of the case in any aspect there was no unlawful infringement. This conclusion was reached by considering the Act of 1910 (Act June 25, 1910, c. 423, 36 Stat. 851 [Comp. St. 1916, § 9465]) in connection with the decision in Crozier v. Krupp, 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771, and by holding that from such considerations it resulted that there existed in favor of the United States a general license to use patent rights when necessary for its governmental purposes and that Simon, as a contractor or one proposing to contract with the United States, could avail himself of the

license right in favor of the United States and therefore was entitled to make and deliver the articles in question for the United States although if such license had not existed, the doing so would be either a direct or contributory infringement. The order as to both the injunction and the motion to dismiss were as follows:

"No injunction will issue. The motion to dismiss is granted, unless plaintiff elects in 20 days to plead over, and allege infringements not arising from governmental contracts. If such election is made, defendant to answer in twenty days after amended bill filed." (D. C.) 227 Fed. 906.

The complainant having refused to make the election and to amend, a decree of dismissal was subsequently entered which was reviewed by the court below. That court while it affirmed upon the theory of the license resulting from the act of 1910 in accordance with the views which had been expressed by the trial court, also treated the act of Simon as either an infringement per se or a contribution to the infringement, if any, resulting from the acts of the United States, and did not distinguish between them doubtless because of a belief that under the construction given to the act of 1910 both were negligible and afforded no ground for complaint. 231 Fed. 1021, 145 C. C. A. 656. By virtue of the allowance of a writ of certiorari the case is now before us.

*56 [1] *In view of the construction which we have given the act of 1910 in the case of William Cramp & Sons Co. v. International Curtis Marine Turbine Co., 246 U. S. 28, 38 Sup. Ct. 271, 62 L. Ed. ——, just decided, it is apparent that both the courts below erred since the significance which they gave to the statute and upon which their conclusions were based, we have held in the case stated to be without foundation. It would hence follow, looking at this case from a generic point of view, that our duty would be to reverse the action of both courts below and to decide the controversy on the merits in the light of the construction of the statute which we have announced. But we are of opinion that under the case as made by the record the duty of applying to the issues the true meaning of the statute cannot with safety or with due regard to the rights of the parties be now performed because of the failure of the courts below (a failure obviously resulting from the mistaken view they took of the statute) to determine whether the acts of Simon in furnishing the wireless apparatus amounted to an intrinsic or per se infringement, or only constituted contributions to the infringement, if any, resulting from the adjustment and use of the apparatus by the United States for its essential governmental purposes. We are compelled to this conclusion because if the making of the parts was in and of itself an infringement, it is clear under the ruling which we have just made in the Cramp Case that Simon was not protected by the supposition of a license resulting from the act of 1910 and that his acts were none the less wrongful because committed in the course of the performance of a contract with the United States. And if on the other hand they were only contributions to an infringement resulting from the acts of the United States, it is equally clear that in view of the provisions of the act of 1910 as interpreted in the Cramp Case and as upheld and applied in the Crozier Case, no illegal interference with the rights of the patentee arose or could arise *57 *from the mere furnishing to the government of the United States of the parts which were not per se infringements even although the use by the United States would infringe the patents.

[2] It follows therefore that to finally decide the case would require us to determine whether or not the apparatus as furnished was a direct infringement or mere contribution. But to do this would call for the exercise on our part of a duty which it was the province of the court below to perform and which doubtless it would have performed but for the error into which it fell concernng the interpretation of the act of 1910 and the application to the subject which was before it of the prior decision of this court in Crozier v. Krupp, supra. Under these circumstances, as we have clearly removed by our decision in the Cramp Case all reasons for misconception concerning the statute and have thus cleared the way for the discharge by the court below of its duty, we think the case before us comes directly within the spirit of the ruling in Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257, 30 Sup. Ct. 505, 54 L. Ed. 757, United States v. Rimer, 220 U. S. 547, 31 Sup. Ct. 596, 55 L. Ed. 578, William Cramp & Sons Co. v. International Curtis Marine Turbine Co., 228 U. S. 645, 33 Sup. Ct. 722, 57 L. Ed. 1003, and Brown v. Fletcher, 237 U. S. 583, 35 Sup. Ct. 750, 59 L. Ed. 1128. We do not overlook, in saying this, contentions advanced in argument that as the devices may have been made by Simon not only for the government but for other persons, and even those furnished the government were made before the contract with the Navy Department was completed, therefore his act in making them was a direct infringement. We do not, however, stop to dispose of them since we are of opinion that under the state of the record we ought not to do so but should leave them also to be considered for what they are worth by the court below, if duly presented and relied upon, when it comes hereafter to consider the controversy.

Our order therefore will be one reversing *58 the decrees of both courts below and remanding to the District Court to the end that in the light of the construction which we have given the act of 1910 the rights of the parties may be considered and determined.

Reversed and remanded.

Mr. Justice McKENNA dissents.

(246 U. S. 178)

CITY AND COUNTY OF DENVER et al. v. DENVER UNION WATER CO.

DENVER UNION WATER CO. v. CITY AND COUNTY OF DENVER et al.

(Argued Oct. 3 and 4, 1917. Decided March 4, 1918.)

Nos. 294, 295.

1. REFERENCE ⟸99(5)—FINDING OF MASTER —REPORT.

Where the court by consent of the parties appointed a special master, with all the powers conferred upon the master under the rules and practice of the federal courts of equity, for the purpose of taking testimony and reporting to the court such testimony, and his findings of fact and conclusions of law, as might be essential to the proper advisement of the court, the master's findings of fact, embodied in his report, which in view of the very terms of the order of reference itself were subject to review by the court, were not conclusive, and exceptions thereto were improperly overruled on the ground the appointment was by consent.

2. APPEAL AND ERROR ⟸1175(7)—REVIEW—DETERMINATION.

Where the issues were fully heard before a master, and all proper evidence was admitted, and the exceptions to his findings raised no serious question of fact, the appellate court may dispose of such exceptions without remanding the case to the trial court, which erroneously declined to consider them.

3. APPEAL AND ERROR ⟸173(2) — CONTENTIONS—URGING CONTENTION BELOW.

A bill to enjoin the enforcement of a municipal ordinance fixing the rates for water permitted to be charged by complainant, on the ground that they did not afford a fair and reasonable compensation based on the value of complainant's property used in that service, and hence amounting to a taking of property without due process of law, alleged that complainant was entitled to have its property, devoted to public use of supplying the municipality and its inhabitants with water, remain unimpaired in value, and to receive for the water supplied and service rendered a reasonable return. The answer admitted complainant's ownership of a system of waterworks, and that it was entitled to have its property devoted to the public use of supplying the municipality, and its inhabitants with water, remain unimpaired in value, and receive a reasonable return therefor, and further alleged that the rates fixed by the ordinance were fair, reasonable, and just. The master's report showed that no question was made before him but that the plant of complainant should be valued as a plant in use. *Held*, that it was not open to the municipality to urge on appeal that a large portion of complainant's property used in supplying water should be computed at its value disassociated from that service, because complainant was occupying the streets of the municipality at sufferance and might be excluded, for that contention, which substantially was that complainant's property should be computed at its junk value, was not raised below.

4. WATERS AND WATER COURSES ⟸192—ORDINANCES — WATERWORKS — RIGHTS IN STREETS.

The franchise of complainant, which supplied a municipality located in a semiarid country with water, having expired, an ordinance reciting in its preamble that complainant was a mere tenant by sufferance of the streets, and that, while it had been supplying the municipality and its inhabitants with water, it had done so at rates that were excessive and should be reduced, established maximum rates which could be charged by complainant, and, after providing that complainant should install a meter for any person desirous of using water by meter and making provisions for hydrants upon existing mains or extensions, imposed a fine for violation of any of its provisions. The ordinance, which was introduced on an initiative petition, was adopted by the city council of the municipality without any discussion of its terms. *Held* that, as the rate ordinance should be construed in view of the circumstances, and as a holding that the municipality might require complainant to remove its mains and other property from the street would necessitate a correlative holding authorizing defendant to discontinue the service at any time, the ordinance must be construed as a franchise of indefinite duration, authorizing complainant to use the streets of the municipality for the furnishing of water.

5. WATERS AND WATER COURSES ⟸203(10)—PUBLIC WATER SUPPLY—REASONABLE COMPENSATION.

A corporation engaged in supplying a municipality and its inhabitants with water under a franchise of indefinite duration is entitled to a reasonable return, and, notwithstanding the indefiniteness of the franchise, the value of its property, when computed to ascertain whether the maximum rates prescribed by an ordinance were confiscatory, should be the present value of the property as used; that is, the market value of the land and reproduction cost, less depreciation of structures.

6. WATERS AND WATER COURSES ⟸203(10)—RATES—"GOING CONCERN VALUE."

Where a corporation, engaged in supplying a municipality and its inhabitants with water, contended that the rates prescribed by an ordinance were confiscatory, and deprived it of its property without due process of law, there should, in computing the value of its property, be an allowance on account of the going concern value of the property, which is an element of value arising out of the fact that the physical properties were assembled and the business was in successful operation.

7. APPEAL AND ERROR ⟸843(2)—QUESTIONS FOR DETERMINATION.

Where a decree enjoining the enforcement of a municipal ordinance prescribing maximum water rates, on the ground that they were confiscatory, could be affirmed on that ground, even though complainant be not deemed the owner of certain water rights, the question whether complainant was under the state laws entitled to such water rights should not be determined.

8. CONSTITUTIONAL LAW ⟸298(3)—WATERS AND WATER COURSES ⟸203(10)—DUE PROCESS — CONFISCATORY RATES — REASONABLE RETURN.

Where the prevailing rate of interest in the locality for secured loans on business and residence property was about 6 per cent., with higher rates for loans less adequately secured, a corporation engaged in the business of supplying the municipality and its inhabitants with water is entitled to at least 6 per cent. on the fair value of its property devoted to public use, and ordinances which would limit the return to a considerably smaller percentage are invalid as confiscatory.

Mr. Justice Holmes, Mr. Justice Brandeis, and Mr. Justice Clarke, dissenting.

Appeals from the District Court of the United States for the District of Colorado.

Suit by the Denver Union Water Company against the City and County of Denver and others. From a decree for complainant, defendants appeal, and complainant filed a

cross-appeal, presenting assignments of error for consideration only in the event that defendants' assignments of error, or some of them, should be sustained. Modified and affirmed.

Messrs. James A. Marsh, Norton Montgomery, and Edward C. Stimson, all of Denver, Colo., for city and county of Denver.

Messrs. Clayton C. Dorsey and Gerald Hughes, both of Denver, Colo., for Denver Union Water Co.

Mr. Justice PITNEY delivered the opinion of the Court.

We have here an appeal and a cross-appeal from a final decree made in a suit in equity brought by the Denver Union Water Company against the city and county of Denver and the members of its council and other public officials, for the purpose of restraining the enforcement of an ordinance passed March 3, 1914, fixing the rates for water permitted to be charged thereafter by the company, upon the ground that they did not afford a fair and reasonable compensation, based upon the value of the property of complainant necessarily used in the service, and hence amounted to a taking of private property without due process of law within the meaning of the Fourteenth Amendment. The city and county of Denver is a municipal corporation having broad powers of self-government, including the power on the part of five per cent. of the electors to initiate an ordinance by petition. For convenience it will be referred to as the city.

An answer having been filed, putting the cause at issue, the District Court, by consent of parties, appointed a special master, "with all of the powers conferred upon the master under the rules of practice for the courts of equity of the United States, and subject to the further orders of this court, * * * for the purpose of taking all testimony in the suit and reporting to the court said testimony, his findings of fact and such conclusions of law as he may deem essential to the proper advisement of the court." After a full hearing he made an elaborate report, sustaining complainant's main contention. The city and the Public Utilities Commission, defendants, filed numerous exceptions to his findings and conclusions, raising questions respecting certain elements that entered into his valuation of complainant's plant. Complainant, while declaring that it did not consent to a review of the report so far as it was conclusive under the order of reference, filed exceptions, subject to such ruling as the court might make respecting its reviewability. Upon these exceptions the cause came on to be heard, whereupon the court, being of the opinion that under the terms of the order appointing the special master his findings of fact were not open for its consideration, and that no material questions of law were raised that could be considered without an examination of the facts, ordered that the exceptions of both parties be struck out, confirmed the master's report, and passed a final decree in favor of complainant in accordance with his findings. Defendants appealed to this court, presenting assignments of error based upon the overruling by the District Court of their exceptions to the master's report. Complainant filed a cross-appeal presenting assignments of error for consideration only in the event that defendants' assignments of error, or some of them, should be sustained.

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[1] In our opinion, the District Court erred in declining to pass upon the questions raised by the exceptions. Although no opinion was filed, the ruling appears to have been based upon the theory that because the order of reference was made by consent of parties, the conclusions of the master were not open to question. Kimberly v. Arms, 129 U. S. 512, 524, 9 Sup. Ct. 355, 32 L. Ed. 764, and Davis v. Schwartz, 155 U. S. 631, 633, 636, 15 Sup. Ct. 237, 39 L. Ed. 289, are cited in support, but they are distinguishable. In the former case, the reference, made by consent of the parties, authorized the master to hear the evidence and decide all the issues between them, and it was because of this that the court held the findings were not merely advisory, as in the ordinary case, but were to be taken as presumptively correct, "subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise," and that the findings ought to have been treated as "so far correct and binding as not to be disturbed unless clearly in conflict with the weight of the evidence upon which they were made." Davis v. Schwartz is to the same effect. In the present case, the consent given to the order of reference was conditioned by the terms of the order itself, which, as we have seen, limited the functions of the master to the taking of testimony and reporting it to the court together with his findings of fact and conclusions of law for the advisement of the court.

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[2] The error of procedure, however, does not necessitate sending the case back to the District Court. The issues were fully heard before the master, all proffered evidence was admitted, the exceptions taken to his findings raise no serious questions of fact, we have before us in the record the evidence and all other materials necessary for judgment, and will simply proceed to do what the District Court ought to have done, namely, consider the report and pass upon the exceptions, and make such decree as is equitable in the premises.

It was admitted before the master, and is not here controverted, that the company is the sole owner of the waterworks, plant,

and system in question, including lands, diversion works, reservoirs, filters, conduits, distribution works, and other apparatus, and is serving the city and its inhabitants with water, that no other waterworks or system of distribution exists in the city, and that
*183 although the city has power to construct a system of its own (subject to a limit of cost that will be mentioned *below), it has not commenced to do so. It was, however, contended by defendants, in the answer and upon the hearing before the master—and the contention is here renewed—that as to such of the company's water diversion rights as had been acquired by it or its predecessors by original appropriation and user (as distinguished from those acquired by purchase) the right to the water itself was not the property of the company but of the city; and this upon the theory that, under the law of appropriation as it obtains in Colorado, the right of diversion belonged to those for whose use and benefit the appropriation was made, the company being entitled to compensation only for its services as carrier in distributing the water by means of the physical system owned by it.

The report of the special master shows, what is not disputed, that his investigation of the matters referred to him was most painstaking and thorough. In estimating the value of the company's property, he adopted the following method, with the practical consent of the parties: Lands and water rights were appraised at their present market values; estimates of the cost of reproducing the structures were made, and, from this cost, allowance for accrued depreciation was deducted so as to determine the reasonable value of the structures in their present condition; and in estimating the cost of reproduction it was assumed that the work would be done under contract after fair competitive bidding, and with reasonable costs for engineering and superintendence in addition to the contract cost. Separate consideration was given to the various tracts of land owned by the company, and the various water rights, diversion works, reservoirs, conduits, distribution pipes, personal property, and other items constituting the plant. He found the plant to be in excellent condition, supplying water abundantly in excess
*184 of the needs of the community and under a proper pressure, and found its entire value to be $13,415,899, in which the *only elements seriously questioned by the city were: (a) The disputed water diversion rights, which he held to be the property of the company and valued at $1,998,117; and (b) an item of $800,000 for "going concern" value, allowed by the master upon the ground that the company had "an assembled and established plant doing business and earning money," according to the principle laid down by this court in Des Moines Gas Co. v. City of Des Moines, 238 U. S. 153, 165, 35 Sup. Ct. 811, 59 L. Ed. 1244. He made no allowance for franchise value or for any permanent right to maintain the waterworks in the streets of the city; but he did value the plant as capable of use and actually in use in the public service, and found that a new plant capable of serving the public with like efficiency could not be built for $13,415,899—a finding to which no exception was taken. The master further found that the net earnings of the company under the ordinance of 1914, after making proper allowances for operating expenses, taxes, and depreciation, would be $488,820, or only 3.64 per cent. of the reasonable value of the plant; while the prevailing rate of interest for secured loans on business and residence properties in Denver was about 6 per cent., with higher rates for loans less adequately secured.

Defendants now insist that the company is occupying the streets and performing its service merely at sufferance; that its rights arose solely out of a franchise ordinance adopted in 1890 and which expired in 1910; and that the city now has the right to exclude the company from its streets, and hence the right to fix the terms upon which it shall continue to do business, and that the value to the company of the property under these circumstances is what it would bring for some other use in case the city should build its own plant—in other words, as to a large part of the property, "junk value." Of course, it is a necessary corollary that the company may discontinue its service at will.
*185 * We are unable to regard the case as capable of being thus disposed of upon the basis of "junk value" for complainant's property.

[3] In the first place, no such question is presented, either by the pleadings, the master's report, the exceptions, or the assignments of error. The bill averred that complainant was "entitled to have its property devoted to the public use of supplying the city and county of Denver and its inhabitants with water remain unimpaired in value, and to receive for the water supplied and services rendered a reasonable return upon the value of the property so devoted to said uses, and a sufficient amount to protect said property against depreciation and other impairments of value." The answer admitted complainant's ownership of the system of waterworks (except that as to certain of the water rights it was denied upon legal grounds that have been indicated), and admitted that "complainant is entitled to have its property devoted to the public use of supplying the city and county of Denver and its inhabitants with water remain unimpaired in value, so far as its actual use in supplying the city and county of Denver and its inhabitants with water is concerned, and to receive for the services rendered in supplying such water a reasonable return upon the value of the property devoted to such use,

and a sufficient amount to protect said property against depreciation and other impairments of value in connection with such use and such water service." The answer further alleged that the rates fixed by the ordinance of 1914 "are fair, reasonable, just, and will produce for complainant a fair, reasonable, and adequate return upon the capital actually invested by complainant in its water system and carrying service." The master's report shows that no question was made before him but that the plant should be valued as a plant in use, except as it was contended that the item of $800,000 for going concern value ought to be eliminated on the ground that such an element of value, admittedly existent in a "purchase case," could not be considered in a "rate case," and on the further ground that the company's franchise had expired. This latter point was made the basis of one of the exceptions. Aside from this, the exceptions were devoted mainly to the contention, already mentioned, that the company's water rights, other than those which had been purchased, were the property not of the company but of the city. It was at no time contended that any element of value except "going concern value" ought to be excluded because of the expiration of the franchise. Defendant's assignments of error are based upon the exceptions, and raise no other question.

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[4] But, supposing the question were properly raised, we are convinced that by the true intent and meaning of the ordinance of 1914 new rights were conferred upon the company of such a nature that in considering the effect of the provisions limiting rates, the plant must be valued not as "junk" but as property useful and in use in the public service.

It is true the title and preamble of the ordinance contain indications of a purpose to treat the company as a mere tenant by sufferance of the streets, but its enacting provisions do not carry out this purpose; and the measure must be construed as a whole, in the light of the circumstances existing at the time of its adoption, and with proper regard for the consequences that would result from giving to it the meaning contended for by the city.

Under the ordinance of 1890 the company had a franchise which expired April 10, 1910, at which time the city had an option either to purchase the works at an appraised valuation, or to renew the contract for a period of twenty years. After its expiration litigation ensued as a result of which this court held, in May, 1913, that the city was under no obligation to accept either option, and that its failure to renew the contract did not amount to an election to purchase the plant. Denver v. New York Trust Co., 229 U. S. 123, 138, 33 Sup. Ct. 657, 57 L. Ed. 1101. Meanwhile fruitless negotiations were conducted looking to a purchase of the plant by the city, but leaving the parties far apart upon the question of valuation. The city on May 17, 1910, adopted a charter amendment whereby it created the Public Utilities Commission, directed that an offer of $7,000,000 be made for the property of the company, and provided that in case of its rejection steps should be taken to construct a water system owned and operated by the city at a cost not to exceed $8,000,000. The water company rejected the offer of $7,000,000; but the city did not commence—has not yet commenced—the construction of its own water system. The company continued to supply water to the city and its inhabitants at the rates charged during the continuance of the ordinance of 1890. In August, 1913—after our decision in the case just mentioned—the city and the Public Utilities Commission appointed a commission of three to inspect, examine, and report upon complainant's water system, and after an investigation, during which complainant gave this commission every reasonable opportunity for inspection and examination of its records and data, the commission, on January 14, 1914, made a unanimous report to the effect that complainant's system was in excellent working condition, adequate for supplying the city's present needs, and worth, exclusive of going-concern value or water rights, something over $10,000,000, and declaring that it would take five years, without allowance for delays in legal proceedings, for the city to construct a new system of its own, and would cost $12,750,000. After this report, and on February 17, there was submitted to the electors and taxpaying electors of the city a contract by which the city was to purchase complainant's water system and properties at a price to be fixed by appraisers, including the Public Utilities Commission, who were to act for the city, which contract complainant agreed to accept and abide by if favorably voted on by the taxpaying electors. It was rejected. Prior to the first of February the ordinance now in question, greatly reducing the rates, was prepared at the instance of the Public Utilities Commission, circulated as an initiated bill under the appropriate provision of the city charter, received the signatures of more than five per cent. of the electors, but only 5,593 in all,[1] was filed with the city clerk about a week after the election just mentioned, was introduced in the city council, published once, and passed by the council on March 3, without amendment and without hearings; that body having acted either in the belief that, since the measure was presented with the signatures of a sufficient number of the citizens, it was mandatory upon the council to pass it, or else that they had no other option except to refer it to a vote of the people, which was not done. See Speer v. People, 52 Colo. 325, 343, 122 Pac. 768. We remark upon the legis-

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[1] The population of the city, by the census of 1910, was 213,381.

lative procedure simply because of its bearing upon the interpretation of the measure, which, as we shall see, lacks certainty in its enacting clauses.

The practical situation existing at the time of its enactment is sufficiently clear from what has been said. The answer admits the averment of the bill that complainant has been and is compelled to continue to serve the city and its inhabitants with water, because there is no other supply of water available, and a cessation of its service would result in great suffering, damage, and loss of life. The city is located in a semi-arid region, and is and for nearly a half century has been absolutely dependent upon the continued operation of complainant's system. The termination of the legal franchise in 1910 did not absolve the city from its duty to the inhabitants. At the time of the enactment of the ordinance of 1914 the company's plant *189 had been in use for four years since the expiration of the former franchise; the city, while endowed with the power to construct a system of its own, but only if it could be done at a cost not exceeding $8,000,000, had not yet commenced the construction of such a system, had just been officially advised that one could not be constructed for less than $12,750,000, and nevertheless had rejected a proposition to purchase complainant's system at an appraised value.

It is in the light of all these circumstances that the provisions of the ordinance of 1914 must be read. There is a preamble reciting that since 1910 the company had been without franchise and a mere tenant by sufferance of the streets, and that, while it had been supplying the city and its inhabitants with water, it had done so "at rates that are excessive and that should be reduced and regulated accordingly"; and there is a declaration that the enactment is made without recognizing the company's right to occupy the streets or to continue its service, but for the purpose of regulating and reducing its charges "during the time it shall further act as a water carrier and tenant by sufferance of said streets." But the enacting provisions, in the terms employed and by necessary intendment, are inconsistent with these declarations, and must be taken to override them. The first section establishes, as the maximum charges permitted to be made by the company, a detailed schedule of "semiannual water rates payable in advance on the first day of May and November of each year." The various uses are specified, and many of these are of kinds that cannot be discontinued on brief notice. There is a special rate for irrigation by the season, May 1 to November 1. There is a provision for meter rates, payable monthly, with a clause requiring the company to instal a meter for any person desirous of using water by meter. Section 2 provides that for hydrants, including "those which may thereafter be ordered by the council to be set upon existing mains or upon extensions thereof," the city shall pay annual rentals. And section 4 imposes fines upon the company and its agents for any violation of the ordinance.

Of course, these provisions are of themselves inexplicit; but in attributing a meaning to them the choice is between a liberal construction that preserves the substantial rights of both parties and a strict construction highly penal and destructive in its effect upon both. The subject-matter was a prime necessity of life, for which there was no substitute available. The very act of regulating the company's rates was a recognition that its plant must continue, as before, to serve the public needs. The fact that no term was specified is, under the existing circumstances, as significant of an intent that the service should continue while the need existed as of an intent that it should not be perpetual. Without attributing to the initiators and to the city council a purpose to subject the inhabitants to grave danger of disease or worse, we cannot read the enacting provisions as leaving the company actually without the right to maintain its plant in the city thereafter, for necessarily this would leave it at liberty to discontinue the service at will. The alternative, which we adopt, is to construe the ordinance as the grant of a new franchise of indefinite duration, terminable either by the city or by the company at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of Denver. It recognizes the dependence of the city upon this plant, by necessary implication confers upon the company whatever privileges may be necessary to enable it to continue serving the public, in effect requires it to furnish water, and in terms prohibits it from exceeding the specified rates.

[5, 6] In this situation, there can be no question of the company's right to adequate compensation for the use of its property em- *191 ployed, and necessarily employed, in the public service; nor can it be doubted that the property must be valued as property in use. It involves a practical contradiction of terms to say that property useful and actually used in a public service is not to be estimated as having the value of property in use, but is to be reckoned with on the basis of its "junk value." Nor is the question of value for present purposes greatly affected, if at all, by the fact that there is neither right nor obligation to continue the use perpetually, or for any long period that may be defined in advance. The reason is not obscure: the cost and detriment to a property owner attributable to the use of his property by the public, and the value of the service rendered by the property to the public, are measured day by day, month by month, year by year, and are little influenced by the question how long the service is to continue. The cost of

the service includes the use of the plant, but, ordinarily, not its destruction, except through the slow processes of wear and tear and obsolescence, for which graduated depreciation allowances are made. The whole calculation is a matter of income, not capital, accounting; and the cost and value of the use of a given property for a stated period is the same whether the use is to be continued after the expiration of the period or not. If the period is extended, compensation for the use is extended proportionately.

What we have said establishes the propriety of estimating complainant's property on the basis of present market values as to land, and reproduction cost, less depreciation, as to structures. That this method was fairly applied by the special master hardly is disputed by appellants, except as they contest the items allowed for "going-concern value" and for the water rights acquired by complainant and its predecessors by original appropriation. With respect to the former item, *192 we adhere to what was said in Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 165, 35 Sup. Ct. 811, 815 (59 L. Ed. 1244):

"That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use."

As was then observed, each case must be controlled by its own circumstances. In the present case, the master expressly declared that his detailed valuation of the physical property and water rights included no increment because the property constituted an assembled and established plant, doing business and earning money; and a careful examination of his very elaborate report convinces us that this is true. The amount allowed by him on this account is not open to serious question from the standpoint of appellants.

[7] The only remaining question of serious moment is the allowance of $1,998,117 for the value of water rights acquired by original appropriation as distinguished from acquisitions by purchase.

The master found that these appropriations were made at times when the company or its predecessor held franchise contracts with the city calling for a supply of water to the inhabitants; that these contracts were limited to short periods, while the use by private consumers was under simple permits or licenses for periods of six months, at rates paid in advance, and under expressed conditions that terminated their right to use the water on violation of the reasonable rules of the company. The parties agree that such a diversion and beneficial use of the unappropriated water of a natural stream is sufficient to initiate and perfect a right to continue to use beneficially the volume of water so appropriated. Complainant contends, and the master held, that the ownership of the *193 appropriation under such circumstances may be fixed by contract between the one who diverts and the one who beneficially applies the water, and that under the circumstances of the case, upon a proper application of the rule adopted by the Supreme Court of Colorado in City of Denver v. Brown, 56 Colo. 216, 138 Pac. 44, the water rights in question were owned by complainant.

Appellants contend that under the Constitution of Colorado (article 16, § 5), and under the law as established by repeated decisions of the Supreme Court, the right to the use of water is not permitted to be acquired by appropriation from the natural streams for purposes of sale or rental; that there is no ownership of the water or right to the use of it except by those actually applying it to a beneficial use; that not only must application to a beneficial use be united to diversion in order to render the right of appropriation complete, but that where a carrying company diverts water for the beneficial use of others it acts as the agent or quasi trustee of the consumers for the protection of their rights, and is not itself the owner of the rights of diversion.

In support of this view, Wheeler v. Northern Colorado Irrigation Co., 10 Colo. 582, 17 Pac. 487, 3 Am. St. Rep. 603; Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966, 31 Am. St. Rep. 275; Wyatt v. Irrigation Co., 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280; White v. Highline Canal Co., 22 Colo. 191, 43 Pac. 1028, 31 L. R. A. 828; Ind. Ditch Co. v. Agr. Ditch Co., 22 Colo. 513, 45 Pac. 444, 55 Am. St. Rep. 149; Wright v. Platte Valley Irrigation Co., 27 Colo. 322, 61 Pac. 603, and some other cases are cited; it being insisted that they establish the rule contended for, and that their authority is not overthrown, but on the contrary recognized, by City of Denver v. Brown, 56 Colo. 216, 138 Pac. 44. The question is one of great consequence, and is not free from difficulty. It ought not to be passed upon unless the exigencies of the case require it. *194

*[8] We find it unnecessary to determine it. As we have shown, the master found the value of complainant's entire plant, including these water rights, to be $13,415,899. Deducting $1,998,117, the entire value of the disputed rights, there remains a valuation of $11,417,782. No part of this is seriously disputed except the item for going concern value, upon which we already have passed. The master found that the net earnings of the company under the ordinance of 1914 would be $488,820. No question is made about this, except some slight criticism of the depreciation charges that enter into the calculation; a criticism that we cannot sustain. The net

return, therefore, is found to be only 4.2812 per cent. of the value of the plant, excluding the disputed water rights; while there is no controversy over the master's finding that the prevailing rate of interest for secured loans on business and residence properties in Denver is about 6 per cent., with higher rates for loans less adequately secured. As was declared in Willcox v. Consolidated Gas Co., 212 U. S. 19, 48, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134, the question of the rate of compensation that may be regarded as sufficient depends greatly upon circumstances and locality. In that case we held (212 U. S. 50, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. [N. S.] 1134) that complainant was entitled to 6 per cent. on the fair value of its property devoted to the public use. We have no hesitation in holding that the return yielded by the ordinance now before us is clearly inadequate, and amounts to a taking of complainant's property without due process of law, contrary to the provision of the Fourteenth Amendment in that regard, even excluding from consideration the disputed water rights.

The decree of the District Court will be modified so as to overrule, instead of striking out, the exceptions taken by defendants to the master's report, and as so modified it will be affirmed.

Modified and affirmed.

*195 *Mr. Justice HOLMES dissenting.

This is a bill to restrain the enforcement of an ordinance of the City and County of Denver, passed on March 3, 1914, fixing the rates for water permitted to be charged thereafter to the city and its inhabitants. After the coming in of the answer the case was referred to a special master, there was an investigation of the usual kind, a report and afterwards a final decree for the Water Company, vitiated by the judge's assumption that he was bound by the master's findings of fact. But I need not dwell upon this mistake, because in my opinion the decision ought to be reversed upon a more important ground. In some instances it would be proper to send back the case for further consideration, Wilson Cypress Co. v. Del Pozo, 236 U. S. 635, 657, 35 Sup. Ct. 446, 59 L. Ed. 758; Brown v. Fletcher, 237 U. S. 583, 35 Sup. Ct. 750, 59 L. Ed. 1128; Marconi Wireless Telegraph Co. v. Simon, 246 U. S. 46, 38 Sup. Ct. 275, 62 L. Ed. ——, decided today; but that is unnecessary when there is disclosed a fundamental bar to the bill, and I may add that, if this be the fact, no omission to raise the point in technical form would induce this Court to enter a decree contrary to the manifest equities of the case. Rule 35 (33 Sup. Ct. xviii).

The Water Company occupied the streets of Denver with its pipes under an ordinance of April 10, 1890, and it is not denied that the franchise granted by that ordinance had expired. Denver v. Denver Union Water Co., 229 U. S. 123, 33 Sup. Ct. 657, 57 L. Ed. 1101. I am of opinion that the ordinance complained of does not grant a new term. Perhaps an instrument could be framed that granted while it said that it did not. But this ordinance qualifies all that follows by a preamble that recites that the Water Company is "without a franchise and a mere tenant by sufferance of the streets of the City and County of Denver" and then, "without in any manner recognizing said Denver Union Water Company's right to occupy the streets of the City and County of Denver, or to continue its service as a water carrier,* for the *196 purpose of regulating and reducing the charges made by it during the time it shall further act as a water carrier and tenant by sufferance of said streets," goes on to fix the rates. It seems to me plain that the rates subsequently established even though purporting to be monthly or semi-annual are established subject to the preliminary declaration, and to the chance of the practically improbable earlier termination of the license or tenancy at sufferance. The ordinance does not attempt to require the Company to furnish water but simply fixes a limit to its charges while it does furnish it as such tenant at sufferance. While the service continues it is charged with a public interest and is subject to regulation by law. The question at the bottom of the case is what elements, if any, the Company has a constitutional right to have taken into account in determining whether the rates ordained are confiscatory, and, more generally, whether it has any constitutional rights at all in the matter of rates.

We must assume that the Water Company may be required, within a reasonable time, to remove its pipes from the streets. Detroit United Railway v. Detroit, 229 U. S. 39, 46, 33 Sup. Ct. 697, 57 L. Ed. 1056. And, to illustrate the problem, it may be asked how a company in that situation can assert a constitutional right to a return upon the value that those pipes would have if there under a permanent right of occupation, as against a city that is legally entitled to reduce them to their value as old iron by ordering them to be removed at once. In view of that right of the city, which if exercised, would make the Company's whole plant valueless as such, the question recurs whether the fixing of any rate by the city could be said to confiscate property on the ground that the return was too low.

I understand that the Water Company has a right to stop furnishing water, corresponding to the right of the city to order out the pipes. It is hard to see how property could *197 be confiscated by the establishment of almost any rate when whatever value it would have over above that dependent upon the use of the pipes would remain to the Company if it

stopped using them and therefore was in the Company's hands to preserve. The ordinance of the city could mean no more than that the Company must accept the city's rates or stop —and as it could be stopped by the city out and out, the general principle is that it could be stopped unless a certain price should be paid. Lloyd v. Dollison, 194 U. S. 445, 449, 24 Sup. Ct. 703, 48 L. Ed. 1062; Ashley v. Ryan, 153 U. S. 436, 443, 444, 14 Sup. Ct. 865, 38 L. Ed. 773. See Denver v. New York Trust Co., 229 U. S. 123, 141, 142, 33 Sup. Ct. 657, 57 L. Ed. 1101. It is true that this principle has not been applied in cases where the condition tended to bring about a state of things that there was a predominant public interest to prevent, but I see no ground for the application here of anything to be deduced from Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; Pullman Co. v. Kansas, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, or Motion Picture Patents Co. v. Universal Film Manufacturing Co., 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187.

It may be said that to argue from such abstract rights is to discuss the case in vacuo —that practically the Company cannot stop furnishing water without being ruined, or the city stop receiving it without being destroyed. And no doubt this is true—but it also is true and not quite as tautologous as it seems, that the law knows nothing but legal rights. Something more than the strong probability that an enjoyment will continue must be shown in order to make an otherwise lawful uncompensated interference with it a wrong. See Matter of City of Brooklyn, 143 N. Y. 596, 616, 38 N. E. 983, 26 L. R. A. 270; Id., 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165. Or conversely if a legal title is taken it must be paid for in full notwithstanding a strong probability that the enjoyment of the property will continue long undisturbed. Howe v. Weymouth, 148 Mass. 605, 606, 607, 20 N. E. 316. So here the mu- *198 tual dependence of the parties upon each *other in fact does not affect the consequences of their independence of each other in law. The question before us is not what would be a fair compensation as between a necessary customer and a necessary seller, but simply whether the property of the company is taken without due process of law by the city's fixing rates for a service, while it continues, that the Company may discontinue at will and the city may order tomorrow to stop. I am of opinion that it is not. See Monongahela Navigation Co. v. United States, 148 U. S. 312, 340, 341, 13 Sup. Ct. 622, 37 L. Ed. 463; Appleton Water Works Co. v. Railroad Commission, 154 Wis. 121, 136, 137, 142 N. W. 476, 47 L. R. A. (N. S.) 770, Ann. Cas. 1915B, 1160. Whatever may be the duty of the City toward its inhabitants, that cannot enlarge its obligations to the Company or of the Company to it after the franchise of the latter has expired, or change the meaning of an ordinance that to my mind is plain upon its face. I presume that if it be necessary the City or the Legislature can take the water works by eminent domain.

The question is different from that which would arise upon a franchise having but a short time to run but still in force. It might be argued that the short life was a fact to be considered, as no doubt it would be in some connections. See Monongahela Navigation Co. v. United States, 148 U. S. 312, 344, 13 Sup. Ct. 622, 37 L. Ed. 463; West Springfield v. West Springfield Aqueduct Co., 167 Mass. 128, 135, 44 N. E. 1063; Kennebec Water District v. Waterville, 97 Me. 185, 205, 54 Atl. 6, 60 L. R. A. 856. Or it well may be that while a limited franchise is in force the very fact that the Company has to rely upon the returns during the life of the franchise to reimburse its outlay and give it whatever profit it can make, entitles it to returns during that period unaffected by the approach of the end. There is no such question here.

Mr. Justice BRANDEIS and Mr. Justice CLARKE concur with this opinion.

(246 U. S. 88)

BRADER v. JAMES.

(Argued Jan. 7 and 8, 1918. Decided March 4, 1918.)

No. 126.

1. INDIANS ⟸15(1) — HOMESTEAD ALLOTMENTS—ALIENATION BY HEIR.

The Supplemental Choctaw and Chickasaw Agreement of July 1, 1902 (32 Stat. 641, c. 1362), imposed no restrictions upon alienations by the heir of a deceased homestead allottee.

2. INDIANS ⟸15(2)—HOMESTEAD ALLOTMENT —ALIENATION BY HEIR.

Act April 26, 1906, c. 1876, 34 Stat. 137, requiring conveyances by full-blooded Indian heirs of certain deceased homestead allottees to be approved by the Secretary of the Interior, applies, although the land descended free from restrictions on alienation prior to the statute's enactment.

3. INDIANS ⟸15(2)—HOMESTEAD ALLOTMENT —CONSTITUTIONALITY OF STATUTE.

Act April 22, 1906, requiring conveyances by full-blooded Indian heirs of certain deceased homestead allottees to be approved by the Secretary of the Interior, is constitutional, although the land descended free from restrictions on alienation prior to the statute's enactment, since Congress has power to regulate such conveyances as long as the Indian heir remains in a tribal relationship under national protection.

In Error to the Supreme Court of the State of Oklahoma.

Suit by Rachel James against J. H. Brader. A judgment for plaintiff was affirmed by the Supreme Court of Oklahoma (49 Okl. 734, 154 Pac. 560), and defendant brings error. Affirmed.

Messrs. E. A. Blythe, of Hugo, Okl., D. M. Tibbetts, of Guthrie, Okl., and J. H. Brader, of Hugo, Okl., for plaintiff in error.

Messrs. A. M. Works, of Hugo, Okl., and Joseph C. Stone, of Muskogee, Okl., for defendant in error.

*93 *Mr. Justice DAY delivered the opinion of the Court.

This case involves the right of Rachel James, a full-blood Choctaw Indian, to convey certain land. The land was originally allotted to Cerena Wallace under the Supplemental Agreement with the Choctaws and Chickasaws of July 1, 1902. 32 Stat. 641, c. 1362. As to the homestead allotment, which is here in question, section 12 of said agreement provided that it should be inalienable during the lifetime of the allottee, not exceeding 21 years from the date of the certificate of allotment. Cerena Wallace, mother of Rachel James, and herself a full-blood Choctaw Indian, died October 27, 1905, leaving her daughter, Rachel James, sole surviving heir at law. On August 17, 1907, Rachel James, joined by her husband, conveyed the land, embraced in the original homestead allotment with some other lands to Tillie Brader, who conveyed by quitclaim deed of September 13, 1909, to the plaintiff in error. The conveyance by Rachel James to Tillie Brader was not approved by the Secretary of the Interior. Rachel James prosecuted this suit to recover the land, and for use and occupation, thereof, basing her right of recovery on the fact that her conveyance had not been approved by the Secretary of the Interior. She *94 succeeded in the court of original jurisdiction, and the judgment *was affirmed by the Supreme Court of Oklahoma. 49 Okl. 734, 154 Pac. 560.

The case as brought to our attention involves two questions:

(1) Could a full-blood Choctaw Indian after the passage of the Act of April 26, 1906, c. 1876, 34 Stat. 137, convey the lands inherited from a full-blood Choctaw Indian, to whom the lands had been allotted in her lifetime, without the approval of the Secretary of the Interior?

(2) If such conveyance were made valid by the act of Congress only with the approval of the Secretary of the Interior, is such legislation constitutional?

[1] As to the homestead allotment to the mother, Cerena Wallace, under the Supplemental Choctaw and Chickasaw Agreement of July 1, 1902, Rachel James as her heir at law received the land free from restriction, and had good right to convey the same unless prevented from so doing by the Act of April 26, 1906. Mullen v. United States, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834. As the conveyance here in question was subsequent to the Act of April 26, 1906, if that act covers the case, and is constitutional, Rachel James may not convey without the approval of the Secretary of the Interior, and the judgment below was right.

[2] The Act of April 26, 1906, was before this court in Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738. In that case it was held that a full-blood Indian of the Creek Tribe after the passage of the Act of April 26, 1906, could not convey land which he had inherited, and which was allotted under the Act of Congress known as the Supplemental Creek Agreement of June 30, 1902, c. 1323, 32 Stat. 500, and as to which the five years named in section 16 of that act had not expired when Congress passed the Act of April 26, 1906, without the approval of the Secretary of the Interior. In that case, as in this, a construction of section 22 of the last-named act was directly involved. That section provides: *95

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

The conveyance by Rachel James is within the terms of the section as construed in the Tiger Case, unless the fact that the restriction of the act under which she inherited had expired when the Act of April 22, 1906, was passed, whereas in the Tiger Case the former limitation had not expired when the act was passed, makes such difference as to require a different ruling in the present case. We are of opinion that this fact does not work a difference in result. As set forth in the opinion in the Tiger Case, the Act of April 22, 1906, was a comprehensive one, and intended to apply alike to all of the Five Civilized Tribes, and to make requirements as to conveyances by full-blood Indians and the full-blood heirs of Indians, which should take the place of former restrictions and limitations. The purpose was to substitute a new and uniform scheme controlling alienation in such cases, operating alike as to all the Civilized Tribes. Notwithstanding Rachel James might have conveyed the homestead allotment after it descended to her, she *96 was a tribal Indian, and as such *still subject to the legislation of Congress enacted in discharge of the nation's duty of guardianship over the Indians. Congress was itself the judge of the necessity of legislation for this purpose; it alone might determine when this guardianship should cease.

The argument that the language in the last sentence of section 22 must be taken to mean that Congress had no intention to deal with restrictions under former acts, certainly not with those which had expired, is answered by the consideration that Congress was dealing with tribal Indians, still under its control and subject to national guardianship. In the terms of this act Congress made no exception as to rights of alienation which had arisen under former legislation, and it undertook, as we held in the Tiger Case, to pass a new and comprehensive act requiring conveyances, of the class herein under consideration, to be valid only when approved by the Secretary of the Interior.

[3] In view of the repeated decisions of this court we can have no doubt of the constitutionality of such legislation. While the tribal relation existed the national guardianship continued, and included authority to make limitations upon the rights which such Indians might exercise in respect to such lands as are here involved. This authority did not terminate with the expiration of the limitation upon the rights to dispose of allotted lands; the right and duty of Congress to safeguard the rights of Indians still continued. It has been frequently held by this court that the grant of citizenship is not inconsistent with the right of Congress to continue to exercise this authority by legislation deemed adequate to that end. It is unnecessary to again review the decisions of this court which support that authority. Some of them were reviewed in the Tiger Case. The doctrine is reiterated in Heckman v. United States, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820, and United States v. Nice, 241 U. S. 591, 598, 36 Sup. Ct. 696, 60 L. Ed. 1192. *287 * The plaintiff in error relies upon Choate v. Trapp, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941, in which this court sustained a contractual exemption as to taxation of certain Indian lands. In that case the right of exemption was based upon a valid and binding contract, and that decision in no wise militates against the right of Congress to continue to pass legislation placing restrictions upon the right of Indians to convey lands allotted as were those in question here. In United States v. First National Bank, 234 U. S. 245, 34 Sup. Ct. 846, 58 L. Ed. 1298, and United States v. Waller, 243 U. S. 452, 37 Sup. Ct. 430, 61 L. Ed. 843, this court dealt with lands as to which certain mixed-blood Indians by act of Congress had been given full ownership with all the rights which inhere in ownership in persons of full legal capacity. Those decisions do not place limitations upon the right of Congress to deal with a tribal Indian whose relation of ward to the government still continues, and concerning whom Congress has not evidenced its intention to release its authority.

We find no error in the judgment of the Supreme Court of Oklahoma, and the same is affirmed.

Affirmed.

(246 U. S. 104)

TALLEY v. BURGESS et al.

(Argued and Submitted January 25, 1918. Decided March 4, 1918.)

No. 157.

1. INDIANS ⟸15(1) — ALIENATING ALLOTTED LANDS—RESTRICTIONS.

The Cherokee Agreement (Act July 1, 1902, c. 1375, 32 Stat. 716), relating to the alienation and descent of allotted lands, imposes no restrictions upon alienations by an allottee's heirs, other than that of minority.

2. INDIANS ⟸15(1) — ALLOTTED LANDS — ALIENATION BY HEIRS.

Act April 26, 1906, c. 1876, § 22, 34 Stat. 145, regulating the alienation of allotted lands by heirs of deceased Indians whose selection has been made, or to whom a deed or patent has been issued, applies to land selected by a deceased Indian's administratrix, pursuant to section 20, and not by such ancestor during his lifetime.

3. INDIANS ⟸15(2) — ALLOTTED LANDS—ALIENATION BY MINOR'S GUARDIAN.

Act April 26, 1906, § 22, providing that minor heirs of deceased Indian allottees might join in sales by a guardian appointed by the proper United States Court for the Indian territory, and that, if a state or territory be organized, the sale should be approved by the court of the proper county upon the guardian's petition, etc., requires approval by the United States Court for the Indian Territory of a guardian's sale made before state or territorial organization.

In Error to the Supreme Court of the State of Oklahoma.

Suit for specific performance by H. B. Talley against Daniel S. Burgess and J. L. Harnage. Judgment for defendants was affirmed by the Supreme Court of Oklahoma (46 Okl. 550, 149 Pac. 120), and plaintiff brings error. Affirmed.

Mr. H. B. Talley, of Tulsa, Okl., pro se.

Messrs. Thomas D. Lyons and Luther James, both of Tulsa, Okl., for defendants in error.

*105 * Mr. Justice DAY delivered the opinion of the Court.

This suit was brought by H. B. Talley in the district court of Tulsa county, Oklahoma, for the specific performance of a certain contract entered into by Nora B. Burgess, mother and guardian of the defendant in error, Daniel S. Burgess, a minor, with the law firm of Talley & Harnage. Harnage refusing to join in this action it was brought by Talley alone. Harnage was made a defendant to the suit. The petition sets forth that the contract was for professional services in consideration of which the attorneys were to receive a one-half interest in the one-third interest of the defendant in error, Daniel S. Burgess, in certain Cherokee allotted land. The contract was made on May 11, 1906, and

the allotment in question was embraced in a selection of land made by Nora B. Burgess as administratrix of the estate of John S. Burgess, the latter, the father of Daniel S. Burgess, having died without having selected or received an allotment.

The petition states that on May 11, 1906, Talley & Harnage entered into contracts with the other heirs of John S. Burgess similar to those entered into with the defendant in error.

The land in controversy, it is set forth, was originally allotted to defendant's mother, an intermarried Cherokee Indian, but the attorneys procured a cancellation of that allotment and then another allotment of the same in the name of the defendant's father, this allotment being selected by the administratrix in his right. The petition avers that defendant's share had been set apart to him, and that at the time of the beginning of the suit he was in the quiet enjoyment thereof. The district court appointed a guardian ad litem for the defendant in error, Daniel Burgess, and a motion was filed, treated in the courts below as a demurrer, and the trial court held that *under the statutes of the United States the guardian could not dispose of the ward's property, as she had undertaken to do, except under order of the proper United States court on petition filed for that purpose; and that the attempted sale by the guardian without court procedure was void. On error the Supreme Court of Oklahoma affirmed the judgment of the district court of Tulsa county. 46 Okl. 550, 149 Pac. 120.

The case as presented in this court involves two questions:

(1) Whether the Act of April 26, 1906, c. 1876, 34 Stat. 137, is applicable to the present suit.

(2) If applicable, whether conveyances of the kind here involved, of the ward's interest in the allotted lands, could be made by his guardian without an order of court.

The land was allotted under the Cherokee Agreement, 32 Stat. 716, which provides in section 11 for allotment by the Commission to the Five Civilized Tribes to each citizen of the Cherokee Tribe, after approval by the Secretary of the Interior of the enrollment provided, of land equal in value to 110 acres, to be selected by each allottee so as to include his improvements. Section 13 provides for the designation of a homestead out of said allotment equal in value to forty acres of the lands of the Cherokee Nation, to be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the allotment. Section 14 provides that lands allotted to citizens shall not in any manner be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of the act. Section 15 provides that all lands allotted to the members of the tribe, except such as are set aside for a homestead, shall be alienable five years after issuance of patent. Section 20 provides:

"If any person whose name appears upon the roll *prepared as herein provided shall have died subsequent to the first day of September nineteen hundred and two, and before receiving his allottment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: Provided, that the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted."

[1] It may be regarded as established that the Cherokee Agreement, in view of the sections just considered, imposes no restrictions upon alienation of the interest in the land thus going to the heir, other than that of minority. Mullen v. United States, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834; Skelton v. Dill, 235 U. S. 206, 35 Sup. Ct. 60, 59 L. Ed. 198; Adkins v. Arnold, 235 U. S. 417, 35 Sup. Ct. 118, 59 L. Ed. 294. However, the agreement upon which this suit was brought was made after the passage of the Act of April 26, 1906, a statute with which this court has had occasion to deal in recent decisions. Its scope and purpose were dealt with in Brader v. James, 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. ——, just decided. That act, as its title indicates, is a comprehensive one for the final disposition of the affairs of the Five Civilized Tribes. Section 22 provides:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult *and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

[2] It is contended that this section applies only to heirs of a deceased Indian whose selection has been made by himself, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which the decedent belonged. But in our view Congress in the passage of section 22 had in contemplation that Indians duly enrolled and entitled to share in the tribal property and lands might die before receiving the allotment

to which he, or she, was entitled. Congress had made provision in section 20 of the Cherokee Agreement that such land might be allotted in the name of the deceased, and should with the proportionate share of the other tribal property descend to the heirs of the one who would have been entitled, if living. It also provided that the selection for a decedent should be made by a duly appointed administrator or executor, or, in default of such selection, the Dawes Commission should designate the land to be allotted. We think minor heirs who thus receive lands are within the meaning and purpose of the statute, as much so as they would have been had the land been selected by the ancestor in his lifetime.

[3] Section 22 being applicable to a conveyance of a minor's lands in the situation here presented, we come to the question whether the guardian could legally make disposition thereof without an order of the court of the *United States for the Indian Territory. It is contended that section 22, as enacted, makes the requirement as to the order of the court applicable only after organization of a state or territory. Literally read the statute might lend itself to such interpretation. But minor heirs are required to join in the sale of the lands by a guardian duly appointed by the proper United States Court for the Indian Territory. The next sentence specifically provides that the order of sale must be made upon petition filed by the guardian in the proper court of the county in which the land is situated. These provisions, read together, and construing the statute in the light of the purpose to be accomplished, we think, require court approval in both instances. It is not denied that the United States Court for the Territory would have had jurisdiction of a proceeding by a guardian for an order to sell the ward's interests in the lands. See Robinson v. Long Gas Co. (C. C. A. 8 Cir.) 221 Fed. 398, 136 C. C. A. 642, where the applicable statutes are set out and considered.

We cannot believe that Congress intended after territorial or state organization to require the guardian to procure the approval and order of a court before disposition of the ward's lands, and before the organization of a territory or state to permit the guardian, who was required to be appointed by the United States Court for the Indian Territory, which court had jurisdiction over the sale of the lands of the ward upon application of the guardian, to dispose of the ward's interests in lands without judicial approval. The Supreme Court of Oklahoma did not err in holding that the Act of April 26, 1906, was applicable, and that the interests in the lands of the ward could only be sold with the approval of the United States Court for the Indian Territory, and its judgment is, therefore

Affirmed.

(246 U. S. 263)

McCURDY, County Treasurer, et al. v. UNITED STATES.

(Argued Jan. 18, 1918. Decided March 4, 1918.)

No. 685.

1. Courts ⟸385(6) — United States Supreme Court — Constitutional Question.
The claim that an attempt to exempt land purchased with released Indian trust funds from state taxation exceeded the powers of Congress, as limited by article 4, § 3, and the Ninth and Tenth Amendments of the federal Constitution, raised a substantial constitutional question, authorizing a direct appeal to the Supreme Court, under Judicial Code (Act March 3, 1911, c. 231) § 238, 36 Stat. 1157 (Comp. St. 1916, § 1215).

2. Courts ⟸385(1) — United States Supreme Court—Scope of Review.
Where a constitutional question confers appellate jurisdiction on the Supreme Court to review a federal District Court's decision, all questions involved are open for review.

3. Taxation ⟸181 — Indian Lands — Releasing Trust Fund—Power.
Act June 28, 1906, c. 3572, 34 Stat. 539, providing for the division of Osage Indian trust funds and lands after 25 years, conferred no authority on the Secretary of the Interior to release any part of such trust funds during the 25-year period.

4. Taxation ⟸181 — Indian Lands — Releasing Trust Funds—Power.
Act April 18, 1912, c. 83, § 5, 37 Stat. 87, authorizing the Secretary of the Interior to pay certain trust funds to Osage allottees under rules to be prescribed by the Secretary, did not authorize the Secretary to give property purchased with released funds immunity from state taxation, especially where it was not shown the released funds were directly invested in property restricted as to alienation.

5. Indians ⟸15(1) — Alienating Property — Restrictions.
While an Indian is a national ward, Congress may reimpose alienation restrictions on property previously freed from such restrictions.

Appeal from the District Court of the United States for the Western District of Oklahoma.

Bill by the United States of America against Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma, in which the City of Pawhuska intervened. Decree for complainant, and defendants appeal. Reversed, with directions to dismiss the bill.

Mr. Preston A. Shinn, of Pawhuska, Okl., for appellants.

Mr. Assistant Attorney General Kearful, for the United States.

*265 * Mr. Justice BRANDEIS delivered the opinion of the Court.

The Osage Tribe of Indians consisted in 1906 of 2,000 persons. Their reservation, located in Oklahoma Territory between the Arkansas river and the Kansas state line, contained about a million and a half acres of fertile well-watered prairie land and of heavily timbered hill lands, largely underlaid with petroleum, natural gas, coal and other minerals. At that time the United States held for the tribe a trust fund of $8,373,658.54 re-

ceived under various treaties as compensation for relinquishing other lands. The annual income of the tribe from interest on this trust fund and from rentals of grazing, oil, and gas lands was nearly $1,000,000; that is, $500 for every man, woman and child, in addition to the earnings of individuals.[1] Congress, concluding apparently that the enjoyment of wealth without responsibility was demoralizing to the Osages, decided upon the policy of gradual emancipation. By Act of June 28, 1906 (34 Stat. 539, c. 3572), it provided for an equal division among them of the trust fund and the lands. The trust fund was to be divided by placing to the credit of each member of the tribe his pro rata share which should thereafter be held for the benefit of himself and his heirs for the period of twenty-five years and then paid over to them respectively (sections 4 and 5).[2] *266 The lands were to be divided by giving to each member the right to make, from the tribal lands, three selections of 160 acres each and to designate which of these should constitute his homestead. A commission was appointed to divide among the members also, the remaining lands, after setting aside enough for county use, school sites and other small reservations. The oil, gas, coal and other mineral rights were reserved to the tribe for the period of twenty-five years with provision for leasing the same. The homesteads were made inalienable and nontaxable for twenty-five years or until otherwise provided by Congress. All other allotted lands—which were known as "surplus lands," were made inalienable for twenty-five years and nontaxable for three years, except that power was vested with the Secretary of the Interior to issue to any adult member, upon his petition, a certificate of competency, authorizing him to sell all of his surplus lands; and upon its issue all his surplus lands became immediately taxable. By Act of April *267 18, 1912, § 5[3] (37 Stat. 86, 87, c. 83), Congress authorized the Secretary of the Interior to pay to any Osage allottee "in his discretion" "under rules and regulations to be prescribed by him and upon application therefor" all or part of the funds held for his benefit, provided the Secretary is satisfied either that the allottee is competent or that such payment would be to "the manifest best interest and welfare of the allottee."

In 1913 (apparently in March) the Secretary paid from the principal of the trust funds held for Robert Panther, a noncompetent[4] allottee the sum of $1,750, which was applied in payment for a lot of land in the city of Pawhuska. The land when purchased was conveyed to one Brenner as trustee for Robert and Emma Panther, but soon after was conveyed by Brenner to Robert individually. The deed to Robert contained the following clause:

"This conveyance is made and accepted with the understanding, and under the condition that the above described property is to be and remain inalienable and not subject to transfer, sale or incumbrance, for a period of eighteen years from the 1st day of July, 1913, except by and with the express consent and approval of the Secretary of the Interior, or his successor in office."

The land was originally a part of the Osage Reservation and became part of Pawhuska when that town was established under the Osage Township Act (March 3, 1905, c. 1479, 33 Stat. 1061). When Oklahoma was admitted into the Union in 1907, the town became the city of Pawhuska and a part of Osage county. The land had passed into private ownership before 1908, became taxable then under the laws of Oklahoma and taxes were assessed thereon and *were paid until* 268 about the time of the conveyance to Brenner in trust for the Panthers. Then default was made and the land was sold by the county treasurer for failure to pay taxes for the second half of 1912.

In January, 1917, the United States tendered to the holder of the tax certificate and to the county treasurer, the amount of the 1912 and 1913 taxes and penalties and demanded a redemption receipt. The tender

[1] Annual Reports, Dept. Interior (1905) pp. 306-312; Id. (1906) pp. 448, 451.

[2] Sec. 4. That all funds belonging to the Osage Tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage Tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided: * * *

Sec. 5. That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage Tribe, according to the roll herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interests, except as hereinbefore provided.

[3] Act of April 18, 1912, § 5:

Sec. 5. That the Secretary of the Interior, in his discretion, hereby is authorized, under rules and regulations to be prescribed by him and upon application therefor, to pay to Osage allottees, including the blind, insane, crippled, aged, or helpless, all or part of the funds in the treasury of the United States to their individual credit: Provided, that he shall be first satisfied of the competency of the allottee or that the release of said individual trust funds would be to the manifest best interests and welfare of the allottee; Provided further, that no trust funds of a minor or a person above mentioned who is incompetent shall be released and paid over except to a guardian of such person duly appointed by the proper court and after the filing by such guardian and approval by the court of a sufficient bond conditioned to faithfully administer the funds released and the avails thereof.

[4] Act of April 18, 1912, § 9:

Sec. 9. The word "competent," as used in this act, shall mean a person to whom a certificate has been issued authorizing alienation of all the lands comprising his allotment, except his homestead.

was refused, because it did not include the taxes and penalties for 1914, 1915 and 1916; and the county treasurer gave notice of intention to issue the tax deed. Thereupon the United States filed, in the federal District Court for the Western District of Oklahoma, this suit against the county treasurer for an injunction to restrain the issue of the tax deed. The government contended, that as the land had been bought for Panther and was by deed made inalienable without the consent of the Secretary of Interior, it was while so held, an instrumentality lawfully employed by the government for the protection of an Indian and as such exempt from taxation by the state or any subdivision thereof. On the other hand the county treasurer and the city (which was permitted to intervene) contended that Congress had not authorized the Secretary of the Interior to invest the trust fund for the Indians' benefit or to impose restriction on alienation of property purchased with money from that source; that the insertion in the deed of the provision against alienation, did not have the effect of exempting the land from taxation by the state; and that it was not the intention of Congress to do so. It was also contended that such exemption was not within the powers of Congress as limited by article 4, § 3, and the Ninth and Tenth Amendments of the Constitution; since before imposing the restriction by deed, the land had become a part of the private property subject to the jurisdiction of the state. A decree
269 was entered granting, in effect, an injunction against taxation during the period of restriction of alienation; and the case is brought here on direct appeal under section 238 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. 1916, § 1215]), on the ground that constitutional questions are involved.

[1, 2] The jurisdiction of this court was questioned; but the case is properly here. The constitutional question is substantial, was properly raised below, and was passed upon there. We have, however, no occasion to consider it; since all questions involved in the case are before us (Northwestern Laundry v. Des Moines, 239 U. S. 486, 491, 36 Sup. Ct. 206, 60 L. Ed. 396) and there are other grounds on which the decree must be reversed.

[3-5] Under the Act of June 28, 1906, the Secretary of the Interior had no authority to release or to invest any part of the principal of the trust fund held for Panther. His authority to release rests wholly upon section 5 of the Act of April 18, 1912. That section confers upon him, if application is made therefor, discretion whether to release or to withhold. If the release "would be to the manifest best interests of the allottee" it may be made although the allottee is not competent, as that term is defined in section 9 of the act. The Secretary is authorized to prescribe the rules and regulations under which such releases shall be made; but he is not given authority to exercise control of any property in which the funds released may thereafter be invested, or otherwise to create with the released funds a governmental instrumentality for the protection of the Osages. Congress apparently believed that in order to prepare the Indian for complete independence, he must be educated in self-control, and that this could best be done by committing to him gradually the care of his property. That course necessarily involved the risk of some property being lost through improvidence. But in the case of the Osages the risk was not attended by serious danger. Even if the whole trust fund should be released and, despite supervision, improvidently spent, the legally competent allottee
270 would still have his homestead and his share in valuable undivided oil, gas and coal rights; and the legally incompetent, his surplus lands in addition. There is nothing in the act or in the facts to which it applies that indicates a purpose to extend governmental control to property in which released funds may be invested. And there are in both the Act of 1906 and in that of 1912, provisions which show that Congress intended to restrict the tax exemption. By section 2 of the Act of 1906 the surplus lands became taxable after three years, even if they remained inalienable. By section 7 of the Act of 1912 both the lands and funds of allottees or their heirs are protected against claims arising prior to competency, inheritance or removal of restrictions; but it is expressly provided "that nothing herein shall be construed so as to exempt any such property from liability for taxes."

The regulations issued under date of June 26, 1912, afford no support to the government's contention. They provide, among other things, that:

(a) "One who has not received a certificate of competency, but who has made good use of all moneys paid him and has properly used the lands and rentals under his control belonging to his minor children may be considered competent to handle his trust funds."

(b) In case of adults neither aged, physically disabled, nor incompetent to a degree requiring legal guardianship, the applicant must agree "to abide by a stipulation in the claim that the money is to be deposited in bank to his credit and expended under the supervision of the superintendent, subject to instructions from the Indian Office, if the Secretary of the Interior so directs."

Like the act under which they are framed, these regulations contemplate supervision of the expenditure of money, not control of the property, if any, for which the money is expended. They tend to confirm the contention of the appellant, that after the money is paid
271 out of the bank it and property in which it may be invested are to be freed from any restriction. Under the Act of 1906, the Secretary of the Interior when applied to for a certificate of competency was confronted with serious alternatives. If he issued the certif-

icate, all the allottee's surplus lands—about 495 acres [5]—would at one time be freed from restrictions on alienation and become subject to disposition by him without governmental control. If the Secretary refused to issue the certificate, the allottee would (unless the certificate were granted later) remain, until the end of the twenty-five year period, in the enjoyment of the income merely; and at the end of that period, he or his heirs though unaccustomed to the control of property, would get absolute dominion at one time over the (a) homestead, (b) surplus lands, (c) the trust fund ($3,928.50),[6] and (d) his share of the interest in the oil, gas, coal and mineral rights. The Act of 1912 made possible the release of parts of the trust fund from time to time. The risks to be incurred at any one time could be made quantitatively as small as the Secretary of the Interior might deem advisable; and by the regulations, the risk was reduced in degree, by virtue of the requirement, that the money must be "deposited in bank and expended under supervision of the superintendent, subject to instructions from the Indian Office, if the Secretary of the Interior so directs." The policy of education and development through the bank account had been tried and found promising.[7] *272 The regulations greatly extended the field of operation by providing that one legally incompetent might get such release where he had made good use of the moneys theretofore paid him or of the lands under his control. It is education through the responsibility for spending, not the property purchased with released moneys, which constitutes the instrumentality employed by the government in fitting the individual Osage Indian to take his full part as a citizen of the United States.

Furthermore, in the case at bar it is not shown that the money released from the trust was invested directly in property restricted as to alienation. Apparently Panther's money had been released six months before the deed to him was executed and was used to pay for a conveyance of the land to Brenner, as trustee for Robert and Emma Panther. What the terms of the trust were does not appear. But there is nothing in the record to indicate that a restriction upon the alienation of the land was among them or that the Secretary of the Interior expressly reserved control over the property or its proceeds. It may well be that the Commissioner of Indian Affairs then believed that an ordinary trust of the property for a short period would best advance the interests of Panther. It is consistent with the facts shown that the restriction upon alienation inserted in the deed was not a continuation of control reserved by the Secretary of the Interior, but a bringing under his control of a part of Panther's estate theretofore freed. In this respect and others the present case differs from United States v. Thurston County, 143 Fed. 287, 74 C. C. A. 425, much relied upon by the government. There is also a clear distinction between the present case and those like United States v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532, where it was sought to tax property, the legal title of which was in the United States and which was held by it for the benefit of Indians.[8] *273 While an Indian is still a ward of the nation, there is power in Congress even to reimpose restrictions on property already freed (Brader v. James, 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. ——, decided this day); but Congress did not confer upon the Secretary of the Interior authority to exercise such power under the circumstances of this case or to give to property purchased with released funds immunity from state taxation.

The decree is reversed with directions to dismiss the bill.

Reversed.

[5] Report of Com. of Indian Affairs (1912) pp. 63, 244.

[6] Report of Com. of Indian Affairs (1910) p. 47.

[7] Report of the Commission of Indian Affairs (1912) pp. 64, 66: "As the keynote of Indian progress has been individualism, perhaps the most effective general action taken during the fiscal year was the sending of a personal letter to each superintendent handling individual Indian funds in order to impress upon his mind a most important consideration —that the funds of an able-bodied Indian should be handled in such a way as not to weaken his moral stamina as a man."

[8] See United States v. Pearson (D. C.) 231 Fed. 270.

(246 U. S. 135)

INTERNATIONAL PAPER CO. v. COMMONWEALTH OF MASSACHUSETTS.

(Argued Oct. 19, 1918. Decided March 4, 1918.)

No. 733.

1. COURTS ⊜366(6)—FOLLOWING STATE DECISION—CONSTITUTIONALITY OF STATUTES.

In determining the constitutionality of state statutes enacted at different dates under which license taxes were assessed, the federal Supreme Court should follow the decisions of the state court and construe the statutes as being part of a single scheme.

2. COMMERCE ⊜69 — EXCISE TAX ON FOREIGN CORPORATION.

St. Mass. 1909, c. 490, pt. 3, § 56, declares that every foreign corporation shall in each year at the time of filing its annual certificate of condition pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax of one-fiftieth of 1 per cent. of the par value of its authorized capital stock, but the amount shall not in any one year exceed the sum of $2,000. St. Mass. 1914, c. 724, § 1, declares that every foreign corporation subject to the tax imposed by the preceding act shall, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, in addition to the tax imposed, an excise tax of one one-hundredth of 1 per cent. of the par value of its authorized capital stock in excess of $10,000,000. The two acts were construed by the Massachusetts courts as part of one general taxing scheme; the latter removing the limitation of the first. *Held*, that the tax as assessed against a foreign corporation, maintaining an office in the state of Massachusetts and doing therein an intrastate and an interstate busi-

ness, is invalid, as a direct burden on interstate commerce.

In Error to the Supreme Judicial Court of the State of Massachusetts.

Petition by the International Paper Company against the Commonwealth of Massachusetts to recover an excise tax. On exceptions to a decree of dismissal, such petition was dismissed by the Supreme Judicial Court of the State of Massachusetts (228 Mass. 101, 117 N. E. 246), and petitioner brings error. Reversed.

Mr. Charles A. Snow, of Boston, Mass., for plaintiff in error.

Mr. Wm. Harold Hitchcock, of Boston, Mass., for the Commonwealth of Massachusetts.

*138 *Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit by a New York corporation to recover the amount of an excise tax assessed against it in Massachusetts for the year 1915 and paid under protest, the right of recovery being predicated on the asserted invalidity of the tax under the commerce clause of the Constitution (article 1, § 8, cl. 3) and the due process clause of the Fourteenth Amendment. The tax is also assailed on other grounds which will be passed without particular notice. The case is set forth in an agreed statement, in the light of which *139 the state court has sustained the tax. 228 Mass. 101, 117 N. E. 246. The Massachusetts statutes under which the tax was imposed are as follows:

St. 1909, c. 490, pt. 3, § 56: "Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent. of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

St. 1914, c. 724, § 1: "Every foreign corporation subject to the tax imposed by section fifty-six of part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one hundredth of one per cent. of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition."

The facts shortly stated are these. The company, as before indicated, is a New York corporation. Its authorized capital stock, on which the tax was computed, is $45,000,000. Its total assets are not less than $39,000,000 or $40,000,000, of which not more than 1¾ per cent. are located or invested in Massachusetts. Its authorized and actual business is manufacturing and selling paper, in which connection it operates 23 paper mills—1 in Massachusetts and 22 in other states. The output of its mills is sold by it in both interstate and intrastate commerce, principally the former. In Massachusetts it maintains a selling office where two salesmen, with a bookkeeping and clerical force, negotiate *140 sales of a part of the *output to consumers in the New England states, subject to the approval of the home office in New York. About 86 per cent. of the sales negotiated through this selling office are in interstate commerce and the remainder are local to Massachusetts. The sales are made largely through long-term contracts with proprietors of newspapers whereby the company engages to supply their needs from its mills and from the output in transit at the time. No stock of goods is kept on hand in Massachusetts from which current sales are made. The executive and financial offices of the company are in New York, and none of its corporate or business activities are carried on in Massachusetts save as is here indicated. It pays local property taxes in Massachusetts on its real and personal property located there. In 1915 the assessed value of such property was $472,000 and the tax paid thereon was $8,118. The tax in question was in addition to the property tax and amounted to $5,500. It was imposed, so the state court holds, as an annual excise for the privilege of doing a local business within the state.

[1] While the legislation under which the tax was assessed and collected was enacted in part in 1909 and in part in 1914, its operation and validity must be determined here by considering it as a whole, for the opinion of the state court not only holds that the "maximum limitation" put on the tax by the part first enacted "is removed" by the other, but treats the two parts as exacting a single tax based on the par value of "the entire authorized capital" and computed as to $10,000,000 thereof at the rate of one-fiftieth of 1 per cent. and as to the excess at the rate of one one-hundredth of 1 per cent.

[2] Cases involving the validity of state legislation of this character often have been before this court. The statutes considered have differed greatly, as have the circumstances in which they were applied, and the questions presented have varied accordingly. *141 In disposing of these *questions there has been at times some diversity of opinion among the members of the court and some of the decisions have not been in full accord with others. But the general principles which govern have come to be so well established as no longer to be open to controversy.

The subject was extensively considered in Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355. A statute of Kansas was there in question. As construed by the state court, it required a foreign corporation doing an interstate and local business in that and other states to pay a license fee or excise of a given per cent. of its authorized capital for the privilege of

conducting a local business in that state. After reviewing the earlier decisions this court pronounced the statute invalid as being repugnant to the commerce clause of the Constitution and the due process clause of the Fourteenth Amendment. In that and two other cases (Pullman Co. v. Kansas, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, and Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423), which were before the court at the same time it was held:

1. The power of a state to regulate the transaction of a local business within its borders by a foreign corporation—meaning a corporation of a sister state—is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on state action.

2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted.

3. Consistently with the due process clause, a state cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the state.

4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce *142 does not prevent a state in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the state cannot require the corporation as a condition of the right to do a local business therein to submit to a tax on its interstate business or on its property outside the state.

5. A license fee or excise of a given per cent. of the entire authorized capital of a foreign corporation doing both a local and interstate business in several states, although declared by the state imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other states; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located.

6. When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the state.

True, those were cases where the business, interstate and local, in which the foreign corporation was engaged was that of a common carrier. But the immunity of interstate commerce from state taxation is not confined to what is done by the carriers in such commerce. On the contrary, it is universal and covers every class of interstate commerce, including that conducted by merchants and trading companies. And as respects the power of a state to tax property beyond its jurisdiction belonging to a foreign corporation, it is of no moment whether the corporation be a carrier or a trading company, for a state is wholly without power to impose such a tax.

Our last decision on the subject was given *143 during the present term in Looney v. Crane Co., 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. ——. The case was orally argued a second time at our request and was much considered. It involved the validity of a Texas statute which, as construed by the state court of last resort, required a foreign corporation as a condition to engaging in local business in that state to pay a permit tax based on its entire authorized capital and a franchise tax based on its outstanding capital plus its surplus and undivided profits. The foreign corporation complaining of these taxes was a manufacturing and trading company extensively engaged in interstate and local commerce, principally the former, in several states, including Texas. It maintained an agency in that state and had a large supply depot at one point therein and a warehouse at another. Of its gross sales and receipts for the year preceding the suit not more than 2½ per cent.—$1,019,750—had any relation to Texas and of this approximately one-half was interstate in character. The assessed value of its property in the state was $301,179, upon which it paid the usual ad valorem tax.

Applying what was held in Western Union Telegraph Co. v. Kansas, supra, and the two other cases before cited, this court unanimously pronounced the Texas statute invalid as placing "direct burdens on interstate commerce" and taxing "property and rights which were wholly beyond the confines of the state and not subject to its jurisdiction." Then turning to Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127, St. Louis, Southwestern Ry. Co. v. Arkansas, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed. 265, Kansas City, Ft. Scott & Memphis Ry. Co. v. Kansas, 240 U. S. 227, 36 Sup. Ct. 261, 60 L. Ed. 617, and Kansas City, Memphis & Birmingham R. R. Co. v. Stiles, 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176, which were relied on as practically overruling Western Union Telegraph Co. v. Kansas and kindred cases, the court pointed out that the former contained express statements that they were not intended to limit the authority of the latter, and further said of the former (245 U. S. 189, 38 Sup. Ct. 87, 62 L. Ed. ——):

*144 "In the first place it is apparent in each of the cases that as the statutes under consideration were found not to be on their face inherently repugnant either to the commerce or due process clause of the Constitution, it came to be

considered whether by their necessary operation and effect they were repugnant to the Constitution in the particulars stated, and this inquiry it was expressly pointed out was to be governed by the rule long ago announced in Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 698 [15 Sup. Ct. 268, 360, 39 L. Ed. 311] that 'the substance, and not the shadow, determines the validity of the exercise of the power.' In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes with the Constitution which was found to exist resulted from particular provisions contained in each of them which so qualified and restricted their operation and necessarily so limited their effect as to lead to such result. These conditions related to the subject-matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied. It is thus manifest on the face of all of the cases that they in no way sustain the assumption that because a violation of the Constitution was not a large one it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Constitution.

"It follows, therefore, that the cases which the argument relies upon do not in any manner qualify the general principles expounded in the previous cases upon which we have rested our conclusion, since the later cases rested upon particular provisions in each particular case which it was held caused the general and recognized rule not to be applicable."

*** That case and those which it followed and reaffirmed are fully decisive of this. The statutes then and now in question differ only in immaterial details, and the circumstances of their application or attempted application are essentially the same. In principle the cases are not distinguishable.

In holding otherwise the state court failed to observe the restricted and limited grounds of our rulings in Baltic Mining Co. v. Massachusetts and the other cases dealt with and distinguished in the excerpt just quoted from our opinion in Looney v. Crane Company. True, the tax sustained in Baltic Mining Co. v. Massachusetts was imposed under the first of the statutes now in question, the one of 1909; but at that time the statute placed a maximum limit on the amount of the tax which, as shown in that and other cases, was a material factor in the decision. This limitation, as the state court holds, was "removed" by the statute of 1914, which also made a partial reduction in the tax rate. Since then the tax has been assessed on the par value of "the entire authorized capital" at one-fiftieth of one per cent. up to $10,000,000 and at one one-hundredth of one per cent. for the excess. Accepting the state court's view of the change wrought by the later statute, it is apparent that since 1914 the Massachusetts law has been in its essential and practical operation like those held invalid in 1910 in Western Union Telegraph Co. v. Kansas, Pullman Co. v. Kansas, and Ludwig v. Western Union Telegraph Co., and like that held invalid at the present term in Looney v. Crane Company.

What has been said sufficiently shows that the tax in question should have been declared unconstitutional and void as placing a prohibited burden on interstate commerce and laid on property of a foreign corporation located and used beyond the jurisdiction of the state.

Judgment reversed.

(246 U. S. 147)

CHENEY BROS. CO. et al. v. COMMONWEALTH OF MASSACHUSETTS.

(Argued April 20, 1916. Restored to Docket for Reargument May 21, 1917. Reargued Oct. 19, 1917. Decided March 4, 1918.)

No. 12.

1. COMMERCE ⟸69—"INTERSTATE COMMERCE"—SALES BY SAMPLE—EXCISE TAX.

The corporate excise tax imposed by St. Mass. 1909, c. 490, pt. 3, § 56, violated the commerce clause of the federal Constitution (article 1, § 8, cl. 3) by taxing interstate business, when applied to a foreign corporation maintaining only a local selling office, in which sample goods were kept and from which its salesmen solicited orders subject to the home office's approval.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. COMMERCE ⟸69—SALES—FOREIGN CORPORATION—INTERSTATE COMMERCE.

The statute did not impose a tax on interstate commerce as applied to a foreign corporation keeping a stock of typesetting machine parts within the state and selling such parts locally.

3. COMMERCE ⟸69—FOREIGN CORPORATION—REPAIR BUSINESS—INTERSTATE COMMERCE.

A tax was not imposed on interstate commerce as applied to a foreign automobile corporation repairing and selling secondhand cars within the state, although such local business tended to maintain the volume of its interstate business in new cars.

4. COMMERCE ⟸69—FOREIGN CORPORATIONS — SOLICITING PURCHASERS — INTERSTATE COMMERCE.

A tax was not imposed on interstate commerce as applied to a foreign flour-milling corporation employing salesmen to induce local retailers to purchase the corporation's flour from local wholesale dealers.

5. COMMERCE ⟸46 — FOREIGN CORPORATION—NATURE OF ACTIVITIES—INTERSTATE COMMERCE.

A foreign holding corporation, whose local activities were confined to holding stockholders' and directors' meetings, keeping records, distributing dividends, etc., was not engaged in interstate commerce.

6. COMMERCE ⟸46 — FOREIGN CORPORATIONS — DISTRIBUTING DIVIDENDS — INTERSTATE COMMERCE.

A foreign corporation, maintaining a local office from which it distributed dividends and where it held directors' meetings, at which officers were elected, the execution of deeds to lands outside of the state were authorized, etc., was not thereby engaged in interstate commerce.

7. CONSTITUTIONAL LAW ⟸230(1) — TAXATION ⟸53—EQUAL PROTECTION OF LAWS—CORPORATE EXCISE TAXES.

St. Mass. 1909, c. 490, pt. 3, § 56, imposing increased excise taxes on foreign corporations,

but not upon domestic corporations, does not deny the equal protection of the laws to a foreign corporation which had previously acquired land for automobile purposes; there being no proof that such land was not saleable at a reasonable price.

8. Constitutional Law ⟸230(1) — Equal Protection of Laws—Taxation.

A state does not surrender or abridge its power to revise its taxing system or tax rates by merely licensing a foreign corporation to engage in local business and acquire property within its limits.

9. Taxation ⟸40(5)—Corporate Taxation.

A state may impose a different tax rate upon a foreign corporation for the privilege of doing business than it applies to domestic corporations.

In Error to the Supreme Judicial Court of the State of Massachusetts.

Separate petitions by the Cheney Bros. Company, the Lanston Monotype Company, the Locomobile Company of America, the Northwestern Consolidated Milling Company, the Copper Range Company, the Champion Copper Company, and the White Company against the Commonwealth of Massachusetts to recover excise taxes were dismissed, and petitioners bring error. Judgment reversed as to Cheney Bros. Company, and affirmed as to other plaintiffs in error.

For opinion below, see 218 Mass. 558, 106 N. E. 310.

Messrs. Charles A. Snow and William P. Evarts, both of Boston, Mass., for plaintiffs in error.

Mr. William Harold Hitchcock, of Boston, Mass., for the Commonwealth of Massachusetts.

*152 * Mr. Justice VAN DEVANTER delivered the opinion of the Court.

We here are concerned with an excise tax imposed by Massachusetts in 1913 on each of seven foreign corporations on the ground that each was doing a local business in the state. Objections to the tax based on the commerce clause of the Constitution (article 1, § 8, cl. 3), and the due process and equal protection clauses of the Fourteenth Amendment were overruled by the state court. 218 Mass. 558, 106 N. E. 310. The tax was imposed under St. 1909, c. 490, pt. 3, § 56, before the maximum limit was removed by St. 1914, c. 724, § 1, and in that respect the case is like Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127, and unlike International Paper Co. v. Massachusetts, 246 U. S. 135, 38 Sup. Ct. 292, 62 L. Ed. ——. Whether in other respects it is like Baltic Mining Co. v. Massachusetts is the matter to be determined, and this requires that the business done by each of the seven corporations be considered.

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* Cheney Brothers Company.

[1] This is a Connecticut corporation whose general business is manufacturing and selling silk fabrics. It maintains in Boston a selling office with one office salesman and four other salesmen who travel through New England. The salesmen solicit and take orders, subject to approval by the home office in Connecticut, and it ships directly to the purchasers. No stock of goods is kept in the Boston office, but only samples used in soliciting and taking orders. Copies and records of orders are retained, but no bookkeeping is done, and the office makes no collections. The salesmen and the office rent are paid directly from Connecticut and the other expenses of the office are paid from a small deposit kept in Boston for the purpose. No other business is done in the state.

We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation. McCall v. California, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 391; Norfolk & Western R. R. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394; Crenshaw v. Arkansas, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. Ed. 565; Rogers v. Arkansas, 227 U. S. 401, 33 Sup. Ct. 298, 57 L. Ed. 569. Nor is the situation changed by inferring, as the state court did, that orders from customers in Connecticut sometimes are taken by salesmen connected with the Boston office and, after transmission to and approval by the home office, are filled by shipments from the company's mill in Connecticut to such customers. In such cases it doubtless is true that the resulting sale is local to Connecticut, but the action of the Boston office in receiving the order and transmitting it to the home office partakes more of *the nature of *154 interstate intercourse than of business local to Massachusetts and affords no basis for an excise tax in that state. International Text Book Co. v. Pigg, 217 U. S. 91, 106, 107, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103. We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the commerce clause.

Lanston Monotype Company.

[2] This is a Virginia corporation which makes typesetting machines in Philadelphia and sells them in interstate commerce. It has a place of business in Massachusetts where it keeps on hand a stock of the several parts of its machines likely to be required for purposes of repair. The stock is replenished weekly and the parts are sold extensively to those who use the machines in that and adjacent states.

It is apparent, as we think, that a consid-

erable portion of the business of selling and supplying the repair parts is purely local and subject to local taxation.

Locomobile Company of America.

[3] This West Virginia corporation conducts an automobile factory in Connecticut and sells its automobiles in interstate commerce. It does an extensive local business in Massachusetts in repairing cars of its own make after they are sold and in use, and also in selling secondhand cars taken in partial exchange for new ones. This local business has some influence on the volume of interstate business done by the company in the state, and its abandonment would tend to reduce the purchases there of the company's automobiles. But this does not make it any the less a local business. It must be judged by what it is rather than by its influence on another business. See Delaware, Lackawanna & Western R. R. Co. v. Yurkonis, 238 U. S. 439, 444, 445, 35 Sup. Ct. 902, 59 L. Ed. 1397.

*155 * Northwestern Consolidated Milling Company.

[4] This company was incorporated under the laws of Minnesota, operates flour mills there, and sells the flour to wholesale dealers throughout the country. It has an office in Massachusetts where it employs several salesmen for the purpose of inducing local tradesmen to carry and deal in its flour. These salesmen solicit and take orders from retail dealers and turn the same over to the nearest wholesale dealer, who fills the order and is paid by the retailer. Thus the salesman, although not in the employ of the wholesaler, is selling flour for him. Of course this is a domestic business—inducing one local merchant to buy a particular class of goods from another—and may be taxed by the state, regardless of the motive with which it is conducted.

Copper Range Company.

[5] This is a Michigan corporation whose articles of association contemplate that it shall have an office in Boston. It is a holding company and owns various corporate stocks and bonds and certain mineral lands in Michigan. Its activities in Massachusetts consist in holding stockholders' and directors' meetings, keeping corporate records and financial books of account, receiving monthly dividends from its holdings of stock, depositing the money in Boston banks and paying the same out, less salaries and expenses, as dividends to its stockholders three or four times a year. The exaction of a tax for the exercise of such corporate faculties is within the power of the state. Interstate commerce is not affected.

Champion Copper Company.

[6] This is another Michigan corporation which maintains an office in Boston pursuant to a provision in its articles of association. It deposits the proceeds of its mining and *smelting business in Michigan in Boston banks and, after paying salaries and expenses, distributes the balance in dividends from its Boston office. The management of its mine is under the control of a general manager in Michigan and he in turn is under the control of the company's directors. The meetings of the latter, which occur several times in a year, are held in the Boston office. At these meetings the directors receive reports from the treasurer and general manager, vote dividends, elect officers, and authorize the execution of deeds and the like for lands in Michigan. These corporate activities in Massachusetts are not interstate commerce and may be made the basis of an excise tax by that state. *156

White Company.

[7-9] This is an Ohio corporation which is conducting a business, conceded to be local, in Massachusetts. On being admitted to do business therein it acquired two pieces of land in Boston and at large cost specially improved and adapted them for use, the one as an automobile service station and the other as a garage. A subsequent change in the statute made the excise tax more onerous than before, without, as it is said, any corresponding change being made in the law relating to domestic corporations. In these circumstances the company insists that by the imposition of the tax, as defined in the statute of 1909, it is denied the equal protection of the laws, and it relies on Southern Ry. Co. v. Greene, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247. In overruling this objection the state court said (218 Mass. 579, 106 N. E. 319):

"The real estate acquired by this petitioner is of a kind adapted to a very considerable and increasing business, in which there is general competition. The storage and care of automobiles and the performance of necessary service for their repair, maintenance and operation is a widespread business in which large amounts of capital *are invested and considerable numbers of persons are engaged. Such establishments are frequent subjects for lease and sale. There is nothing to indicate or to warrant the inference that the petitioner's investment in real estate is not readily salable at reasonable prices. It is not property of a nature irretrievably devoted to a limited and monopolistic use, and not readily available either for other valuable uses or to other persons ready to devote it to the same uses at prices fairly equivalent, subject to the general vicissitudes of business conditions, to the original investment. The Greene Case related to railroad property, which is not susceptible of use for any other purpose without great loss. In that opinion it was said: 'It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. * * * The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed.'" *157

Assenting, as we do, to what was thus said, it suffices to add, first, that a state does not surrender or abridge its power to change and revise its taxing system and tax

rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits, and, second, that "a state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchise which the state grants in creating them." Kansas City, Memphis & Birmingham R. R. Co. v. Stiles, 242 U. S. 111, 118, 37 Sup. Ct. 58, 61 (61 L. Ed. 176).

Bearing in mind that the tax of which these corporations are now complaining was imposed under the statute as it stood in 1913, which was before the maximum limit was removed, it follows from our decision in Baltic Mining Co. v. Massachusetts that the several objections based on the Constitution of the United States are all*untenable, save in the instance of the Cheney Bros. Company. The tax on that company, as before indicated, was a tax on interstate business and therefore void under the commerce clause.

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Judgment reversed as to Cheney Bros. Company and affirmed as to the other plaintiffs in error.

(246 U. S. 146)

LOCOMOBILE CO. OF AMERICA v. COMMONWEALTH OF MASSACHUSETTS.

(Argued Oct. 19, 1918. Decided March 4, 1918.)

No. 734.

COMMERCE ⊂⊃69—REGULATION—TAXATION—FOREIGN CORPORATIONS.

St. Mass. 1909, c. 490, pt. 3, § 56, imposes on foreign corporations an annual excise tax of $^1/_{50}$ of 1 per cent. of the par value of the authorized capital stock, but provides that the amount of such tax shall not in any one year exceed the sum of $2,000. St. 1914, c. 724, § 1, requires every foreign corporation subject to the tax imposed by section 56 to pay an additional tax of $^1/_{100}$ of 1 per cent. of the par value of its authorized capital stock in excess of $10,000,000, thus removing the maximum limit fixed by section 56. *Held* that, as thus changed, the statute is invalid as applied to a foreign corporation doing both an interstate and a local business in Massachusetts.

In Error to the Supreme Judicial Court of the State of Massachusetts.

Proceeding by the Locomobile Company of America against the Commonwealth of Massachusetts to recover certain taxes. The petition was dismissed by the Supreme Judicial Court of Massachusetts (228 Mass. 117, 117 N. E. 5), and the petitioner brings error. Reversed.

Mr. Charles A. Snow, of Boston, Mass., for plaintiff in error.

Mr. Wm. Harold Hitchcock, of Boston, Mass., for the Commonwealth of Massachusetts.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

An excise tax of $1,300 imposed on a West Virginia corporation for doing a local business in Massachusetts during the year 1915 is here in question. The state court sustained it. 228 Mass. 117, 117 N. E. 5. The corporation is engaged in manufacturing in Connecticut and sells its manufactured articles extensively in interstate commerce. It does both an interstate and a local business in Massachusetts. Each is of considerable volume, but the*interstate is much the larger, although this is not material. The tax is of a designated per cent. of the entire authorized capital, and was imposed after the maximum limit named in St. 1909, c. 490, part 3, § 56, was removed by St. 1914, c. 724, § 1. As thus changed the statute is in its essence and practical operation indistinguishable from those adjudged invalid in Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; Pullman Co. v. Kansas, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423, and Looney v. Crane Co., 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. ——. This we have just decided in International Paper Co. v. Massachusetts, 246 U. S. 135, 38 Sup. Ct. 292, 62 L. Ed. ——.

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Judgment reversed.

(246 U. S. 97)

EIGER et al. v. GARRITY.

(Argued Jan. 22 and 23, 1918. Decided March 4, 1918.)

No. 143.

CONSTITUTIONAL LAW ⊂⊃300—INTOXICATING LIQUORS ⊂⊃283—DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS—CIVIL DAMAGE LAW.

Hurd's Rev. St. Ill. 1915–16, c. 43, § 9, declares that every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person or means of support by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication in whole or in part of such person or persons, and any person owning, renting, leasing, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who shall knowingly permit therein the sale of intoxicating liquors, that have caused in whole or in part the intoxication of any person, shall be liable severally or jointly with the sellers. Section 10 declares that for the payment of any judgment for damages and costs that may be recovered against any person in consequence of the sale of intoxicating liquors under the preceding section the real estate and personal property of such person shall be liable, and such judgment shall be a lien until paid, and in case any person shall rent or lease to another any building or premises to be used or kept in whole or in part for the sale of intoxicating liquors, or shall knowingly permit the same to be so used, such building or premises shall be liable for and may be sold to satisfy any judgment against the person occupying such building or premises. *Held* that, in view of the right of states to pass laws for the regulation of the traffic in intoxicating liquors, and to legislate

with a view to repress the evil consequences which may result therefrom, as well as that a landlord has the option to refuse to demise his premises for use as a dramshop, and himself may select his tenant, section 10, making the demised premises liable for the payment of any judgment obtained against the occupant, is valid, and does not work a deprivation of property without due process of law.

In Error to the Supreme Court of the State of Illinois.

Bill by Delia Garrity against Emil Eiger and others. A decree for complainant was affirmed on appeal (272 Ill. 127, 111 N. E. 735), and defendants bring error to the Supreme Court of the state of Illinois. Affirmed.

Mr. A. J. Pflaum, of Chicago, Ill., for plaintiffs in error.

Mr. Ode L. Rankin, of Chicago, Ill., for defendant in error.

*98 *Mr. Justice DAY delivered the opinion of the Court.

This suit was brought by Delia Garrity to subject premises in Chicago owned by plaintiffs in error to the payment of a judgment obtained by her against Clarence Green by reason of injury sustained to her means of support through sales of intoxicating liquors to her husband by Green, who was a tenant of the plaintiffs in error occupying and using their premises for the sale of such liquors.

In her complaint she sets forth that she was the wife of one William J. Garrity; that Clarence Green on June 18, 1912, and for one year prior thereto, was the owner of and did conduct what is commonly known as a saloon or dramshop, and during such period of time sold intoxicating liquors in such shop in a certain building at 134 North Dearborn street, Chicago, standing upon certain premises described in the bill; that on June 18, 1912, she began a suit in the circuit court *99 of Cook county, Illinois,* against said Green, under the provisions of statute of the state of Illinois known as the Dramshop Act (Hurd's Rev. St. 1915–16, c. 43), to recover damages for injury to her means of support, and alleged in the declaration in said suit that she was the wife of William J. Garrity on and prior to June 18, 1912; that said Green sold and gave intoxicating liquors to her husband, which liquor in whole or in part caused the said Garrity to become habitually intoxicated, and alleged injury to her means of support resulting therefrom in the sum of $10,000; that summons was duly served on said Green; that he failed to appear, and on September 26, 1912, an order of default was entered against him, and thereupon the case came for trial before the judge and jury for the assessment of damages; that on October 2, 1914, the court and jury having heard the testimony, the jury returned a verdict finding said Green guilty, assessed the plaintiff's damages in the sum of $1,500, and judgment was rendered accordingly. The bill then alleges leasehold ownership of the land and ownership of the building in the plaintiffs in error, and that for a year or more prior to the filing of the suit in the circuit court of Cook county said Green occupied the building on the premises for the purpose of the sale of intoxicating liquors as tenant of the plaintiffs in error, who leased said building and premises to, and knowingly permitted said building and premises to be occupied by said Green for the sale of intoxicating liquors for the period of a year or more prior to the filing of the suit in the circuit court of Cook county; that the liquors sold or given to Garrity on said premises, were the sales or gifts which resulted in the verdict and judgment aforesaid; and such sales or gifts were made or given while the said Green occupied the said building as tenant of the plaintiffs in error, and with their knowledge and consent, for the purpose of keeping a dramshop, and the complainant seeks to have the building and premises charged with a lien for the payment of the judgment and costs, and *prays that in default of the payment of the judgment, interest and costs, that said building and the premises described in the bill he sold to satisfy the judgment. *100

A demurrer to the bill was overruled and the court made a decree in substance finding the allegations in the bill to be true, and adjudged that in default of the payment of the judgment, with interest, the said building, leasehold and premises of the plaintiffs in error should be subjected to sale for the payment thereof. Upon appeal the Supreme Court of Illinois affirmed the decree, holding, among other things, that the statute did not deprive the plaintiffs in error of their property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States. 272 Ill. 127, 111 N. E. 735. The decree was rendered under section 10, chapter 43, of the Revised Statutes of that state, which provides:

"For the payment of any judgment for damages and costs that may be recovered against any person in consequence of the sale of intoxicating liquors under the preceding section, the real estate and personal property of such person, of every kind, except such as may be exempt from levy and sale upon judgment and execution, shall be liable; and such judgment shall be a lien upon such real estate until paid; and in case any person shall rent or lease to another any building or premises to be used or occupied, in whole or in part, for the sale of intoxicating liquors, or shall knowingly permit the same to be so used or occupied, such building or premises so used or occupied shall be held liable for and may be sold to pay any such judgment against any person occupying such building or premises. Proceedings may be had to subject the same to the payment of any such judgment recovered, which remains unpaid, or any part thereof, either before or after execution shall issue against the property of the person against whom such judgment shall have been recovered; and when execution shall issue against the property so *leased or rented,* *101

the officer shall proceed to satisfy said execution out of the building or premises so leased or occupied, as aforesaid: Provided, that if such building or premises belong to a minor or other person under guardianship, the guardian or conservator of such person, and his real and personal property, shall be held liable instead of such ward, and his property shall be subject to all the provisions of this section relating to the collection of said judgment."

Construing this section with the preceding section (9) (printed in the margin[1]) the Supreme Court of Illinois held that the purpose of section 10 was to make the building or premises used for the sale of intoxicating liquors liable for the payment of a judgment rendered against the occupant of the *102 premises wherein the liquor was sold, provided the *owner had rented the same to be used or occupied for the sale of intoxicating liquors, or knowingly permitted the same to be so used and occupied. The court held that the judgment against the tenant, in the absence of fraud or collusion, was conclusive in the action under section 10 to subject the building and premises to its payment, except that the owner of the building is entitled to controvert the allegations that he had knowingly rented or knowingly permitted his building to be used for the sale of intoxicating liquor, and that a judgment had been recovered against the occupant for damages arising from the sale of liquor therein. The question in this court is whether the act, as thus construed, deprives the plaintiffs in error of their property without due process of law.

[1] The right of the states to pass laws for the regulation of the traffic in intoxicating liquors, and to legislate with a view to repress the evil consequences which may result therefrom, has been frequently affirmed in this court. Cramer v. Campbell, 245 U. S. 304, 38 Sup. Ct. 98, 62 L. Ed. —, decided December 10, 1917. In the opinion in that case the former cases in this court sustaining the authority of the state to deal with the evils resulting from the sale and use of intoxicating liquor are cited, and we need not review them now.

Under this broad power over the liquor traffic, and the right to pass legislation to prevent its evils, the state of Illinois has made the premises of an owner in that state subject to a lien for damages recovered by a wife for injury to her means of support against one who has furnished the husband intoxicating liquor which was sold upon the premises sought to be charged, when the owner had rented the same for the purpose of the sale of intoxicating liquor, or had knowingly permitted such sales upon his premises.

The owner of such building has no absolute right to rent his property for any and all purposes. The use of property may be regulated *103 under the police power of the *state in the* public interest in such manner as to safeguard the health and welfare of the community. Certainly there is no right beyond the reach of legislative control, to rent premises for the sale of intoxicating liquor. The state may consistently with due process of law prohibit the rental of premises for such purposes. In this instance it has undertaken to regulate the right to rent property for the sale of intoxicating liquors by making the premises so used subject to a lien for a judgment for damages because of the deprivation of the means of support of the wife resulting from the intoxication of the husband upon whom she depends for support. Obviously, the state may pass laws to meet this as well as other evil consequences likely to follow from the traffic. See Marvin v. Trout, 199 U. S. 212, 224, 225, 26 Sup. Ct. 31, 50 L. Ed. 157.

The stress of the argument for plaintiff in error is laid upon the want of notice to the landlord and the lack of opportunity to be heard as to the right of recovery and the amount thereof, before his property can be subjected to the lien of such judgment. But the effect of this statute is to make the landlord responsible only when he rents his property for the use and sale of intoxicants, or knowingly permits its use for that purpose. The statute has the effect of making the tenant the agent of the landlord for its purposes, and through this agency, voluntarily assumed, the landlord becomes a participant in the sales of intoxicants and is responsible for the consequences resulting from them.

It was the owner's privilege to rent the property to a lessee of his own choosing, and to safeguard himself by the amount of the rent reserved, or otherwise, for the possible damages resulting from the traffic in intoxicants which the landlord has agreed may be carried on in his premises. The property is not summarily taken, the owner may be heard to deny the rendition of the judgment

[1] Section 9: "Every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who have leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages; and a married woman shall have the same right to bring suits and to control the same and the amount recovered, as a feme sole; and all damages recovered by a minor under this act shall be paid either to such minor, or to his or her parent, guardian or next friend, as the court shall direct; and the unlawful sale, or giving away, of intoxicating liquors, shall work a forfeiture of all rights of the lessee or tenant, under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place; and all suits for damages under this Act may be by any appropriate action in any of the courts of this state having competent jurisdiction."

*104 against the tenant, the making of the lease authorizing the sale of intoxicating liquor, or, if his knowledge of such use be the issue, he may be heard upon that question. Mullen v. Peck, 49 Ohio St. 447, 31 N. E. 1077; Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323.

In view of the broad authority of the states over the liquor traffic, and the established right to prohibit or regulate the sale of intoxicating liquors, we are unable to discover that there has been a deprivation of property rights in the legislation in question in violation of due process of law secured by the Fourteenth Amendment.

Judgment affirmed.

STATE OF ARKANSAS v. STATE OF TENNESSEE.

(Argued Oct. 9, 1917. Decided March 4, 1918.)

No. 4, Original.

1. States ⊂⊃12(2) — Boundaries — Navigable Streams—"Thalweg."

The boundary line between states separated by a navigable stream is the middle of the navigable channel or "thalweg," and not a line equidistant between the banks of the stream at its normal stage.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Thalweg.]

2. States ⊂⊃13 — Boundaries — Establishment by Acquiescence.

The Supreme Court of Arkansas in administering the criminal laws of that state, entirely independent of any action taken or proposed by the authorities of Tennessee, decided in a series of decisions, the first of which was made in 1883, that the boundary line between the two states was a line along the river bed equidistant from the permanent and defined banks of the channel. The Supreme Court of Tennessee in 1907 reached a similar conclusion partly upon the ground that it had been adopted by the courts of Arkansas. In 1903 (Laws 1903, c. 420) and again in 1907 (Laws 1907, c. 516) the General Assembly of Tennessee authorized the appointment of a commission to act with a like commission representing the state of Arkansas, in locating the line in an abandoned channel of the river, and the later act provided that if Arkansas failed to appoint a commission the Attorney General might sue in the federal Supreme Court to establish and locate the line. *Held*, that these decisions and this legislation did not amount to such long-continued acquiescence in the practical location of a common boundary and possession in accordance therewith as required the boundary to be established in accordance with such acquiescence and possession.

3. States ⊂⊃12(2)—Boundaries—Streams—"Erosion"—"Accretion"—"Avulsion."

Where running streams are the boundaries between states, the same rule applies as between private proprietors, and, when the bed and channel are changed by natural and gradual processes known as "erosion" and "accretion," the boundary follows the varying course of the stream, while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one by the process known as "avulsion," the resulting change of channel works no change of boundary, which remains in the middle of the old channel though no water may be flowing in it and irrespective of subsequent changes in the new channel, and the fact that navigation of the old channel is rendered impossible as the result of the avulsion does not prevent the boundary remaining as it was prior to the avulsion in the center of the old channel.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accretion; Avulsion; Second Series, Erosion.]

4. States ⊂⊃12(2)—Boundaries—Streams—Avulsion.

Where a stream forming the boundary between two states leaves its former bed and establishes a new one as the result of an avulsion, the boundary remains in the middle of the former channel, whether the avulsion results in the drying up of the old channel or not, and is not restored to its location as it existed at the time of the earliest record, thereby eliminating the shifting of the river bed that resulted from erosions and accretions preceding the avulsion, and the rule that, where a reliction restores that which was once private property and was lost through the violence of the sea, the private right is restored if the land is capable of identification, has no application.

5. States ⊂⊃12(2)—Boundaries—Streams—Avulsion.

Where a stream establishes a new bed, so long as the old channel remains a running stream, a state boundary marked by it is subject to changes by erosion and accretion; but, when the water becomes stagnant, the effect of these processes is at an end, and the boundary then becomes fixed, and the gradual filling up of the bed is not treated as an accretion to the shores, but as an ultimate effect of the avulsion.

6. Navigable Waters ⊂⊃39(2)—States ⊂⊃12(2)—Riparian Rights—Law Governing—State Boundaries.

How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each state, but the states' disposition thereof is limited by the interstate boundary and cannot be permitted to press back the boundary line from where it otherwise should be located.

7. Judgment ⊂⊃707 — Conclusiveness Against Persons Not Parties.

Cases involving the location of a boundary between two states had no effect as judicial determinations of the boundary line as against one of the states which was a stranger to the record in both cases.

In Equity. Original suit by the State of Arkansas against the State of Tennessee, to determine the location of a boundary line. Interlocutory decree appointing commission to fix the line in accordance with the opinion.

*160 *This is an original suit in equity brought by the State of Arkansas against the State of Tennessee for the purpose of determining the location of the boundary line between those States along that portion of the bed of the Mississippi river that was left dry as the result of an avulsion which occurred March 7, 1876, when a new channel was formed known as the "Centennial Cut-Off."

The cause, having been put at issue by the filing of answer and replication, was brought on to hearing upon stipulated facts, pursuant to an intimation made by this court in Cissna v. Tennessee, 242 U. S. 195, 198, 37 Sup. Ct. 108, 61 L. Ed. 243.

The facts are as follows: By the Treaty of 1763 between England, France, and Spain, Art. VII (3 Jenkinson's Treaties, 177, 182), the boundary line between the British and French possessions at this place was established as "a line drawn along the middle of the River Mississippi," with consequent recognition of the dominion of France over the territory now comprising the State of Arkansas, and the dominion of Great Britain over that now comprising the State of Tennessee. By the Treaty of Peace concluded between the United States and Great Britain, September 3, 1783 (8 Stat. 80), the territory comprising Tennessee passed to the United States, its westerly boundary being described (Art. II) as "a line to be drawn along the middle of the said River Mississippi." It formed a part of the State of North Carolina. In the year 1790 North Carolina ceded it to the United States (Act of April 2, 1790, ch. 6, 1 Stat. 106). In the report made in the following year by Thomas Jefferson, then Secretary of State, and submitted to Congress by President Washington, the bounds of the ceded territory were described, the western boundary being "the middle of the River*Mississippi." 1 American State Papers, Public Lands, p. 17. And by Act of June 1, 1796 (ch. 47, 1 Stat. 491), the whole of the territory thus ceded was made a State. By the Louisiana Purchase, under the Treaty of April 30, 1803 (8 Stat. 200), the territory comprising Arkansas was acquired by the United States from France. It was admitted into the Union as a State by Act of June 15, 1836 (ch. 100, 5 Stat. 50), its easterly boundary being described as "the middle of the main channel of the said river."

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According to the stipulated facts, the earliest evidence concerning the location of the river at the place in question relates to the year 1823, and is set forth upon a map made recently by Major Humphreys, purporting to show the conditions as they existed at that time. The river flowed southward past Dean's Island on the Arkansas side, made a bend to the westward at or about the southernmost part of this island, and then swept northerly and westerly around Island No. 37 (Tennessee), a lesser channel known as McKenzie Chute passing between that island and the main Tennessee shore; the main and lesser channels met at the southwestern extremity of Island No. 37, and the river flowed thence southwesterly past Point Able, Tennessee, opposite which it turned again easterly and then northerly, forming what is known as the Devil's Elbow, and flowed thence easterly or northeasterly around Brandywine Point or Island (Arkansas), until it came within a distance of about two miles from the place where it started its northerly turn opposite Dean's Island; and at this point it turned again to the southward. It is agreed that in 1823 the river ran substantially as indicated upon the Humphreys map, and that between that year and the year 1876 the width of the channel, by erosion and caving in of the Tennessee bank south, southwest, and west of Dean's Island, along the mainland and Island No. 37, had increased from its former width of about a *mile or less to a width of 1¼ or 1½ miles,* with consequent narrowing of the neck of land opposite Dean's Island. It is a matter in controversy between the parties whether during the same period there were accretions to Dean's Island and Plum Island, in the State of Arkansas, and to Island No. 37 and the shore below Point Able, on the Tennessee side. A steamboat reconnaissance of the river was made by Colonel Suter under the direction of the War Department in 1874, and a map of the place in question was prepared under his direction and is in evidence. There being no proof of material changes in the river between 1874 and 1876, this map, while not shown to be entirely accurate, is agreed to represent the general situation as it existed in the latter year.

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On March 7, 1876, the river suddenly and with great violence, within about thirty hours, made for itself a new channel directly across the neck opposite the apex of Dean's Island, so that the old channel around the bend of the elbow (a distance of fifteen to twenty miles) was abandoned by the current, and although it remained for a few years covered with dead water it was no longer navigable except in times of high water for small boats, and this continued only for a short time, since the old bed immediately began to fill with sand, sediment, and alluvial deposits. In the course of time it became dry land suitable for cultivation and to a considerable extent covered with timber. The new channel is called, from the year in which it originated, the "Centennial Cut-Off," and the land that it separated from the Tennessee mainland goes by the name of "Centennial Island."

The cut-off and the territory affected by it are the same that are mentioned and dealt with in the cases of Stockley v. Cissna, 119 Fed. 812, 56 C. C. A. 324, State v. Pulp Co., 119 Tenn. 47, 104 S. W. 437, and Stockley v. Cissna, 119 Tenn. 135, 104 S. W. 792. The State of Tennessee, in her answer, pleads and relies upon the first and second of these cases as judicial* determinations and evidence of the boundary line between the States at the place in question. Their materiality and effect are matters to be determined.

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Prior to 1876, notably around "Island 37" and "Devil's Elbow," the bank on one side of the river was high and subject to erosion, the effect of the water against it; while on the opposite side the bank was a flat or sloping shore, so that the width of the river was materially affected by the rise and fall of the water, being considerably wider at normal than at low-water stage.

The following questions are submitted for the determination of this court:

(1) Arkansas contends that the true boundary line between the States (aside from the question of the avulsion of 1876) is the middle of the river at low water, that is, the middle of the channel of navigation; whereas Tennessee contends that the true boundary is a line equidistant from the well-defined banks at a normal stage of the river.

(2) Arkansas contends that by the avulsion of 1876 the boundary line between the States was unaffected, and remained in the middle of the river bed which was by the avulsion abandoned, whether the first or the second definition of the middle of the river be adopted; whereas Tennessee contends that the line was affected by the avulsion to the extent indicated by the opinion of the Supreme Court of that State in State v. Pulp Co., 119 Tenn. 47, 104 S. W. 437; that is, that the effect of the avulsion was to press back the line between the two States to the middle of the old channel as it ran previous to the erosions upon the Tennessee banks that occurred between 1823 and 1876.

(3) Tennessee contends that, irrespective of the question of accretions and erosions, it is impossible now to locate accurately the line of the river as it ran in 1876 just prior to the avulsion, and that therefore the line of *164 1823 *must prevail as the boundary line between the States, where it has been or can be located accurately and definitely; whereas Arkansas insists that there is no real difficulty in locating the middle of the river in 1876.

Upon the determination of these points, the court is to appoint a commission to run, locate, and designate the line.

Mr. Caruthers Ewing, of Memphis, Tenn., for the State of Arkansas.

Mr. G. T. Fitzhugh, of Memphis, Tenn., for the State of Tennessee.

*165 *Mr. Justice PITNEY, after stating the case as above, delivered the opinion of the Court.

[1] Concerning the proper location of an interstate boundary line with reference to the shores and channel of a navigable river separating one State of the Union from another, much has been written. The subject was brought under the consideration of this court in Iowa v. Illinois, 147 U. S. 1, 13 Sup. Ct. 239, 37 L. Ed. 55. In that case, Illinois contended that the boundary followed the middle of the channel of commerce, that is, the channel commonly used by steamboats and other craft navigating the river; while on the part of Iowa it was insisted that the line ran in the middle of the main body of the river, taking the middle line between its banks or shores, irrespective of where the channel of commerce might be, and that the measurements must be taken at ordinary stage of water. The contention of each State was supported by a decision of its court of last resort: Dunlieth & Dubuque Bridge Co. v. County of Dubuque, 55 Iowa, 558, 565, 8 N. W. 443; Buttenuth v. St. Louis Bridge Co., 123 Ill. 535, 548, 17 N. E. 439, 5 Am. St. Rep. 545. This court recognized these cases as presenting in the clearest terms the different views as to the line of jurisdiction between neighboring States separated by a navigable stream, and thereupon proceeded to analyze their reasoning and doctrine. From a review of the authorities upon international law, it was declared that when a navigable river constituted the boundary between two independent States the interest of each State in the navigation, and the preservation by each of its equal right in such navigation, required that the middle of the channel should mark the boundary up to which each State on its side should exercise jurisdiction; that hence, in international law, and by the usage of European *170 nations, the term "middle of the stream," as applied to a navigable river, meant the middle of the channel of such stream, and that in this sense the terms were used in the treaty between Great Britain, France, and Spain, concluded at Paris in 1763, so that by the language "a line drawn along the middle of the River Mississippi," as there used, the middle of the channel was indicated; that the *thalweg*, or middle of the navigable channel, is to be taken as the true boundary line between independent States for reasons growing out of the right of navigation, in the absence of a special convention between the States or long use equivalent thereto; and that although the reason and necessity of the rule may not be as cogent in this country, where neighboring States are under the same general government, yet the same rule must be held to obtain unless changed by statute or usage of so great a length of time as to have acquired the force of law; and that the Illinois Enabling Act of April 18, 1818 (3 Stat. 428, ch. 67, § 2), which made "the middle of the Mississippi river" the western boundary of the State, the Missouri Enabling Act of March 6, 1820 (3 Stat. 545, ch. 22, § 2), which adopted "the middle of the main channel of the Mississippi river" as the eastern boundary of that State, and the Wisconsin Enabling Act of August 6, 1846 (9 Stat. 56, ch. 89), which referred to "the center of the main channel of that river," employed these varying phrases as signifying the same thing. Hence we reached the conclusion (147 U. S. p. 13, 13 Sup. Ct. 239, 37 L. Ed. 55) that as between the different views as to the line of jurisdiction between neighboring States, separated by a navigable stream, the controlling consideration "is that which preserves to each State equality in the right of navigation in the river." It was accordingly adjudged and declared that the boundary line between the contesting States was "the middle of the main navigable channel of the Mississippi river"; and a final decree to that effect was

afterwards made. 202 U. S. 59, 26 Sup. Ct. 571, 50 L. Ed. 934.

*171 * The rule thus adopted, known as the rule of the "thalweg," has been treated as set at rest by that decision. Louisiana v. Mississippi, 202 U. S. 1, 49, 26 Sup. Ct. 408, 571, 50 L. Ed. 913; Washington v. Oregon, 211 U. S. 127, 134, 29 Sup. Ct. 47, 53 L. Ed. 118; 214 U. S. 205, 215, 29 Sup. Ct. 631, 53 L. Ed. 969. The argument submitted in behalf of the defendant State in the case at bar, including a reference to the notable recent decision of its Supreme Court in State v. Pulp Co. (1907) 119 Tenn. 47, 104 S. W. 437, has failed to convince us that this rule ought now, after the lapse of twenty-five years, to be departed from.

[2] It is said that Arkansas has interpreted the line to be at a point equidistant from the well-defined and permanent banks of the river, that Tennessee likewise has recognized this boundary, and that by long acquiescence on the part of both States in this construction, and the exercise of jurisdiction by both in accordance therewith, the question should be treated as settled. The reference is to certain judicial decisions, and two acts of legislation. In Cessill v. State (1883) 40 Ark. 501, which was a prosecution for unlicensed sale of liquors upon a boat anchored off the Arkansas shore, it was held that the boundary line, as established by the original treaties and since observed in federal legislation, state constitutions, and judicial decisions was the "line along the river bed equidistant from the permanent and defined banks of the ascertained channel on either side." This was followed in subsequent decisions by the same court. Wolfe v. State (1912) 104 Ark. 140, 143, 148 S. W. 641; Kinnanne v. State (1913) 106 Ark. 286, 290, 153 S. W. 262. The first pertinent decision by the Supreme Court of Tennessee is State v. Pulp Co. (1907) 119 Tenn. 47, 104 S. W. 437, in which a similar conclusion was reached, partly upon the ground that it had been adopted by the courts of Arkansas. The legislative action referred to consists of two acts of the General Assembly of the State of Tennessee (Acts 1903, p. 1215, ch. 420; Acts 1907, p. 1723, ch. 516), each of which authorized

*172 the appointment of a commission to confer and act with a like commission representing the State of Arkansas to locate the line between the States in the old and abandoned channel at the place that we now have under consideration; and the Act of 1907 further provided that if Arkansas should fail to appoint a commission, the Attorney General of Tennessee should be authorized to institute a suit against that State in this court to establish and locate the boundary line. These acts, far from treating the boundary as a line settled and acquiesced in, treat it as a matter requiring to be definitely settled, with the co-operation of representatives of the sister State if practicable, otherwise by appropriate litigation.

The Arkansas decisions had for their object the establishment of a proper rule for the administration of the criminal laws of the State, and were entirely independent of any action taken or proposed by the authorities of the State of Tennessee. They had no particular reference to that part of the river bed that was abandoned as the result of the avulsion of 1876; on the contrary, they dealt with parts of the river where the water still flowed in its ancient channel. The decision of the Supreme Court of Tennessee in State v. Pulp Co., 119 Tenn. 47, 104 S. W. 437, sustained the claim of the State to a part of the abandoned river bed which, by the rule of the *thalweg*, would be without that State. The combined effect of these decisions and of the legislation referred to, all of which were subsequent to the year 1876, falls far short of that long acquiescence in the practical location of a common boundary, and possession in accordance therewith, which in some of the cases has been treated as an aid in setting the question at rest. Rhode Island v. Massachusetts, 4 How. 591, 638, 639, 11 L. Ed. 1116; Indiana v. Kentucky, 136 U. S. 479, 510, 514, 518, 10 Sup. Ct. 1051, 34 L. Ed. 329; Virginia v. Tennessee, 148 U. S. 503, 522, 13 Sup. Ct. 728, 37 L. Ed. 537; Louisiana v. Mississippi, 202 U. S. 1, 53, 26 Sup. Ct. 408, 571, 50 L. Ed. 913; Maryland v. West Virginia, 217 U. S. 1, 41, 30 Sup. Ct. 268, 54 L. Ed. 645.

*173 * Therefore we find it unnecessary to decide whether the supposed agreement between the States respecting the boundary would be valid without the consent of Congress, in view of the third clause of section 10 of article 1 of the Constitution of the United States.

[3] The next and perhaps the most important question is as to the effect of the sudden and violent change in the channel of the river that occurred in the year 1876, and which both parties properly treat as a true and typical avulsion. It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel. New Orleans v. United States, 10 Pet. 662, 717, 9 L. Ed. 573; Jefferis v. East Omaha Land Co., 134 U. S. 178, 189, 10 Sup. Ct. 518, 33 L. Ed. 872; Nebraska v. Iowa, 143 U. S. 359, 361, 367, 370, 12 Sup. Ct. 396, 36 L. Ed. 186; Missouri v. Nebraska, 196 U. S. 23, 34–36, 25 Sup. Ct. 155, 49 L. Ed. 372.

There is controversy with respect to the application of the foregoing rule to the particular circumstances of this case. It is insisted in behalf of the State of Tennessee that since the rule of the *thalweg* derives its origin from the equal rights of the respective States in the navigation of the river, the reason for the rule and therefore the rule itself ceases when navigation has been rendered impossible by the abandonment of a portion of the river bed as the result of an avulsion. In support of this contention we are referred to some expressions of Vattel, Almeda, *174 Moore, and other writers; but we deem them inconclusive, and are of the opinion, on the contrary, that the contention runs counter to the settled rule and is inconsistent with the declarations of this court, in Nebraska v. Iowa, 143 U. S. 359, 367, 12 Sup. Ct. 396, 399 (36 L. Ed. 186), that "avulsion would establish a fixed boundary, to wit: the center of the abandoned channel," or, as it is expressed on page 370 of 143 U. S., on page 400 of 12 Sup. Ct. (36 L. Ed. 186), "the boundary was not changed, and it remained as it was prior to the avulsion, the center line of the old channel," and in Missouri v. Nebraska, 196 U. S. 23, 36, 25 Sup. Ct. 155, 158 (49 L. Ed. 372) that the boundary line "must be taken to be the middle of the channel of the river as it was prior to such avulsion."

[4, 5] It is contended, further, that since the avulsion of 1876 caused the old river bed to dry up, what is called "the doctrine of the submergence and reappearance of land" must be applied, so as to establish the ancient boundary as it existed at the time of the earliest record, in this case the year 1823, with the effect of eliminating any shifting of the river bed that resulted from the erosions and accretions of the half century preceding the avulsion.

This contention is rested chiefly upon a quotation from Sir Matthew Hale, De Jure Maris, chap. 4:

"If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced; yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his propriety; and accordingly it was held by Cooke and Foster, M. 7 Jac. C. B., though the inundation continue forty years." 1 Hargraves' Law Tracts, 15; Note to Ex parte Jennings, 6 Cow. (N. Y.) 542, 16 Am. Dec. 447.

To the same effect, 2 Roll. Abr. 168, l. 48; 6 Comyns' Dig., tit. Prerogative, D. 61, 62; 5 Bacon's Abr., tit. Prerogative, B. 1. A reference to the context shows that the portion quoted is a statement of one of several *175 exceptions to the general rule that any increase of land per relictionem, or sudden recession of the sea, belonged of common right to the King as a part of his prerogative. It amounts to no more than saying that where the reliction did but restore that which before had been private property and had been lost through the violence of the sea, the private right should be restored if the land is capable of identification. Such a case was Mulry v. Norton, 100 N. Y. 424, 3 N. E. 581, 53 Am. Rep. 206, the true scope of which decision was pointed out in In re City of Buffalo, 206 N. Y. 319, 326, 327, 99 N. E. 850. But this doctrine has no proper bearing upon the rule we have stated with reference to boundary streams. Certainly it cannot be regarded as having the effect of carving out an exception to the rule that where the course of the stream changes through the operation of the natural and gradual processes of erosion and accretion, the boundary follows the stream; while if the stream leaves its former bed and establishes a new one as the result of an avulsion, the boundary remains in the middle of the former channel. An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion: but when the water becomes stagnant, the effect of these processes is at an end: the boundary then becomes fixed in the middle of the channel as we have defined it, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion. The emergence of the land, however, may or may not follow, and it ought not in reason to have any controlling effect upon the location of the boundary line in the old channel. To give to it such an effect is, we think, to misapply the rule quoted from Sir Matthew Hale.

[6] How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private *176 ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. Pollard's Lessee v. Hagan, 3 How. 212, 230, 11 L. Ed. 565; Barney v. Keokuk, 94 U. S. 324, 338, 24 L. Ed. 224; Hardin v. Jordan, 140 U. S. 371, 382, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; Shively v. Bowlby, 152 U. S. 1, 40, 58, 14 Sup. Ct. 548, 38 L. Ed. 331; St. Anthony Water Falls Power Co. v. Water Com'rs, 168 U. S. 349, 358, 18 Sup. Ct. 157, 42 L. Ed. 497; Scott v. Lattig, 227 U. S. 229, 242, 33 Sup. Ct. 242, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107. Thus Arkansas may limit riparian ownership by the ordinary high-water mark (Railway v. Ramsey, 53 Ark. 314, 323, 13 S. W. 931, 8 L. R. A. 559, 22 Am. St. Rep. 195; Wallace v. Driver, 61 Ark. 429, 435, 436, 33 S. W. 641, 31 L. R. A. 317); and Tennessee, while extending riparian ownership upon navigable

streams to ordinary low-water mark, and reserving as public the lands constituting the bed below that mark (Elder v. Burrus, 25 Tenn. [6 Humph.] 358, 368; Martin v. Nance, 40 Tenn. [3 Head] 649, 650; Goodwin v. Thompson, 83 Tenn. [15 Lea] 209, 54 Am. Rep. 410), may, in the case of an avulsion followed by a drying up of the old channel of the river, recognize the right of former riparian owners to be restored to that which they have lost through gradual erosions in times preceding the avulsion, as she has done in State v. Pulp Co., 119 Tenn. 47, 104 S. W. 437. But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located.

[7] It is hardly necessary to say that State v. Pulp Co., supra, and Stockley v. Cissna, 119 Fed. 812, 56 C. C. A. 324, relied upon in defendant's answer as judicial determinations of the boundary line, can have no such effect against the State of Arkansas, which was a stranger to the record in both cases.

Upon the whole case we conclude that the questions submitted for our determination are to be answered as follows:

*177 *(1) The true boundary line between the States, aside from the question of the avulsion of 1876, is the middle of the main channel of navigation as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.

(2) By the avulsion of 1876 the boundary line between the States was unaffected, and remained in the middle of the former main channel of navigation, as above defined.

(3) The boundary line should now be located according to the middle of that channel as it was at the time the current ceased to flow therein as a result of the avulsion of 1876.

(4) A commission consisting of three competent persons, to be named by the court upon the suggestion of counsel, will be appointed to run, locate, and designate the boundary line between the States at the place in question in accordance with the above principles.

(5) The nature and extent of the erosions and accretions that occurred in the old channel prior to its abandonment by the current as a result of the avulsion of 1876, and the question whether it is practicable now to locate accurately the line of the river as it then ran, will be referred to said commission, subject to a review of its decision by this court if need be.

The parties may submit the form of an interlocutory decree to carry into effect the above conclusions.

(246 U. S. 289)

CISSNA v. STATE OF TENNESSEE.

(Argued Nov. 10, 1916. Restored to Docket for Reargument, Dec. 11, 1916. Reargued Oct. 9 and 10, 1917. Decided March 11, 1918.)

No. 20.

1. COURTS ⟸396(1) — SUPREME COURT — REVIEW OF STATE COURT—FEDERAL QUESTION.
Where a state Supreme Court treats federal questions as necessarily involved, decides them against plaintiff in error, and could not otherwise have reached the same result, it is immaterial, in so far as the Supreme Court's jurisdiction to review the decision is concerned, how such questions were raised.

2. COURTS ⟸394(1)—SUPREME COURT—FEDERAL QUESTION.
Where a state Supreme Court's decision turned upon various treaties and acts of Congress establishing an interstate boundary line, a federal question is involved, conferring jurisdiction on the federal Supreme Court to review the decision.

3. STATES ⟸12(2)—BOUNDARIES—NAVIGABLE STREAMS.
The boundary line between Tennessee and Arkansas is the middle of the navigable channel in the Mississippi river, and not a line midway between the stream's visible and fixed banks.

4. COURTS ⟸394(1) — FEDERAL QUESTION — STATE BOUNDARIES.
Whether two states, by long acquiescence in a practical location of their common boundary, or by other agreement, had definitely fixed or changed a boundary fixed by federal treaties or statutes, is a federal question.

5. STATES ⟸12(2)—BOUNDARIES—STREAMS.
Where the bed and channel of an interstate boundary stream is changed by natural and gradual erosion and accretion, the boundary follows the stream's varying course; but, if the stream suddenly leaves its old bed and forms a new one, the resulting change of channel works no change of boundary.

6. COURTS ⟸394(1) — STATE BOUNDARIES — FEDERAL QUESTION.
The federal treaties and statutes establishing the Mississippi river as a boundary between Arkansas and Tennessee require that the effect of changes in the river's channel be determined as a federal question.

7. STATES ⟸12(2)—BOUNDARIES—STREAMS.
The common-law rule that lands once swallowed by the sea, if afterwards exposed by its recession, are restored to former owners, who can be identified, is inapplicable, when considering the effect of erosion, accretion, and avulsion of a river forming an interstate boundary.

In Error to the Supreme Court of the State of Tennessee.

Suit by the State of Tennessee against W. A. Cissna and another. A decree dismissing the bill was reversed by the Supreme Court of Tennessee (119 Tenn. 47, 104 S. W. 437), and from a final adverse judgment or decree, the named defendant brings error. Reversed and remanded.

See, also, 242 U. S. 195, 37 Sup. Ct. 108, 61 L. Ed. 243.

Mr. Caruthers Ewing, of Memphis, Tenn., for plaintiff in error.

Messrs. John P. Bullington, of Memphis, Tenn., and Frank M. Thompson, of Chattanooga, Tenn., for the State of Tennessee.

*290 * Mr. Justice PITNEY delivered the opinion of the Court.

The state of Tennessee sued Cissna and others in a court of equity of that state, setting up ownership by the state of that portion of the dry lands formerly a part of the bed of the Mississippi river which lay between low-water mark on the Tennessee side and the middle of the river as it flowed prior to the change in the channel made in the year 1876 by the opening of the Centennial Cut-Off; alleging that the defendant Cissna claiming ownership, but having none, and the Muncie Pulp Company acting under him, were cutting and removing timber from a particularly described portion of those lands; and praying for an injunction against further acts of trespass and against the removal of the timber cut, and a recovery of the value of the timber. Cissna pleaded in abatement *291 that the land described in the bill, except a small portion to *which he disclaimed title, was in the state of Arkansas and not in the state of Tennessee, and hence that the court had no jurisdiction over the controversy. His codefendant having raised a similar issue, the cause came on to be heard before a chancellor, who sustained the pleas to the jurisdiction and ordered that the bill be dismissed. Upon appeal, the Supreme Court of Tennessee, disregarding the form of the pleadings, treated the action as brought to recover the land as well as to stay waste in cutting and removing timber; and deeming that the question of jurisdiction which depended upon the location of the boundary line between Tennessee and Arkansas and the question of the right of the former state to recover the land were practically the same question, considered them together. The facts bearing upon the location of the boundary, recited in the opinion of the court, were substantially the same as those upon which this court passed in the boundary suit of Arkansas v. Tennessee, 246 U. S. 158, 38 Sup. Ct. 301, 62 L. Ed. ——, No. 4, Original, recently decided. The state court held, contrary to the rule laid down by this court in Iowa v. Illinois, 147 U. S. 1, 13 Sup. Ct. 239, 37 L. Ed. 55, and still adhered to, that the boundary line did not follow the middle of the channel of commerce, but was fixed and defined as "a line along the middle of the main channel of the river equidistant from the visible and permanent banks confining its waters." The court found that the change made in the channel in the year 1876 at Centennial Cut-Off was an avulsion, and declared that "the limits of Tennessee and Arkansas, their respective rights in the abandoned channel, and those of individuals who owned lands lying and abutting upon it, all remained as they were before the formation of the new channel." But, not carrying this into effect, it concluded that at the place where the lands sued for are situate the correct boundary between the states was midway between the banks of the river as they existed in the year 1823 as shown by the Humphreys Map, notwithstanding the fact that between that date *292 and the time of the cut-off the river had gradually encroached upon the Tennessee shore, to a large extent in the aggregate; the court holding that the effect of the avulsion was to press back the line between the two states so as to restore to Tennessee what it held before the erosions upon its banks. And since it appeared that complainant had sued only for the land lying on the hither side of the middle of the channel as it was in 1876, and therefore could not recover to the middle of the channel of 1823, the court, on remanding the cause for a hearing upon the answers of defendants, ordered that the bill might be amended so as to make the proper averments to enable the state to recover under the principles laid down in its opinion. State v. Pulp Co., 119 Tenn. 47, 104 S. W. 437.

The cause was remanded, the pleadings were amended, and the suit remained pending in the trial court, when the state of Arkansas filed its bill in this court against the state of Tennessee to settle the boundary line between these states along that part of the former bed of the Mississippi river which was left dry as a result of the avulsion of 1876, including the portion in dispute in the present case; this being the same action above mentioned as No. 4, Original. The pendency of that action was brought by Cissna to the attention of the trial court in the present case, and made the basis of an application for a stay of proceedings until the boundary line between the states should have been fixed and located by this court. This application was overruled and the cause proceeded, with the result that the chancellor made a decree against Cissna on the merits in conformity with the opinion of the Supreme Court, subject however to an accounting with respect to the amount and value of the timber cut and removed during the pendency of the suit. Upon appeal to the Supreme Court this decree was affirmed, with modifications not necessary to be mentioned. *293 that *court ordered that a writ of possession* be issued to place the complainant state in possession of the tract of land in controversy, and retained the case for an accounting respecting the value of the timber. By way of objection to the entry of a decree pursuant to the accounting that followed, Cissna again called the attention of the court to the boundary suit pending in this court, and prayed for a stay of proceedings in the suit against him upon the ground that any determination by that court not in accordance with the determination of this court would be void. This objection was overruled, a final judgment or decree went against him for upwards of $110,000, and the case was brought here by writ of error under section 237, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), before the amendment of September 6, 1916 (39 Stat. 726, c. 448, § 2 [Comp. St. 1916, § 1214]).

It was first argued at the October term,

1916, when, for reasons stated in 242 U. S. 195, 37 Sup. Ct. 108, 61 L. Ed. 243, it was restored to the docket, and thereafter was heard at the same time with the suit of Arkansas v. Tennessee.

Our jurisdiction is invoked upon the ground that the decision of the state court of last resort was adverse to the federal rights of plaintiff in error in two respects: (1) In overruling his prayer for a stay of proceedings to await the determination of the suit pending in this court to settle the boundary line between the states; and (2) in coming to an erroneous conclusion upon the merits of the question of the proper location of that boundary. We need not pass upon the first point, since we are of the opinion that we have jurisdiction on the second ground, and that the judgment under review must be reversed.

[1] The record does not show that Cissna specially set up in the state courts any contention that the decision of the merits turned upon questions of federal law, except as this may appear by inference from the nature of the grounds upon which the decision *294 was rested. But if the Supreme Court of the state treated federal questions as *necessarily involved and decided them adversely to plaintiff in error, and could not otherwise have reached the result that it did reach, it becomes immaterial to consider how they were raised. Miedreich v. Lauenstein, 232 U. S. 236, 243, 34 Sup. Ct. 309, 58 L. Ed. 584; North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 257, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; Mallinckrodt Works v. St. Louis, 238 U. S. 41, 49, 35 Sup. Ct. 671, 59 L. Ed. 1192.

[2, 3] The opinion of that court, State v. Pulp Co., 119 Tenn. 47, 104 S. W. 437, shows that it treated the question of jurisdiction presented by the pleas in abatement and the question of the title of the state of Tennessee to the lands in controversy as both dependent upon the location of the boundary, because the state claimed the lands as a sovereign under the same treaties and acts of Congress by which its western boundary was defined and established; and the court held that the location of this boundary depended upon the interpretation of the Treaty of 1783 between the United States and Great Britain (8 Stat. 80, 82, art. II), the act of cession from North Carolina to the United States made in 1790 (1 Stat. 106, c. 6), the Treaty of 1795 between the United States and Spain (8 Stat. 138, 140, art. IV), the Act of Congress of June 1, 1796, admitting Tennessee into the Union as a State (1 Stat. 491, c. 47), the Louisiana Purchase Treaty of 1803 (8 Stat. 200), and the Act of Congress of June 15, 1836 (5 Stat. 50, c. 100), admitting Arkansas as a State. Upon a consideration of the Treaty of 1783, which employed the expression "middle of the said river Mississippi" to define the western boundary of the United States, and interpreting this in view of the use of the same expression in the previous Treaty of 1763 between Great Britain, France, and Spain (3 Jenkinson's Treaties, 177), and declaring that the treaty with Spain, which provided that the western boundary of the United States should be "in the middle of the channel or bed of the river," was not only an interpretation of the former treaties, but superseded them, and construing the phrase "middle of the main channel," employed in the act *admitting *295 Arkansas, as introducing no new meaning, the court held that the expression "middle of the river," by true interpretation, meant not the middle of the channel of commerce, but a line midway between the visible and fixed banks of the stream, and that any general rule of international law to the contrary must yield to the intent which the court deemed to be expressed in the treaties and acts of Congress referred to.

Since the decision adverse to plaintiff in error turned so clearly and essentially upon questions of federal law, we have jurisdiction to review the resulting judgment. And as the conclusion reached by the state court upon the question of interpretation is directly opposed to that reached by us in Arkansas v. Tennessee upon a consideration of the same pertinent treaties and acts of Congress, we need only refer to our opinion in that case for a statement of the grounds upon which we hold that the state court erred.

Two additional errors entered into the judgment, so intimately connected with the question of interpretation as to be inseparable from it.

[4] The first of these was a decision to the effect that the question of boundary had been settled by the duly constituted authorities of the two states, by judicial decisions, legislation, long acquiescence, exercise of jurisdiction, and other acts amounting to an agreement or convention defining the limit between the states to be the line midway between the visible banks of the river. Obviously, whether two states of the Union, either by long acquiescence in a practical location of their common boundary, or by agreement otherwise evidenced, have definitely fixed or changed the limits of their jurisdiction as laid down by the authority of the general government in treaty or statute, is in its nature a federal question. We have stated briefly, in Arkansas v. Tennessee, the reasons why we are unable to concur with the state court in its decision upon this point. *296

[5-7] The remaining error arose in the determination of the consequences of the avulsion of 1876. It is a part of the law of interstate boundaries, that where a running stream forms the boundary, if the bed and channel are changed by the natural and gradual processes of erosion and accretion,

the boundary follows the varying course of the stream; while if the stream suddenly leaves its old bed and forms a new one, the resulting change of channel works no change of boundary, which remains in the middle of the old channel although no water be flowing in it. Arkansas v. Tennessee, supra. A correct application of this rule to changes in the Mississippi is necessary in order that proper effect may be given to the treaties and acts of Congress by which that river was established as an interstate boundary, and hence this is a question of federal law. The state court acknowledged the rule in theory, but departed from it in fact. Starting with the Humphreys map as showing the location of the banks of the river as they were in 1823, the date to which the earliest records related, and finding from the evidence that between that date and the time of the avulsion there has been gradual erosions from the Tennessee bank at the place where the land in controversy is situate, to an extent sufficient in the aggregate to increase the width of the river from a little less than a mile to between 1¼ and 1½ miles, the court held that the subsequent emergence of the bed of the river at this place, consequent upon the avulsion of 1876, had the effect of pressing back the line between the states to the middle of the old channel as it ran in 1823, so as to restore to Tennessee what it held before the erosions from its banks. This result was reached by grafting upon the acknowledged rule as to boundary streams an exception deduced from the rule of the common law that lands once swallowed by the sea, if afterwards exposed by its recession, are restored to the former owner if they can be identified. As we have pointed out in *Arkansas v. Tennessee, it is a misapplication of this doctrine to treat it as forming an exception to the established rule respecting the effect of erosion, accretion, and avulsion upon the course of a boundary stream.

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We conclude, therefore, that the court erred in awarding to the state of Tennessee a recovery of any land or damages for cutting and removing timber from any land lying without the limits of the state as defined in our opinion in Arkansas v. Tennessee, supra, being a line drawn along the middle of the main channel of navigation of the Mississippi river (as distinguished from a line midway between the visible and fixed banks of the stream) as it was at the time when the current ceased to flow therein as a result of the avulsion of 1876, and without regard to changes in the banks or channel that had occurred through the natural and gradual processes of erosion and accretion prior to the avulsion.

It results that the judgment of the state court must be

Reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

(246 U. S. 297)

OETJEN v. CENTRAL LEATHER CO.
(two cases).

(Argued Jan. 3 and 4, 1918. Decided. March 11, 1918.)

Nos. 268, 269.

1. EVIDENCE ⟸48—JUDICIAL NOTICE—RECOGNITION OF FOREIGN GOVERNMENTS.
Judicial notice will be taken that the government of the United States recognized the government of Carranza as the de facto government of Mexico on October 19, 1915, and as the de jure government on August 31, 1917.

2. TREATIES ⟸7—CONSTRUCTION AND OPERATION—HAGUE CONVENTIONS.
The Hague Conventions are international in character, and designed and adapted to regulate international warfare, and do not in terms or in purpose apply to a civil war.

3. CONSTITUTIONAL LAW ⟸68(1)—JUDICIAL FUNCTIONS—POLITICAL QUESTIONS.
The conduct of the foreign relations of our government is committed to the political departments of the government, the executive and legislative departments, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

4. INTERNATIONAL LAW ⟸4 — RECOGNITION OF GOVERNMENT—EFFECT.
When a government which originates in a revolution or revolt is recognized by the political department of our government as the de jure government of the country in which it is established, such recognition is retroactive in effect, and validates all the actions and conduct of the government so recognized from the commencement of its existence.

5. INTERNATIONAL LAW ⟸10 — RELATIONS BETWEEN STATES.
Where a Mexican military commander duly commissioned by the Carranza government, since recognized by the government of the United States, in the progress of a revolution and when conducting active independent operations, seized and sold as a military contribution property owned by and in the possession of a citizen of Mexico, his action is not subject to re-examination and modification by the courts of this country, though the property so seized and sold is brought within the custody of such courts, as the principle that the conduct of one independent government cannot be successfully questioned in the courts of another is applicable to such a case.

In Error to the Court of Errors and Appeals of New Jersey.

Two actions by Henry A. Oetjen against the Central Leather Company. Judgment for defendant in each action was affirmed by the Court of Errors and Appeals of New Jersey (87 N. J. Law, 552, 94 Atl. 789, L. R. A. 1917A, 276; 87 N. J. Law, 704, 96 Atl. 1102), and plaintiff brings error. Affirmed.

Messrs. John M. Enright and James D. Carpenter, Jr., both of Jersey City, N. J., for plaintiff in error.

Mr. Eli J. Blair, of New York City, for defendant in error.

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Mr. Justice CLARKE delivered the opinion of the Court.

These two cases involving the same question, were argued and will be decided together. They are suits in replevin and involve the title to two large consignments of hides,

which the plaintiff in error claims to own as assignee of Martinez & Co., a partnership engaged in business in the city of Torreon, Mexico, but which the defendant in error claims to own by purchase from the Finnegan-Brown Company, a Texas corporation which it is alleged purchased the hides in Mexico from General Francisco Villa on January 3, 1914.

The cases were commenced in a circuit court of New Jersey in which judgments were rendered for the defendants, which were affirmed by the Court of Errors and Appeals (87 N. J. Law, 552, 94 Atl. 789, L. R. A. 1917A, 276; 87 N. J. Law, 704, 96 Atl. 1102), and they are brought to this court on the theory that the claim of title to the hides by the defendant in error is invalid because based upon a purchase from General Villa, who, it is urged, confiscated them contrary to the provisions of the Hague Convention of 1907 respecting the laws and customs of war on land; that the judgment of the state court denied to the plaintiff in error this right which he "set up and claimed" under the Hague Convention or treaty; and that this denial gives him the right of review in this court.

A somewhat detailed description will be necessary of the political conditions in Mexico prior to and at the time of the seizure of the property in controversy by the military authorities. It appears in the record, and is a matter of general history, that on February 23, 1913, Madero, President of the Republic of Mexico, was assassinated; that immediately thereafter General Huerta declared himself Provisional President of the Republic and took the oath of office as such; that on the 26th day of March following General Carranza, who was then governor of the state of Coahuila, inaugurated a revolution against the claimed authority of Huerta and in a "Manifesto Addressed to the Mexican Nation" proclaimed the organization of a constitutional government under "the plan of Guadalupe," and that civil war was at once entered upon between the followers and forces of the two leaders. When General Carranza assumed the leadership of what were called the Constitutionalist forces he commissioned General Villa his representative, as "Commander of the North," and assigned him to an independent command in that part of the country. Such progress was made by the Carranza forces that in the autumn of 1913 they were in military possession, as the record shows, of approximately two-thirds of the area of the entire country, with the exception of a few scattered towns and cities, and after a battle lasting several days the city of Torreon in the state of Coahuila was captured by General Villa on October 1 of that year. Immediately after the capture of Torreon, Villa proposed levying a military contribution on the inhabitants, for the support of his army, and thereupon influential citizens, preferring to provide the required money by an assessment upon the community, to having their property forcibly seized, called together a largely attended meeting and after negotiations with General Villa as to the amount to be paid, an assessment was made on the men of property of the city, which was in large part promptly paid. Martinez, the owner from whom the plaintiff in error claims title to the property involved in this case, was a wealthy resident of Torreon and was a dealer in hides in a large way. Being an adherent of Huerta, when Torreon was captured Martinez fled the city and failed to pay the assessment imposed upon him, and it was to satisfy this assessment that, by order of General Villa, the hides in controversy were seized and on January 3, 1914, were sold in Mexico to the Finnegan-Brown Company. They were paid for in Mexico, and were thereafter shipped into the United States and were replevied, as stated.

[1] This court will take judicial notice of the fact that since the transactions thus detailed and since the trial of this case in the lower courts, the government of the United States recognized the government of Carranza as the de facto government of the Republic of Mexico, on October 19, 1915, and as the de jure government on August 31, 1917. Jones v. United States, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691; Underhill v. Hernandez, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456.

On this state of fact the plaintiff in error argues that the "Regulations" annexed to the Hague Convention of 1907 "Respecting Laws and Customs of War on Land" constitute a treaty between the United States and Mexico; that these "Regulations" forbid such seizure and sale of property as we are considering in this case; and that, therefore, somewhat vaguely, no title passed by the sale made by General Villa and the property may be recovered by the Mexican owner or his assignees when found in this country.

[2] It would, perhaps, be sufficient answer to this contention to say that the Hague Conventions are international in character, designed and adapted to regulate international warfare, and that they do not, in terms or in purpose, apply to a civil war. Were it otherwise, however, it might be effectively argued that the declaration relied upon that "private property cannot be confiscated" contained in article 46 of the Regulations does not have the scope claimed for it, since article 49 provides that "money contributions * * * for the needs of the army" may be levied upon occupied territory, and article 52 provides that "requisitions in kind and services may be demanded for the needs of the army of occupation," and that contributions in kind shall, as far as possible, be paid for in cash, and when not so paid for a receipt shall be given and payment of the amount due shall be made as soon as possible. And also for the reason that the "Convention" to which

the "Regulations" are annexed, recognizing the incomplete character of the results arrived at, expressly provides that until a more complete code is agreed upon, cases not provided for in the "Regulations" shall be governed by the principles of the law of nations.

But, since claims similar to the one before us are being made in many cases in this and in other courts, we prefer to place our decision upon the application of three clearly settled principles of law to the facts of this case as we have stated them.

[3] The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—"the political"—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. United States v. Palmer, 3 Wheat. 610, 4 L. Ed. 471; Foster v. Neilson, 2 Pet. 253, 307, 309, 7 L. Ed. 415; Garcia v. Lee, 12 Pet. 511, 517, 520, 9 L. Ed. 1176; Williams v. Suffolk Ins. Co., 13 Pet. 415, 420, 10 L. Ed. 226; In re Cooper, 143 U. S. 472, 499, 12 Sup. Ct. 453, 36 L. Ed. 232. It has been specifically decided that:

"Who is the sovereign, de jure or de facto, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances." Jones v. United States, 137 U. S. 202, 212, 11 Sup. Ct. 80, 83 (34 L. Ed. 691).

[4] It is also the result of the interpretation by this court of the principles of international law that when a government which originates in revolution or revolt is *303 recognized by the political department of our government as the de*jure government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence. Williams v. Bruffy, 96 U. S. 176, 186, 24 L. Ed. 716; Underhill v. Hernandez, 168 U. S. 250, 253, 18 Sup. Ct. 83, 42 L. Ed. 456. See s. c., 65 Fed. 577, 13 C. C. A. 51, 38 L. R. A. 405.

[5] To these principles we must add that:

"Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." Underhill v. Hernandez, 168 U. S. 250, 252, 18 Sup. Ct. 83, 84 (42 L. Ed. 456); American Banana Co. v. United Fruit Co., 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047.

Applying these principles of law to the case at bar, we have a duly commissioned military commander of what must be accepted as the legitimate government of Mexico, in the progress of a revolution, and when conducting active independent operations, seizing and selling in Mexico, as a military contribution, the property in controversy, at the time owned and in the possession of a citizen of Mexico, the assignor of the plaintiff in error. Plainly this was the action, in Mexico, of the legitimate Mexican government when dealing with a Mexican citizen, and, as we have seen, for the soundest reasons, and upon repeated decisions of this court such action is not subject to re-examination and modification by the courts of this country.

The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest*considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations." *304

It is not necessary to consider, as the New Jersey court did, the validity of the levy of the contribution made by the Mexican commanding general, under rules of international law applicable to the situation, since the subject is not open to re-examination by this or any other American court.

The remedy of the former owner, or of the purchaser from him, of the property in controversy, if either has any remedy, must be found in the courts of Mexico or through the diplomatic agencies of the political department of our government. The judgments of the Court of Errors and Appeals of New Jersey must be

Affirmed.

(246 U. S. 304)

RICAUD et al. v. AMERICAN METAL CO., Limited.

(Submitted Jan. 3, 1918. Decided March 11, 1918.)

No. 119.

1. COURTS ⊂⊃384—CERTIFICATION OF CASES BY CIRCUIT COURT OF APPEALS.

Under Supreme Court rule 37 (32 Sup. Ct. xiv), requiring a certificate from the Circuit Court of Appeals to contain a proper statement of facts on which the questions and propositions of law arise, a certificate containing a statement of what was alleged and denied by the parties, with the additional statement that there was evidence tending to establish the facts as claimed by each party, but without any finding whatever as to what the evidence showed the facts to be, and assuming facts as the basis of the first question on which the others depended, was not in proper form.

2. EVIDENCE ⊂⊃48—JUDICIAL NOTICE—RECOGNITION OF FOREIGN GOVERNMENT.

Judicial notice will be taken of the recognition by the United States government of the government of Carranza as the de facto and later as the de jure government of Mexico.

3. COURTS ⊂⊃279—FEDERAL COURTS—JURISDICTION—ALLEGATIONS IN PLEADING.

A petition alleging the required diversity of citizenship, and further alleging that certain bullion was plaintiff's property, and had been forcibly taken from its possession in Mexico by unknown persons without any reference being made to a state of war prevailing therein at the time, that it was consigned to one of the defendants in Texas, and was in a bonded warehouse in the possession of another defendant as collector of customs, who, unless restrained, would deliver it to the other defendants, was sufficient in form to bring the case within the jurisdiction of the federal District Court.

4. CONSTITUTIONAL LAW ⊂⊃68(1)—LEGISLATIVE AND JUDICIAL FUNCTIONS—POLITICAL QUESTIONS.

The recognition of the Carranza government by the political department of our government as the de facto and later as the de jure government of Mexico binds the judges, as well as all other officers and citizens of the government.

5. INTERNATIONAL LAW ⊂⊃4 — RECOGNITION OF GOVERNMENT—EFFECT.

The recognition of the Carranza government by the government of the United States is retroactive in effect, and validates all the actions of that government from the commencement of its existence; and hence the act of a military commander representing that government in 1913, in seizing and selling bullion for the purpose of purchasing military supplies, must be regarded as the action of a duly commissioned general of the legitimate government of Mexico.

6. INTERNATIONAL LAW ⊂⊃10 — RELATIONS BETWEEN STATES.

The courts of one independent government will not sit in judgment on the validity of the acts of another, done within its own territory.

7. INTERNATIONAL LAW ⊂⊃10 — RELATIONS BETWEEN STATES.

Where the petition in a suit involving the title to bullion was sufficient to confer jurisdiction, the court had jurisdiction to determine the title to the property, though it was made to appear that the bullion had been seized and sold by a military commander representing the Carranza government, since recognized by the United States government as the de jure government of Mexico, since the rule that the courts of one government will not sit in judgment on the validity of the acts of another done within its own territory does not deprive the courts of jurisdiction once acquired over a case, but only requires that the action of the foreign government on the subject-matter of litigation shall be accepted by our courts as a rule for their decision, and to accept such ruling authority and decide accordingly is not a surrender or abandonment of jurisdiction, but an exercise of jurisdiction.

8. INTERNATIONAL LAW ⊂⊃10 — RELATIONS BETWEEN STATES.

The action of a military commander representing the Carranza government, in seizing and selling bullion for military purposes, is not subject to re-examination and modification in the courts of this country, though title to the bullion was in an American citizen, who was not in or a resident of Mexico at the time it was seized, and whatever rights he has can be asserted only through the Mexican courts, or through the political departments of our government.

On a Certificate from the United States Circuit Court of Appeals for the Fifth Circuit.

Suit by the American Metal Company, Limited, against Eduardo Ricaud and others. From a decree in favor of plaintiff, defendants appealed to the Circuit Court of Appeals for the Fifth Circuit, which certified certain questions to the Supreme Court. Questions answered.

Messrs. Frank E. Hunter, of El Paso, Tex., and Ernest Wilkinson, of Washington, D. C., for Ricaud and others.

Mr. U. S. Goen, of El Paso, Tex., for American Metal Co., Limited.

*305 *Mr. Justice CLARKE delivered the opinion of the Court.

In this suit in equity, commenced in the United States District Court for the Western District of Texas, the plaintiff in that court claims to be the owner of and entitled to a large consignment of lead bullion held in bond by the *collector of customs at El Paso, *306 Texas. An injunction was granted restraining the collector until further order from delivering the bullion to either of the other defendants.

Barlow, one of the defendants in the District Court, claims to be the owner of the property by purchase from the defendant Ricaud, who it is claimed purchased it from General Pereyra, who in the year 1913 was the commander of a brigade of the Constitutionalist army of Mexico, of which Venustiano Carranza was then First Chief.

It is not seriously disputed that General Pereyra, in his capacity as a commanding officer, in September, 1913, demanded this bullion from the Penoles Mining Company, a Mexican corporation doing business at Bermejillo, Mexico; that when it was delivered to him he gave a receipt which contains a promise to pay for it "on the triumph of the revolution or the establishment of a legal government"; that Pereyra sold the bullion to defendant Ricaud, who sold it to the defendant Barlow; that the proceeds of the sale were devoted to the purchase of arms, am-

munition, food and clothing for Peryra's troops, and that Pereyra in the transaction represented and acted for the government of General Carranza, which has since been recognized by the United States government as the de jure government of Mexico.

The plaintiff, appellee here, claims to have purchased the bullion from the Penoles Mining Company in June, 1913.

The District Court rendered a decree in favor of the plaintiff from which defendants appealed to the Circuit Court of Appeals for the Fifth Circuit, and that court certifies three questions as to which it desires the instruction of this court.

[1, 2] The sufficiency of the certificate of the Circuit Court of Appeals is challenged at the threshold.

*307 *There is no denying that there is much of merit in the objection to the form of this certificate, including the form of the questions, for the reason that the certificate, instead of containing a "proper statement of the facts on which the questions and propositions of law arise," as is required by rule 37 of this court (32 Sup. Ct. xiv), contains a statement of what is "alleged and denied" by the parties plaintiff and defendant in their pleadings, with the additional statement that there was evidence "tending to establish the facts as claimed by each party," but without any finding whatever as to what the evidence showed the facts to be, and the first question, on which the other two depend, is in terms based entirely on an "assumed" statement of facts.

If this certificate had not been supplemented by the recognition by the United States government of the government of Carranza, first as the de facto and later as the de jure government of Mexico, of which facts this court will take judicial notice (Jones v. United States, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691; Underhill v. Hernandez, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456), it would be our duty to declare the certificate insufficient and to return it to the Circuit Court of Appeals without answering the questions (Cinn., Ham. & Dayton Rd. Co. v. McKeen, 149 U. S. 259, 15 Sup. Ct. 1038, 40 L. Ed. 143; Graver v. Faurot, 162 U. S. 435, 16 Sup. Ct. 799, 40 L. Ed. 1030; Cross v. Evans, 167 U. S. 60, 17 Sup. Ct. 733, 42 L. Ed. 77; Stratton's Independence v. Howbert, 231 U. S. 399, 422; 34 Sup. Ct. 136, 58 L. Ed. 285).

But this recognition of the government under which General Pereyra was acting, as the legitimate government of Mexico, makes the answers to the questions so certain and its effect upon the case is so clear, that, for the purpose of making an end of the litigation, we will proceed to answer the questions.

The first question is:

*308 I. "Assuming that the bullion in suit was seized, condemned, and sold for war supplies by the Constitutionalist forces in revolution in Mexico, acting under authority from General Carranza, claiming to be the provisional president of the Republic of Mexico, had the District Court of the Western District of Texas, into which the said bullion had been imported from Mexico, jurisdiction to try and adjudge as to the validity of the title acquired by and through the said seizure, appropriation and sale by the Carranza forces as against an American citizen claiming ownership of said bullion prior to its seizure?"

[3] There can be no doubt that the required diversity of citizenship to give the District Court jurisdiction of the case was stated in the petition for injunction. The certificate shows that it was alleged in the petition that the bullion was the property of the plaintiff and that it had been forcibly taken from its posession in Mexico by unknown persons but without any reference being made to a state of war prevailing therein at the time; that it was consigned to defendant Barlow at El Paso, Texas, and was in a bonded warehouse in the possession of of the defendant Cobb, as collector of customs, who, unless restrained by the court would deliver it to the other defendants.

This form of petition brought the case within the jurisdiction of the District Court (United States v. Arredondo et al., 6 Pet. 691, 709, 10 L. Ed. 93; Grignon's Lessee v. Astor et al., 2 How. 319, 11 L. Ed. 283; Minnesota Co. v. St. Paul Co., 2 Wall. 609, 632, 17 L. Ed. 886), and the question is whether the circumstance that the bullion was seized, condemned and sold under the conditions stated in the question, deprived the court of jurisdiction to go forward and adjudge as to the validity of the title acquired by the seizure and sale by the Carranza forces.

[4, 5] The answer which should be given to this question has been rendered not doubtful by the fact that, as we have said, the revolution inaugurated by General Carranza against General Huerta proved successful and the government established by him has been recognized by the *political department* 309 of our government as the de facto and later as the de jure government of Mexico, which decision binds the judges as well as all other officers and citizens of the government. United States v. Palmer, 3 Wheat. 610, 4 L. Ed. 471; In re Cooper, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232; Jones v. United States, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691. This recognition is retroactive in effect and validates all the actions of the Carranza government from the commencement of its existence (Williams v. Bruffy, 96 U. S. 176, 186, 24 L. Ed. 716; Underhill v. Hernandez, 168 U. S. 250, 253, 18 Sup. Ct. 83, 42 L. Ed. 456), and the action of General Pereyra complained of must therefore be regarded as the action, in time of civil war, of a duly commissioned general of the legitimate government of Mexico.

[6, 7] It is settled that the courts will take judicial notice of such recognition, as we have here, of the Carranza government by the political department of our government (Jones v. United States, 137 U. S. 202, 11

Sup. Ct. 80, 34 L. Ed. 691), and that the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory (Underhill v. Hernandez, 168 U. S. 250, 253, 18 Sup. Ct. 83, 42 L. Ed. 456; American Banana Company v. United Fruit Company, 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047; Oetjen v. Central Leather Co., 246 U. S. 297, 38 Sup. Ct. 309, 62 L. Ed. ——). This last rule, however, does not deprive the courts of jurisdiction once acquired over a case. It requires only that when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it. It results that the title to the property in this case must be determined by the result of the action taken by the military authorities of Mexico and that, giving effect to this rule is an exercise of jurisdiction which requires that the first question be answered in the affirmative

*310 * The second question reads:

"If the first question is answered in the affirmative, does the subsequent recognition by the United States government of Carranza as the legitimate president of the Republic of Mexico and his government as the only legitimate government of the Republic of Mexico deprive this court of jurisdiction on this appeal to decide and adjudge the case on its merits?"

Our answer to the first requires a negative answer to this second question.

The third question reads:

"If question 2 is answered in the negative, did the seizure, condemnation, and sale of the bullion in the manner and for the purposes stated to be assumed in question 1 have the effect of divesting the title to or ownership of it of a certain citizen of the United States of America not in or a resident of Mexico when such seizure and condemnation occurred?"

[8] The answer to this question must be in the affirmative, for the reasons given and upon the authorities cited in the opinion recently announced in cases Nos. 268 and 269, Oetjen v. Central Leather Company. The fact that the title to the property in controversy may have been in an American citizen, who was not in or a resident of Mexico at the time it was seized for military purposes by the legitimate government of Mexico, does not affect the rule of law that the act within its own boundaries of one sovereign state cannot become the subject of re-examination and modification in the courts of another. Such action when shown to have been taken, becomes, as we have said, a rule of decision for the courts of this country. Whatever rights such an American citizen may have can be asserted only through the courts of Mexico or through the political departments of our government. The first and third questions will be answered in the affirmative and the second in the negative.

And it is so ordered.

MEMORANDUM DECISIONS

Disposed of at October Term, 1917

No. 148. PUGET SOUND TRACTION, LIGHT & POWER COMPANY et al., plaintiffs in error, v. Fred W. NEWELL et al., Commissioners, etc. March 4, 1918. In error to the Supreme Court of the State of Washington. Mr. James B. Howe, of Seattle, Wash., for plaintiffs in error. Mr. James C. Hering, of Washington, D. C., for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of: (1) First National Bank v. Estherville, 215 U. S. 341, 346, 30 Sup. Ct. 152, 54 L. Ed. 223; Rogers v. Clark Iron Co., 217 U. S. 589, 30 Sup. Ct. 693, 54 L. Ed. 895; Roller v. Murray, 234 U. S. 738, 34 Sup. Ct. 902, 58 L. Ed. 1570; (2) St. Anthony Falls Water Co. v. Board of Water Commissioners, 168 U. S. 349, 358, 370, 371, 18 Sup. Ct. 157, 42 L. Ed. 497; Joy v. St. Louis, 201 U. S. 332, 342, 26 Sup. Ct. 478, 50 L. Ed. 776; Weems Steamboat Co. v. People's Co., 214 U. S. 345, 355, 29 Sup. Ct. 661, 53 L. Ed. 1024, 16 Ann. Cas. 1222; (3) Deming v. Carlisle Packing Co., 226 U. S. 102, 105, 33 Sup. Ct. 80, 57 L. Ed. 140; Consolidated Turnpike v. Norfolk, etc., Ry. Co., 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; Ennis Water Works v. Ennis, 233 U. S. 652, 658, 34 Sup. Ct. 767, 58 L. Ed. 1139.

No. 179. FORD MOTOR COMPANY, appellant, v. John S. CHAMBERS, as Controller of the State of California, et al. March 4, 1918. Appeal from the District Court of the United States for the Northern District of California. Mr. W. F. Williamson, of San Francisco, Cal., for appellant.

PER CURIAM. Judgment affirmed with costs upon the authority of Arkansas Building & Loan Association v. Madden, 175 U. S. 269, 20 Sup. Ct. 119, 44 L. Ed. 159; Boise Artesian Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796; Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288.

No. 232. H. A. MOSS and J. F. Bradford, plaintiffs in error, v. C. C. MOORE et al. March 4, 1918. Mr. A. E. Shaw, of San Francisco, Cal., for plaintiffs in error. Messrs. Burke Corbet, Julius Kahn, and Alfred Sutro, all of San Francisco, Cal., for defendants in error. Death of Peter Martin suggested and appearance of Union Trust Company of San Francisco, administrator, etc., as a party defendant in error filed and entered on motion of Mr. Alexander Britton for the defendants in error.

No. 331. David GOLDSMITH et al., plaintiffs in error, v. Alfred C. F. MEYER. March 4, 1918. In error to the St. Louis Court of Appeals of the State of Missouri. For opinion below, see 185 Mo. App. 707, 171 S. W. 606. Mr. David Goldsmith, of St. Louis, Mo., for plaintiffs in error. Dismissed per stipulation.

No. 413. INTERBORO BREWING COMPANY (Inc.), petitioner, v. The STANDARD BREWING COMPANY OF BALTIMORE. March 4, 1918. On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. For opinion below, see 229 Fed. 543, 144 C. C. A. 3. Messrs. Warren H. Small and George Ramsey, both of New York City, for petitioner. Dismissed with costs, on motion of counsel for the petitioner.

Nos. 474 and 475. ALASKA PACIFIC STEAMSHIP COMPANY, plaintiff in error, v. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA et al. March 4, 1918. In error to the Supreme Court of the State of California. For opinion below, see 174 Cal. 389, 163 Pac. 204. Messrs. Ira A. Campbell and Edward J. McCutchen, both of San Francisco, Cal., for plaintiff in error. Mr. Christopher M. Bradley, of San Francisco, Cal., for defendants in error.

PER CURIAM. Stipulations of counsel to the effect that the same judgments may be entered in these cases as in case No. 476 (246 U. S. 648, 38 Sup. Ct. 315, 62 L. Ed. —) having been filed, the judgments are therefore reversed and the cases remanded for further proceedings.

No. 476. STEAMSHIP BOWDOIN COMPANY, plaintiff in error, v. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA et al. March 4, 1918. In error to the Supreme Court of the State of California. For opinion below, see 174 Cal. 390, 163 Pac. 204. Messrs. Edward J. McCutchen and Ira A. Campbell, both of San Francisco, Cal., for plaintiff in error. Mr. Christopher M. Bradley, of San Francisco, Cal., for defendants in error.

PER CURIAM. Judgment reversed upon the authority of Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, Ann. Cas. 1917E, 900; Clyde Steamship Co. v. Walker, 244 U. S. 255, 37 Sup. Ct. 545, 61 L. Ed. 1116.

No. 489. GLASGOW NAVIGATION COMPANY (Ltd.), appellant, v. MUNSON STEAMSHIP LINE. March 4, 1918. Appeal from the United States Circuit Court of Appeals for the Second Circuit. Messrs. J. Parker Kirlin and Charles R. Hickox, both of New York City, for appellant. Mr. John W. Griffin, of New York City, for appellee.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of: (1) Section 128, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133 [Comp. St. 1916, § 1120]); Oregon Ry. & Nav. Co. v. Balfour, 179 U. S. 55, 21 Sup. Ct. 28, 45 L. Ed. 82; See MacFadden v. United States, 213 U. S. 288, 29 Sup. Ct. 490, 53 L. Ed. 801; Chott v. Ewing, 237 U. S. 197, 35 Sup. Ct. 571, 59 L. Ed. 913. (2) Section 237, Judicial Code, as amended by the act of Congress of September 6, 1916 (sec. 2, c. 448, 39 Stat. 726 [Comp. St. 1916, § 1228a]). See Glasgow Nav. Co. (Ltd.), v. Munson S. S. Co., 243 U. S. 643, 37 Sup. Ct. 405, 61 L. Ed. 944.

No. 539. John KNOELL et al., plaintiffs in error, v. The UNITED STATES. March 4, 1918. In error to the United States Circuit Court of Appeals for the Third Circuit. For opinion below, see 239 Fed. 16, 152 C. C. A. 66. Mr. R. O. Moon, of Philadelphia, Pa., for plaintiff in error. The Attorney General, for the United States.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of MacFadden v. The United States, 213 U. S. 288, 29 Sup. Ct. 490, 53 L. Ed. 801; Friedman v. The United States, 244 U. S. 643, 37 Sup. Ct. 650, 61 L. Ed. 1367.

No. 631. David GOLDSMITH et al., plaintiffs in error, v. Alfred C. F. MEYER. March 4, 1918. In error to the Supreme Court of the State of Missouri. For opinion below, see 196 S. W. 745. Mr. David Goldsmith, of St. Louis, Mo., for plaintiffs in error. Dismissed per stipulation.

No. 808. JOSEPH SCHLITZ BREWING COMPANY, petitioner, v. HOUSTON ICE & BREWING COMPANY et al. March 4, 1918. For opinion below, see 241 Fed. 817, 154 C. C. A. 519. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted.

No. 821. MACBETH-EVANS GLASS COMPANY, petitioner, v. GENERAL ELECTRIC COMPANY. March 4, 1918. For opinion below, see 246 Fed. 695. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 831. ERIE RAILROAD COMPANY, petitioner, v. John R. SHUART et al. March 4, 1918. For opinion below, see 117 N. E. 1084. Petition for a writ of certiorari to the Supreme Court of the State of New York granted.

No. 843. John L. CREVELING, petitioner, v. J. T. NEWTON, Commissioner of Patents. March 4, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(246 U. S. 335)

WELLS v. ROPER, First Assistant Postmaster General of the United States.

(Argued Jan. 2, 1918. Decided March 18, 1918.)

No. 103.

UNITED STATES ⊂=125—ACTIONS AGAINST—WHAT ARE.

Where the Postmaster General, acting under Appropriation Act March 9, 1914, c. 33, 38 Stat. 295, authorizing expenditures for experimental deliveries, determined in the interests of the service that the experiment should be conducted at Washington, D. C., and for that reason the First Assistant Postmaster General, as authorized by its terms, notified plaintiff in writing of the cancellation of the contract under which he furnished motorcars for use in collecting and delivering mail in Washington, plaintiff's suit to enjoin such First Assistant from annulling the contract must be deemed one against the United States, and hence cannot be maintained.

Appeal from the Court of Appeals of the District of Columbia.

Bill by Josephus Wells for an injunction against Daniel C. Roper, First Assistant Postmaster General of the United States. A decree of the Supreme Court of the District of Columbia dismissing the bill was affirmed by the Court of Appeals (44 App. D. C. 276) and plaintiff appeals. Affirmed.

Messrs. Daniel Thew Wright and T. Morris Wampler, both of Washington, D. C., for appellant. Mr. G. Carroll Todd, Assistant to the Attorney General, for appellee.

Mr. Justice PITNEY delivered the opinion of the Court.

This was a suit in equity brought in the Supreme Court of the District of Columbia for an injunction to restrain Daniel C. Roper, First Assistant Postmaster General, from annulling a contract theretofore made between plaintiff and the Postmaster General acting for the United States, and from interfering between plaintiff and the United States in the proper performance and execution of the contract by plaintiff. The Supreme Court sustained a *motion to dismiss the bill, its decree to that effect was affirmed by the Court of Appeals of the District of Columbia (44 App. D. C. 276), and plaintiff appeals to this court.

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The contract was made February 14, 1913, and by it plaintiff agreed for a stated compensation to furnish, during a period of four years a number of automobiles (with chauffeurs) specially equipped according to specifications for use in collecting and delivering mail at Washington, D. C. One of its provisions (the third) was a stipulation that:

"Any or all of the equipments contracted for herein may be discontinued at any time upon ninety days' notice from the said party of the first part," meaning the Postmaster General.

Another was:

"18. That all acts done by the First Assistant Postmaster General in respect of this contract shall be deemed and taken, for all purposes, to be the acts of the Postmaster General, within the meaning and intent of this contract."

Plaintiff expended considerable sums of money and incurred substantial obligations in providing automobiles and other special equipment necessary for the performance of the contract, and continued to perform it for nearly two years. Then the Postmaster General, acting under a provision of an appropriation act approved March 9, 1914 (chapter 33, 38 Stat. 295, 300), by which he was authorized in his discretion to use such portion of a certain appropriation as might be necessary "for the purchase and maintenance of wagons or automobiles for and the operation of an experimental combined screened wagon and city collection and delivery service," determined it to be in the interest of the public service that such an experiment should be conducted at Washington, D. C., and in order to do this deemed it necessary to discontinue the service then being performed by plaintiff. Accordingly the First Assistant Postmaster General notified plaintiff in writing that it was essential for the purpose mentioned that his *contract should be canceled, and that "under the third stipulation of the contract the use of all the automobiles furnished thereunder will be discontinued at the close of business January 31, 1915, and the contract canceled effective on that date." Notwithstanding protest by plaintiff, this decision was adhered to, and the present suit was commenced.

*337

Both courts held it to be essentially and substantially a suit against the United States and therefore beyond the jurisdiction of the court, and in this view we concur. The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract, and thus prevent the inauguration of the experimental service contemplated by the act of 1914—a direct interference with one of the processes of government. The argument to the contrary assumes to treat defendant, not as an official, but as an individual who, although happening to hold public office, was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties. Indeed, it was only because of his official authority that plaintiff's interests were at all endangered by what he proposed to do.

That the interests of the government are so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party, although not named in the bill, is entirely plain. And the case does not fall within any of the exceptions to the general rule that the United States may not be sued without its consent,

nor its executive agents subjected to the control of the courts respecting the performance of their official duties. It cannot successfully be contended that any question of defendant's official authority is involved; it *338 is a mere question of action alleged to be inconsistent with the stipulation under which it purported to be taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of official discretion. And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of the argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States. See Noble v. Union River Logging Railroad, 147 U. S. 165, 171, 13 Sup. Ct. 271, 37 L. Ed. 123, and cases cited; Belknap v. Schild, 161 U. S. 10, 17, 18, 16 Sup. Ct. 443, 40 L. Ed. 599; School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 108, 23 Sup. Ct. 33, 47 L. Ed. 90; Philadelphia Co. v. Stimson, 223 U. S. 605, 620, 32 Sup. Ct. 340, 56 L. Ed. 570.

The United States has consented to be sued in the Court of Claims and in the District Courts upon claims of a certain class, and not otherwise. Hence, without considering other questions discussed by the courts below or raised by appellant in this court, we conclude that the dismissal of the bill was not erroneous.

Decree affirmed.

(246 U. S. 330)

UNION PAC. R. CO. v. HADLEY.

(Argued March 7, 1918. Decided March 18, 1918.)

No. 174.

1. TRIAL ⟸214 — INSTRUCTIONS — SEPARATE SUBMISSION OF ACTS SPECIFIED AS NEGLIGENCE.

In an action for the death of a brakeman killed in a rear-end collision, where there were numerous circumstances besides the mere collision from which negligence of the company could be inferred, such as negligence of the train dispatcher in routing trains in view of an unusual snowstorm as well as the negligence of the crew of the following train who passed the automatic block signals giving warning of the train upon which deceased was a brakeman, the submission to the jury of the general question of negligence and denial of defendant's requests for rulings on the several items specified in the declaration as negligence was proper.

2. MASTER AND SERVANT ⟸289(39) — INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE.

Though a brakeman killed in a rear-end collision was contributorily negligent in remaining in the caboose instead of going back to warn the following train, if the railroad company was negligent, and neither train would have been at the place of collision if it had done its duty, it cannot be declared as a matter of law that the proximate cause of the brakeman's death was his contributory negligence, and that under Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (Comp. St. 1916, § 8657), it did not result in part from the negligence of any employé of the railroad company.

3. TRIAL ⟸337 — JURY — DISREGARD OF INSTRUCTIONS.

Where, in an action for death of a railroad brakeman, the circumstances were such that the jury might have concluded that, because his duty was nearly impossible of performance, no substantial deduction should be made because of nonperformance, an award of damages, while subject to remittitur if too high, is not open to attack on the theory that the jury disregarded instructions directing a diminution of recovery.

In Error to the Supreme Court of the State of Nebraska.

Action by Charles M. Hadley, as administrator of the estate of Charles M. Cradit, against the Union Pacific Railroad Company. A judgment for plaintiff was affirmed on condition of the entry of a remittitur (99 Neb. 349, 156 N. W. 765), and defendant brings error. Affirmed.

Mr. Nelson H. Loomis, of Omaha, Neb., for plaintiff in error.

Mr. John J. Halligan, of North Platte, Neb., for defendant in error.

*331 *Mr. Justice HOLMES delivered the opinion of the Court.

This is an action under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, for causing the death of Cradit, the plaintiff's (the defendant in error's) intestate. The case was brought to this Court before the Act of September 6, 1916, c. 448, 39 Stat. 727, *332 and with the exception of one or two matters that need a word, presents only the ordinary questions of negligence that it is not our practice to discuss at length.

The deceased was a brakeman on an eastbound freight train known an Extra 504 East. At Dix, in Nebraska, it was overtaken by another eastbound train known as Extra 501 East. There is a single track from Dix to Mile Post 426, 17 miles distant, and train 504 went ahead to this latter point. Train 501 followed for about half the distance to Potter and was held there until 504 had reached Mile Post 426, seven miles further on, when 501 was started on again, leaving its conductor there. But an Extra 510 West had broken down at Mile Post 426 and the train dispatcher at Sidney, about twelve miles still further east, ordered train 504 to take the disabled engine of 510 back to Sidney. The engineer asked the dispatcher to allow 504 to go on and to let 501, when it came up, take back the engine of 510, but it was refused. No. 501 came up, ran into 504 and killed Cradit and some others. The plaintiff says that the accident was due to at least contributory negligence of the railroad—the defendant that it was not negligent, that Cradit would not have been killed if he had done his duty and had gone back to warn the

following train by lights, torpedoes, &c., instead of remaining in the caboose, as he did, and that this was the proximate cause of his death.

[1] On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that *333 point there can be no question. We are not left to the mere happening of the accident. There were block signals working on the road that gave automatic warning of danger to 501, and which it was negligent to pass, seen or unseen, as the engine crew knew where they were and that another train was not far ahead. There was a snow storm raging which the jury might have found to have been of unprecedented violence, and it was open to them to find in view of circumstances unnecessary to detail that the dispatcher ought not to have sent out Extra 510 West as he did and that he was grossly wrong in not allowing 504 to come in and in not leaving it to 501 to bring back the disabled engine. It might have been found improper to leave the conductor of 501 at Potter. It is superfluous to say more upon this point.

[2] But it is said that in any view of the defendant's conduct the only proximate cause of Cradit's death was his own neglect of duty. But if the railroad company was negligent it was negligent at the very moment of its final act. It ran one train into another when if it had done its duty neither train would have been at that place. Its conduct was as near to the result as that of Cradit. We do not mean that the negligence of Cradit was not contributory. We must look at the situation as a practical unit rather than inquire into a purely logical priority. But even if Cradit's negligence should be deemed the logical last, it would be emptying the statute of its meaning to say that his death did not "result in part from the negligence of any of the employés" of the road. Act of April 22, 1908, c. 149, § 1, 35 Stat. 65. In Great Northern Ry. Co. v. Wiles, 240 U. S. 444, 36 Sup. Ct. 406, 60 L. Ed. 732, it appeared that the only negligence connected with the death was that of the brakeman who was killed.

[3] The Court after instructing the jury that Cradit assumed the ordinary risks of his employment, but not extraordinary ones, in a form that is not open to criticism here, *334 instructed them further that he was guilty of contributory negligence, and that, under the statute, if the jury found it necessary to consider that defence, his negligence was to go by way of diminution of damages in proportions explained. The jury in answer to a question found that nothing should be deducted for the negligence of the deceased, and found a verdict for $25,000, which was cut down to $15,000 by the trial Court, and to $13,500 by the Supreme Court. There were intimations that the jury disregarded the instructions of the Court, and on that footing the defendant claims the right to a new trial in order that the jury may determine the proper amount to be deducted, since that was a matter that the Court had no right to decide. But however the belief that the jury had disregarded the instructions may have influenced the mind of the Court, we perceive no legal warrant for the assumption. The account of the weather and other circumstances on the plaintiff's side made it possible for the jury to believe that Cradit's duty was so nearly impossible of performance that no substantial allowance should be made on that account. It does not appear that his superior, the conductor, who was in the caboose with him, required him to perform the task. And since the finding was possible on the evidence it cannot be attributed to disregard of duty. The Court had the right to require a remittitur if it thought, as naturally it did, that the verdict was too high. Beyond the question of attributing misconduct to the jury we are not concerned to inquire whether its reasons were right or wrong.

Judgment affirmed.

(246 U. S. 323)

IRELAND v. WOODS, Police Com'r.

(Argued March 6, 1918. Decided March 18, 1918.)

No. 611.

1. COURTS ⊜391(1)—SUPREME COURT—JURISDICTION—REMEDIES—NATURE OF.

The difference in the remedies of writ of error and certiorari provided for by Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156 [Comp. St. 1916, § 1214]) § 237, as amended by Act Sept. 6, 1916, c. 448, 39 Stat. 226, to review decisions of the state courts involving federal questions is that the writ of error is allowed as of right where upon examination it appears that the case is of the class designated, but in certiorari cases the issuance of the writ rests in the discretion of the Supreme Court.

2. COURTS ⊜394(7)—SUPREME COURT—JURISDICTION—CERTIORARI.

Where petitioner who was arrested for interstate rendition under a warrant issued by the Governor of New York pursuant to Code Cr. Proc. N. Y. § 827, sought discharge under habeas corpus on the ground that he was restrained in violation of the United States Constitution, art. 4, § 2, subd. 2, and Rev. St. § 5278 (Comp. St. 1916, § 10126), not being a fugitive from justice, and the state courts denied relief on the ground that it appeared from the indictment and the testimony of petitioner himself that he was a fugitive from justice, there was no denial of national powers, entitling petitioner, under Jud. Code, § 237, as amended September

6, 1916, to sue out a writ of error from the United States Supreme Court to review the judgment of the state court, but the case was one which was reviewable only by certiorari.

In Error to the Court of Appeals of the State of New York.

Petition by John D. Ireland for a writ of habeas corpus directed to Arthur Woods, Police Commissioner of the City of New York. An order dismissing the writ was affirmed by the Appellate Division (177 App. Div. 1, 163 N. Y. Supp. 991), and, the order being affirmed (117 N. E. 1081), petitioner brings error to the Court of Appeals of the State of New York. Dismissed.

Mr. George W. Wickersham, of New York City, for plaintiff in error.

Mr. Robert S. Johnstone, of New York City, for defendant in error.

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*Mr. Justice McKENNA delivered the opinion of the Court.

A case in interstate rendition. Upon requisition of the Governor of the state of New Jersey, representing that Ireland, plaintiff in error, was charged in that state with the crime of conspiracy and with having fled therefrom and taken refuge in New York, the Governor of the state of New York issued his warrant requiring Ireland to be arrested and delivered to the agent of the state of New Jersey to be taken back to the latter state. By virtue of the warrant defendant in error, Woods, police commissioner of the city of New York, arrested Ireland.

After his arrest Ireland filed a petition in habeas corpus in the Supreme Court of New York County, State of New York, for his discharge from the custody of Woods, alleging that the arrest was illegal and that he was restrained of his liberty in violation of the provisions of subdivision 2 of section 2, art. 4, of the Constitution of the United States and of section 5278 of the Revised Statutes of the United States (Comp. St. 1916, § 10126).

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The basis of the charge was that he*was not within the limits of the state of New Jersey at the times the alleged crimes were said to have been committed, nor was there any evidence, either before the Governor of New Jersey when that officer issued his demand upon the Governor of New York or before the latter when he issued his warrant, that he (Ireland) was within the limits of New Jersey at such times; and therefore it did not appear that he was a fugitive from the justice of New Jersey. And it was charged that it appeared on the face of the indictment that no crime under the laws of New Jersey was alleged or was committed.

Woods duly made return to the petition, to which were annexed the requisition of the Governor of New Jersey and the warrant of the Governor of New York.

Ireland traversed the return under oath, and denied that he had committed the crimes charged against him, or any crime; denied that he was within the state at the times that the indictment charged the crimes were committed, which he alleged to be the 1st of January, 9th of June and 12th of July, 1913, or in the state at the time of the finding of the indictment; alleged that he examined a sworn copy of the requisition of the Governor of New Jersey and that it did not contain any evidence or proof that he, Ireland, was in that state on any day in any of the months set forth in the indictment; and he further denied that he was a fugitive from the justice of the state.

After a hearing, at which the papers which were before the Governor of New York at the time he issued his warrant were introduced in evidence (over the objection of Ireland), and certain oral testimony, including that of Ireland, an order was entered dismissing the writ. It was successively affirmed by the Appellate Division and the Court of Appeals. This writ of error was then sued out.

It is stated in the opinion of the Appellate Division, Judge Shearn speaking for the court, that the requisition*was honored upon* the production of the necessary papers and that it was not claimed there was no sufficient showing before the Governor to warrant the exercise of his jurisdiction; the case depending entirely on the testimony that he, Ireland, was only three times in New Jersey, none of which times was charged in the indictment.

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The court did not pass upon or even refer to the charge of the petition that his arrest was in violation of the Constitution of the United States or of section 5278, R. S. It rested its decision upon the sixth count of the indictment and the testimony of Ireland.

The sixth count charged that the offenses were committed "on or about the 1st day" of January, 1913, "and on divers other days between that day and the day of the taking of the inquisition." And the court rejected the contention made by counsel that this was merely an allegation of a crime committed on January 1st and held that the dates set forth in the count defined a period of time during any part of which the offenses could have been committed, citing Comm. v. Wood, 4 Gray (Mass.) 11; Comm. v. Snow, 14 Gray (Mass.) 20, and held further that the indictment followed the common and accepted form of pleading a continuing conspiracy, adducing Comm. v. Sheehan, 143 Mass. 468, 9 N. E. 839; Comm. v. Briggs, 11 Metc. (Mass.) 573; Comm. v. Dunn, 111 Mass. 426.

Considering the effect of Ireland's concession that he was present in the state on at least three occasions during the period defined, the court held, upon the authority of certain cases, that there could be no question but that he was a fugitive from justice within the meaning of the extradition law for his presence there was not under conditions which established the impossibility of his participation in the conspiracy; that, al-

*327 though his stay was short on each occasion, there was an abundance of opportunity not only to confer with his alleged *confederates but to hand to them the letters of credit and bogus checks which, it was alleged, were used to accomplish the overt acts.

It was not considered necessary to pass upon the contentions with respect to the five other counts of the indictment.

[1, 2] A motion to dismiss is made, the grounds of it being: (1) The judgment of the Court of Appeals is reviewable, if at all, only by certiorari. (2) It is not reviewable at all because under the limitation of the jurisdiction of the Court of Appeals it had no power to review or decide the question whether there was any evidence to show that Ireland was a fugitive from justice and that the Court of Appeals must be assumed not to have passed upon or to have decided the question whether Ireland was a fugitive from justice. Whether the assumption is justified or not we do not consider, on account of the view we entertain of the first ground of the motion, to which we immediately pass. To sustain it counsel adduces section 237 of the Judicial Code as amended September 6, 1916, chapter 448, 39 Stat. 726. It provides in what cases and how there can be a review of a judgment or decree of a state court by this court. It reads as follows:

"A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

*328 When, however, the conditions are reverse, that is, when state court judgments affirm the national powers *against a contention of their invalidity or do not sustain the validity of the state authority against an attack based on federal grounds, there can be review only by certiorari. And the same manner of review is prescribed where any title, right, privilege, or immunity, is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is either in favor of or against the claim set up.

The difference between the remedies is that one (writ of error) is allowed as of right where upon examination it appears that the case is of the class designated in the statute and that the federal question presented is real and substantial and an open one in this court, while the other (certiorari) is granted or refused in the exercise of the court's discretion.[1]

Coming, then, to consider what was involved in the decision of the courts below, it is manifest that the validity of no national enactment or authority was drawn in question nor, in the meaning of the section, the validity of a statute or authority of the state. There is no doubt of the right of the Governor of New Jersey to have demanded of the Governor of New York the extradition of Ireland, nor of the Governor of the latter state to have complied. Indeed, it was the duty of both so to act if the case justified it, and whether there was such justification was the only inquiry and decision of the courts below.

We said in Champion Lumber Co. v. Fisher, 227 U. S. 445, 451, 33 Sup. Ct. 329, 57 L. Ed. 591, that the validity of a statute of the United States or an authority exercised thereunder is drawn in question when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry. A dispute of the facts upon which the authority was exercised is not a dispute of its *329 validity. See, also, Foreman v. Meyer, 227 U. S. 452, 33 Sup. Ct. 331, 57 L. Ed. 594. If there be no dispute about the facts, Hyatt v. People ex rel. Corkran, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657, might apply. And necessarily the same principle and comment are applicable when there is drawn in question the validity of a statute of or authority exercised under a state.

In opposition to the motion to dismiss, plaintiff in error contends that a writ of error is the proper proceeding to bring to this court for review the final order or judgment of a state court in a habeas corpus proceeding. Undoubtedly, if the proper conditions of review by that writ exist as prescribed in the amended section 237 of the Judicial Code, supra. The argument of counsel to show that such conditions do exist in the instant case is somewhat roundabout. It begins by the assertion that the warrant under which Ireland was held in custody was an exercise of the authority of the state in that it was issued by the Governor pursuant to the provisions of section 827 of the Code of Criminal Procedure of that state. It is not necessary to quote it. It is simply the fulfillment by the state of New York of the Constitution of the United States and, it may be said, of section 5278, R. S. It enjoins the duty upon the Governor, when a requisition is made upon him by the Governor of another state, to issue his warrant for the arrest "of a fugitive from justice." It is upon the quoted words (which, we may say in passing, are a paraphrase of the provision of the Constitution of the United States and of section 5278, R. S.) that the argument of counsel dwells and terminates, the persistent contention being that Ireland is not

[1] Twitchell v. Comm., 7 Wall. 321, 19 L. Ed. 223; Spies v. Illinois, 123 U. S. 131, 8 Sup. Ct. 22, 31 L. Ed. 80; In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519; Phila. & R. C. & I. Co. v. Gilbert, 245 U. S. 165, 38 Sup. Ct. 58, 62 L. Ed. —.

such a fugitive, and that the decision of the Supreme Court at Special Term and in the Appellate Division to the contrary was based on the construction of the New Jersey indictment—a pure question of law, it is contended, and that the effect the court gave to Ireland's presence in the state at the testified times is another question of law. "These *330 questions *were reviewable in the Court of Appeals and are open to decision in this court," is the final insistence of counsel.

We are unable to assent to the latter part of the insistence. Questions of law which may be raised upon the indictment, the deductions from the facts which may be charged against the action of the Governor, do not impugn it or the validity of the statute which enjoined it. And surely the decisions of the courts of New York, one trial and two appellate, affirming the legality of his action, are not decisions against the validity of the authority he exercised.

There is a difference between a question of power to pass a law and its construction, and a difference between the endowing of an officer with authority and his erroneous exercise of that authority. As was said by Chief Justice Fuller, speaking for the court in United States v. Lynch, 137 U. S. 280, 285, 11 Sup. Ct. 114, 116 [34 L. Ed. 700]:

"The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed."

We think, therefore, that the writ of error must be and it is

Dismissed.

[246 U. S. 338]

SHECKELS v. DISTRICT OF COLUMBIA.

(Argued Jan. 28, 1918. Decided March 18, 1918.)

No. 144.

DISTRICT OF COLUMBIA ⟸35 — CLAIMS AGAINST—ALLOWANCE—INTEREST.

Act June 16, 1880, § 1, 21 Stat. 284, after conferring jurisdiction on the Court of Claims over claims arising against the District of Columbia, declares that the court shall proceed in accordance with the rules in relation to the adjudication of claims against the United States. Section 5 provides for payment by the Secretary of the Treasury of the amount allowed upon presentation of a copy of judgment duly certified, while section 6 authorizes the Secretary to demand of the sinking fund commissioner of the District of Columbia so many bonds authorized by Act June 20, 1874, c. 337, 18 Stat. 116, as may be necessary for payment of the judgments, and declares that before delivery of such bonds coupons shall be detached therefrom to the date upon which the claims allowed were due and payable, but that the gross amount of the bonds issued shall not exceed $15,000,000. The Amendatory Act of March 3, 1881, c. 134, 21 Stat. 458, allowed the treasurer of the United States as ex officio sinking fund commissioner to sell the bonds and pay the judgments from the proceeds of the sale. *Held*, in view of Rev. St. § 1091 (Comp. St. 1916, § 1168), declaring that no interest shall be allowed on any claim to the time of rendition of judgment by the Court of Claims unless upon a contract expressly stipulating for interest, which is applicable to claims against the United States, and the fact that bonds remaining subject to issuance under the act of 1880 were insufficient to satisfy the judgment, the Court of Claims properly specified the date when the claim accrued, and directed payment of interest only from the time of rendition of the judgment, unless the claim was one based upon contract expressly stipulating for the payment of interest.

Appeal from the Court of Claims.

Suit by Helen C. Sheckels, surviving executrix of Theodore Sheckels, deceased, against the District of Columbia. From a judgment of the Court of Claims in favor of claimant which allowed interest only from the date of judgment, claimant appeals. Affirmed.

Messrs. John Raum and V. B. Edwards, both of Washington, D. C., for appellant.

Mr. Assistant Attorney General Thompson, for the District of Columbia.

*339 *Mr. Justice PITNEY delivered the opinion of the Court.

This is an appeal by claimant in a suit that was commenced by her testator in the Court of Claims in the year 1880, under Act of June 16, 1880 (chapter 243, 21 Stat. 284). A judgment was rendered in claimant's favor after the amendatory Act of February 13, 1895, c. 87, 28 Stat. 664 (Johnson, Adm'r, v. D. C., 31 Ct. Cl. 395), which judgment was reversed by this court in 1897, and the cause remanded for further proceedings. District of Columbia v. Johnson, 165 U. S. 330, 17 Sup. Ct. 362, 41 L. Ed. 734. After a long delay, proceedings were had which resulted in a judgment in favor of claimant February 21, 1916, from which the District of Columbia has not appealed.

Claimant's appeal relates to the question of *340 interest *upon the amount recovered. The form of the judgment is that the claimant "do have and recover of and from the District of Columbia in the manner provided by the act of June 16, 1880, chapter 243, seven thousand three hundred and six dollars and twenty-five cents ($7,306.25). Said amounts were due and payable April 1, 1876, but said judgment shall bear interest only from the date of its rendition, and is payable as provided by section 6 of the Act of June 16, 1880 (21 Stat. L. p. 284), as amended by the Act of March 3, 1881 (21 Stat. L. p. 466)." There is no finding that the claim is based upon a contract expressly stipulating for the payment of interest.

It is insisted that the court erred in allowing interest only from the date of judgment, rather than from April 1, 1876, the day on which the claim became due and payable.

The act of 1880, in its first section, conferred jurisdiction upon the Court of Claims over all claims then existing the District of

Columbia arising out of certain operations of the District government during the preceding decade; and as to procedure it declared:

"Said Court of Claims shall have the same power, proceed in the same manner, and be governed by the same rules, in respect to the mode of hearing, adjudication, and determination of said claims, as it now has in relation to the adjudication of claims against the United States."

This, if it stood alone, would leave the question of interest to be governed by the general principle that interest is not recoverable from the government, embodied in section 1091, Rev. Stat.:

"No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest." still in force as section 177, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1141 [Comp. St. 1916, § 1168]).

But other sections of the act of 1880 contain provisions that must be considered. By section 5 it was enacted that, where no appeal was taken, or on affirmance of a judgment *341 in favor of the claimant, "the sum due thereby shall be paid, as hereinafter provided, by the Secretary of the Treasury," upon presentation to him of a copy of the judgment properly certified. And by section 6 the Secretary was authorized to demand of the sinking fund commissioner of the District of Columbia so many of the 3.65 per cent. bonds authorized by Act of Congress approved June 20, 1874 (chapter 337, 18 Stat. 120), and amendatory acts, as might be necessary for the payment of the judgments; "which bonds shall be received by said claimants at par in payment of such judgments, and shall bear date August first, eighteen hundred and seventy-four, and mature at the same time as other bonds of this issue; provided, that before the delivery of such bonds as are issued in payment of judgments rendered as aforesaid on the claims aforesaid, the coupons shall be detached therefrom from the date of said bonds to the day upon which such claims were due and payable; and the gross amount of such bonds heretofore and hereafter issued shall not exceed in the aggregate fifteen millions of dollars." By amendment of March 3, 1881 (chapter 134, 21 Stat. 458, 466), the Treasurer of the United States as ex officio sinking fund commissioner was authorized, whenever in his opinion it would be more advantageous for the interest of the District of Columbia to do so, to sell the bonds and pay the judgments from the proceeds of the sales instead of delivering the bonds to the claimants.

Under the act of 1880, the Court of Claims held that it was necessary it should determine when the claims were due and payable within the meaning of the act, and specify the date in the judgment, in order that the Secretary of the Treasury might know what coupons, if any, were to be detached from bonds delivered by him in payment. Fendall's Case, 16 Ct. Cl. 106, 121. See District of Columbia v. Johnson, 165 U. S. 330, 336, 17 Sup. Ct. 362, 41 L. Ed. 734.

Construing sections 1, 5, and 6 of the act of 1880 in *connection with section 1091, Rev. Stat. (Comp. St. 1916, § 1168), it is plain that the claimant in such a judgment is not entitled to a recovery of interest as such, saving any that may accrue after the rendition of the judgment, unless the recovery be based upon a contract expressly stipulating for the payment of interest. Section 6, however, provided a special fund out of which claims of this character might be paid, and as this consisted of coupon bonds dated in 1874 and maturing 50 years later, the provision to the effect that coupons maturing after the date upon which the claim was due and payable should accompany the bonds amounted to giving interest at a limited rate, before and after judgment, where payment was made in that mode. *342

But this special mode of payment was qualified by a proviso that the gross amount of such bonds should not exceed $15,000,000; and, as it happens, all except $2,700 had been issued prior to the entry of the judgment now under review. This is admitted in appellant's brief, and may be additionally verified by reference to Annual Report of the Secretary of the Treasury on the State of the Finances for the fiscal year ended June 30, 1915, p. 122; like report for the following fiscal year, p. 92.

It was not erroneous for the Court of Claims to take note of the fact that, at the utmost, only a part of the claim could be paid in bonds or from the proceeds of bonds, and that with respect to any part not paid in this special manner there was no right to interest prior to the rendition of the judgment. This is the effect of the judgment as entered.

Affirmed.

Mr. Justice McREYNOLDS took no part in the consideration or decision of this case.

(246 U. S. 343)

OMAECHEVARRIA v. STATE OF IDAHO.

(Argued Dec. 20, 1917. Decided March 18, 1918.)

No. 102.

1. PUBLIC LANDS ⊂⊃7—POLICE POWER—FEDERAL PUBLIC DOMAIN.

The police power of the state extends over the federal public domain, at least when there is no legislation by Congress on the subject.

2. CONSTITUTIONAL LAW ⊂⊃206(1), 237 — EQUAL PROTECTION OF LAWS—DENIAL OF PRIVILEGES OF CITIZENS OF UNITED STATES.

Rev. Codes Idaho, § 6872, making it a misdemeanor to herd, graze, or pasture sheep on any cattle range previously occupied by cattle, the purpose of the statute being to prevent conflicts between cattle rangers and sheep herders on the public domain, as to the use of which Congress has prescribed no rules, is not invalid,

as abridging the privileges or immunities of citizens of the United States, or denying the equal protection of the law; the preference given to cattle rangers not being an arbitrary discrimination, and sheep herders requiring no protection against the encroachment of cattle.

3. CONSTITUTIONAL LAW ⊜293—DUE PROCESS OF LAW—INDEFINITENESS OF TERMS OF STATUTE.

Rev. Codes Idaho, § 6872, making it a misdemeanor to pasture sheep on any cattle range, and declaring that priority of possessory right between cattle and sheep owners shall be determined by the priority in the usual and customary use of such range, is not invalid, under Const. Amend. 14, as denying due process of law, because of the indefiniteness of its terms and failure to provide for the ascertainment of the boundaries of a range, in view of section 6314, providing that in every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence.

4. PUBLIC LANDS ⊜17—CONFLICT BETWEEN STATE STATUTE AND ACT OF CONGRESS—GRAZING REGULATIONS.

Nor is the above section invalid, as in conflict with Act Feb. 25, 1885, c. 149, § 1, 23 Stat. 321 (Comp. St. 1916, § 4997), declaring that the assertion of a right to the exclusive use and occupancy of any part of the public lands without claim, color of title, etc., is unlawful. The evil sought to be remedied by such act was the unlawful inclosing of the public domain, while the Idaho statute gives no exclusive right to cattle owners on public ranges, but merely seeks to prevent conflicts and breaches of the peace by prescribing a rule of priority between cattle rangers and sheep herders.

Mr. Justice Van Devanter and Mr. Justice McReynolds, dissenting.

In Error to the Supreme Court of the State of Idaho.

Secundino Omaechevarria was convicted of pasturing sheep on a cattle range, in violation of Rev. Codes Idaho, § 6872, and, the conviction being affirmed on appeal (27 Idaho, 797, 152 Pac. 280), defendant brings error. Affirmed.

Messrs. Frank P. Prichard, of Philadelphia, Pa., and S. L. Hodgin, of Twin Falls, Idaho, for plaintiff in error.

Messrs. T. A. Walters and William Healy, both of Boise, Idaho, for State of Idaho.

*344 *Mr. Justice BRANDEIS delivered the opinion of the Court.

For more than forty years the raising of cattle and sheep have been important industries in Idaho. The stock feeds in part by grazing on the public domain of the United States. This is done with the government's acquiescence, without the payment of compensation, and without federal regulation. Buford v. Houtz, 133 U. S. 320, 326, 10 Sup. Ct. 305, 33 L. Ed. 618. Experience has demonstrated, says the state court, that in arid and semi-arid regions cattle will not graze, nor can they thrive, on ranges where sheep are allowed to graze extensively; that the encroachment of sheep upon ranges previously occupied by cattle results in driving out the cattle and destroying or greatly impairing the industry; and that this conflict of interests led to frequent and serious breaches of the peace and the loss of many lives.[1] Efficient policing of the ranges is *impossible; *345 for the state is sparsely settled and the public domain is extensive, comprising still more than one-fourth of the land surface.[2] To avert clashes between sheep herdsmen and the farmers who customarily allowed their few cattle to graze on the public domain near their dwellings, the territorial Legislature passed in 1875 the so-called "Two Mile Limit Law." It was enacted first as a local statute applicable to three counties, but was extended in 1879 and again in 1883 to additional counties, and was made a general law in 1887.[3] After the admission of Idaho to the Union, the statute was re-enacted and its validity sustained by this court in Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499. To avert clashes between the sheep herdsmen and the cattle rangers, further legislation was found necessary; and in 1883 the law (now section 6872 of the Revised Codes) was enacted which prohibits any person having charge of sheep from allowing them to graze on a range previously occupied by cattle.[4] For *violating this statute the *346 plaintiff in error, a sheep herdsman, was convicted in the local police court and sentenced to pay a fine. The judgment was affirmed by an intermediate appellate court and also by the Supreme Court of Idaho. 27 Idaho, 797, 152 Pac. 280. On writ of error to this court the validity of the statute is assailed on the

[1] Sweet v. Ballentyne, 8 Idaho, 431, 447, 69 Pac. 995; Pyramid Land & Stock Co. v. Pierce, 30 Nev. 237, 253-255, 95 Pac. 210. Report of National Conservation Commission, 1909, Vol. III (60th Congress, 2d Session, Senate Doc. No. 676) p. 357. Conference of Governors (1908) p. 143.

[2] The land area of Idaho is approximately 53,346,560 acres (U. S. Census [1910] Vol. VI, p. 401), of which 20,000,000 acres were specifically classified as grazing lands (Report of Secretary of Interior [1890] Vol. I, p. XCI). In 1883 about 50,000,000 acres still formed a part of the public domain. "The Public Domain," by Thomas Donaldson (1884) pp. 528, 529, 1190. On July 1, 1914, there were still unappropriated and unreserved 16,342,781 acres. Report of Department of Interior (1914) Vol. I, p. 207. The population of Idaho in 1880 was 32,610; in 1910 it was 325,594.

[3] Acts of January 14, 1875; February 13, 1879 (Laws 1879, p. 58); January 31, 1883 (Laws 1883, p. 71); Revised Statutes 1887, § 1210 et seq. The first session of the territorial Legislature convened December 7, 1863. Idaho was admitted to the Union July 3, 1890.

[4] Revised Codes of Idaho 1908, § 6872:

"Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

ground that the statute is inconsistent both with the Fourteenth Amendment and with the act of Congress of February 25, 1885, c. 149, 23 Stat. 321 (Comp. St. 1916, §§ 4997–5002), entitled "An act to prevent unlawful occupancy of the public lands."

[1, 2] First. It is urged that the statute denies rights guaranteed by the Fourteenth Amendment, namely: Privileges of citizens of the United States, in so far as it prohibits the use of the public lands by sheep owners; and equal protection of the laws, in that it gives to cattle owners a preference over sheep owners. These contentions are, in substance, the same as those made in respect to the "Two Mile Limit Law" in Bacon v. Walker, supra; and the answer made there is applicable here. The police power of the state extends over the federal public domain, at least when there is no legislation by *347 Congress on the subject.[5] We cannot say that the measure adopted* by the state is unreasonable or arbitrary. It was found that conflicts between cattle rangers and sheep herders on the public domain could be reconciled only by segregation. In national forests, where the use of land is regulated by the federal government, the plan of segregation is widely adopted.[6] And it is not an arbitrary discrimination to give preference to cattle owners in prior occupancy without providing for a like preference to sheep owners in prior occupancy.[7] For experience shows that sheep do not require protection against encroachment by cattle, and that cattle rangers are not likely to encroach upon ranges previously occupied by sheep herders. The propriety of treating sheep* differently than cattle has been generally recognized.[8] That the interest of the sheep owners of Idaho received due consideration is indicated by the fact that in 1902 they opposed the abolition by the government of the free ranges.[9] *348

[3] Second. It is also urged that the Idaho statute, being a criminal one, is so indefinite in its terms as to violate the guaranty by the Fourteenth Amendment of due process of law, since it fails to provide for the ascertainment of the boundaries of a "range" or for determining what length of time is necessary to constitute a prior occupation a "usual" one within the meaning of the act. Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other states.[10] This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. Nash v. United States, 229 U. S. 373, 377, 33 Sup. Ct. 780, 57 L. Ed. 1232; Miller v. Strahl, 239 U. S. 426, 434, 36 Sup. Ct. 147, 60 L. Ed. 364. Furthermore, any danger to sheep men which might otherwise arise from indefiniteness, is removed by section 6314 of Revised Codes, which provides that:

"In every crime or public offence there must exist a union, or joint operation, of act and intent, or criminal negligence."

*[4] Third. It is further contended that the *349 statute is in direct conflict with the Act of

[5] The advisability of regulation by some system of leasing or licensing has been repeatedly recommended to Congress, and bills to that end have been introduced, but none has been enacted. Report of Department of Interior (1902) Vol. I, pp. 167-175; Congressional Record, Vol. 35 (1901-02) pp. 291, 1048; Report of Public Lands Commission, Senate Doc. (1905) 58th Congress, 3d Session, No. 189, pp. XX-XXIII, 5-61; Congressional Record, Vol. 40 (1905-06) pp. 54, 1164; Letter from the Acting Secretary of Interior, House Doc. No. 661 (March, 1906); Report of Department of Interior (1907) Vol. I, pp. 78-81; Congressional Record, Vol. 42 (1907-08) p. 14; Report of Department of Interior (1908) Vol. I, p. 15; Action of the American National Live Stock Association Relative to the Disposition of the Unappropriated Public Lands of the United States (1908); Report of Department of Interior (1911) Vol. I, p. 9; Congressional Record, Vol. 48 (1911-12) p. 69; Hearings before the House Committee on Public Lands on H. R. Bill 19857 (1912); Report of Department of Interior (1912) Vol. I, p. 5; Congressional Record, Vol. 50 (1913) p. 2365; Vol. 51 (1913-14) pp. 939, 3814; Report of Department of Agriculture (1914) pp. 8-10; Hearing before a Subcommittee of the House Committee on Public Lands on H. R. 9582, February 12, 1914, pp. 7, 8; "Practical Application of the Kent Grazing Bill to Western & Southwestern Grazing Ranges," address by J. J. Thornber before the American National Live Stock Association, Denver, Colo., January 22, 1914; Report of Department of Agriculture (1915) p. 47; Congressional Record, Vol. 53 (1915-16) p. 21; Report of Department of Agriculture (1916) pp. 18, 19.

[6] National Forest Manual (1913) pp. 13, 28; Hearing before House Committee on H. R. 9582 and H. R. 10539, on Grazing on Public Lands (1914) p. 73; Grazing in Forest Reserves, by F. Roth, Yearbook of Dept. of Agriculture (1901) pp. 333, 338, 343; Grazing of Live Stock on Forest Reserves, by Gifford Pinchot, Report National Live Stock Association (1902) pp. 274, 275.

[7] In the prolonged discussion of the proposal to correct the abuses of "open range" by leasing government grazing lands, the propriety of safeguarding "rights" as determined by priority of occupancy and use has been generally insisted upon. See Conference of Governors (1908) p. 347; Report of Department of Interior (1902) p. 174; Report of Public Lands Commission, Senate Doc. (1905) 58th Congress, 3d Session, No. 189, pp. 14, 60 (par. 13); National Forest Manual June 4, 1913, pp. 53, 58.

[8] Reports of the Department of Interior (1898) Vol. I, p. 87; (1899) Vol. I, pp. XX, 105-112; (1900) Vol. I, p. 390; (1901) Vol. I, p. 127. Utah (1853), Laws 1851-1869, chap. 60, p. 90; Washington, Laws 1907, p. 78; Arizona, Penal Code 1913, § 641. See statutes cited, infra, in note 14.

[9] Hearings before House Committee on Public Lands on Leasing Grazing Lands (1902) 57th Congress, 1st Session, pp. 76-77.

[10] Montana, Laws 1871-72, page 287, § 87, makes it a crime to drive stock from a "range" on which they "usually" run; North Dakota, Laws 1891, p. 123, deals with "customary range"; Arizona, Penal Code 1913, § 637, with "range"; Colorado, Courtright's Statutes, § 6375, with "usual range"; Texas, Penal Code Annotated 1916, art. 1356 (1866), with "accustomed range."

350 Congress of February 25, 1885.[11] That statute which was designed to prevent the illegal fencing of public lands, contains at the close of section 1 the following clause with which the Idaho statute is said to conflict:

"And the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United*States in any state or any* of the territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited."

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An examination of the federal act in its entirety makes it clear that what the clause quoted from section 1 sought to prohibit was merely the assertion of an exclusive right to use or occupation by force or intimidation or by what would be equivalent in effect to an inclosure. That this was the intent of Congress is confirmed by the history of the act. The reports of the Secretary of the Interior upon whose recommendation the act was introduced, the reports of the committees of Congress, and the debates thereon indicate that this alone was the evil sought to be remedied,[12] and to such action only does its prohibition appear to have been applied in practice.[13] Although Idaho had, by statute, excluded sheep from portions of the public domain since 1875, no reference to the fact has been found in the discussion which preceded and followed the enactment of the federal law, nor does any reference seem to have been made to the legislation of other states which likewise excluded sheep, under certain circumstances, from parts of the public domain.[14] And no case has been found in

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[11] "An act to prevent unlawful occupancy of the public lands.

"Be it enacted by the Senate and House of Representatives of the United States of Amrica in Congress assembled, that all inclosures of any public lands in any state or territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state or any of the territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited.

"Sec. 2. That it shall be the duty of the district attorney of the United States for the proper district, on affidavit filed with him by any citizen of the United States that section one of this act is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by governmental sub-divisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States District or Circuit Court, or territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also hereby conferred on any United States District or Circuit Court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity by writ of injunction, to restrain violations of the provisions of this act; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure; and any suit brought under the provisions of this section shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day. In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court.

"Sec. 3. That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: Provided, this section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith.

"Sec. 4. That any person violating any of the provisions hereof, whether as owner, part owner, or agent, or who shall aid, abed, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor and fined in a sum not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, for each offense. [As amended by Act March 10, 1908, c. 75 (35 Stat. 40).]

"Sec. 5. That the President is hereby authorized to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any of said lands, and to employ civil or military force as may be necessary for that purpose.

"Sec. 6. That where the alleged unlawful inclosure includes less than one hundred and sixty acres of land, no suit shall be brought under the provisions of this act without authority from the Secretary of the Interior.

"Sec. 7. That nothing herein shall affect any pending suits to work their discontinuance, but as to them hereafter they shall be prosecuted and determined under the provisions of this act.

"Approved, February 25th, 1885."

[12] Reports of Department of Interior (1882) Vol. I, p. 13; (1883) Vol. I, pp. XXXII, 30, 210; (1884) Vol. I, pp. XVII, 17; (1885) Vol. I, p. 205; Letter of Secretary of Interior (1884) Senate Ex. Doc. (1883-84) No. 127; Report of House Committee, 48th Congress, 1st Session (1884) No. 1325; Report of Senate Committee, 48th Congress, 2d Session (1885) No. 979; Congressional Records, Vol. 15 (1883-84) pp. 4768-4783; Vol. 16 (1884-85) p. 1457.

[13] United States v. Brandestein (D. C.) 32 Fed. 738, 741; Reports of Department of Interior (1885) Vol. I, p. 44; (1886) Vol. I, pp. 30-41; (1887) Vol. I, pp. 12, 13; (1888) Vol. I, p. XVI; (1901) Vol. I, p. 92; (1902) Vol. I, pp. 11, 172, 173, 306; (1903) Vol. I, pp. 18-19; (1904) Vol. I, pp. 20, 367; (1905) Vol. I, p. 20; (1908) Vol. I, p. 15; (1915) Vol. I, p. 226. Compiled Statutes, §§ 4997-5002, notes.

[14] Statutes resembling the Idaho "Two Mile Limit Law" have been passed in a number of the Western states. Arizona, Act Feb. 12, 1875, Compiled Laws 1864-77, p. 561; Penal Code of Ariz.

which it was even urged that these state statutes were in conflict with this act of Congress.

The Idaho statute makes no attempt to grant a right to use public lands. McGinnis v. Friedman, 2 Idaho (Hasb.) 393, 17 Pac. 635. The state, acting in the exercise of its police power, merely excludes sheep from certain ranges under certain circumstances. Like the forcible entry and detainer act of Washington which was held in Denee v. Ankeny (decided March 4, 1918) 246 U. S. 208, 38 Sup. Ct. 226, 62 L. Ed. ——, not to conflict with the homestead laws, the Idaho statute was enacted primarily to prevent breaches of the peace. The incidental protection which it thereby affords to cattle owners does not purport to secure to any of them, or to cattle owners collectively, "the exclusive use and occupancy of any part of the public lands." For every range from which sheep are excluded remains open not only to all cattle, but also to horses, of which there are many in Idaho.[15] This exclusion of sheep owners under certain circumstances does not interefere with any rights of a citizen of the United States. Congress has not conferred upon citizens the right to graze stock upon the public lands. The government has merely suffered the lands to be so used. Buford v. Houtz, supra. It is because the citizen possesses no such right, that it was held by this court that the Secretary of Agriculture might, in the exercise of his general power to regulate forest reserves, exclude sheep and cattle therefrom. United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563; Light v. United States, 220 U. S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570.

*353 *All the objections urged against the validity of the statute are unsound. The judgment of the Supreme Court of Idaho is

Affirmed.

Mr. Justice VAN DEVANTER and Mr. Justice McREYNOLDS dissent.

(246 U. S. 312)

ROCK SPRING DISTILLING CO. et al. v. W. A. GAINES & CO.

(Argued Jan. 31 and Feb. 1, 1918. Decided March 18, 1918.)

No. 58.

1. TRADE-MARKS AND TRADE-NAMES ⊂⊃31—APPLICATION OF TRADE-MARK.

A trade-mark on whisky includes both straight and blended whisky and entitles an owner to use it on both brands.

2. JUDGMENT ⊂⊃720 — CONCLUSIVENESS—ISSUES—MATTERS CONCLUDED.

A decision of the Circuit Court of Appeals, reversing a decree in favor of complainant in trade-mark litigation, the court's opinion indicating that the reversal was on account of defendant's prior appropriation and unlimited as to time or territory, is conclusive against complainant's right to recover in another circuit against the same defendants for the alleged infringement.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Bill by W. A. Gaines & Co. against the Rock Spring Distilling Company and Silas Rosenfield. A decree of the District Court, dismissing the bill (202 Fed. 989), was reversed by the Circuit Court of Appeals (226 Fed. 531, 141 C. C. A. 287), and defendants bring certiorari. Decree of Circuit Court of Appeals reversed, and that of the District Court affirmed.

*313 *This is a bill in equity brought by the Gaines Company against the Rock Spring Company to restrain the latter from using the trade-mark of the former. The trade-mark is registered and is employed by the Gaines Company to designate a brand of straight rye or straight bourbon whisky manufactured by that company.

The following are the facts of the bill, stated narratively:

The Gaines Company is the owner of a whisky distillery in Woodford county, Kentucky, known and named as the Old Crow Distillery. It is the only one in the state that is or ever has been designated by the name of "Crow" or "Old Crow."

*314 Its product has been at all of the times mentioned in *the bill straight rye and straight bourbon whisky and to it there has at all times been applied the trade-mark consisting of the words "Old Crow" by being imprinted or branded on the wooden box containing the whisky and imprinted upon labels affixed to bottles containing the whisky. The trade-mark is now and for many years past has been used by the company and its predecessors in commerce among the states.

On February 26, 1909, it filed in the Patent Office, in pursuance of the Act of February 20, 1905 (33 Stat. 724 [Comp. St. 1916, § 9485 et seq.]), in due form and under the conditions required, an application for registration of the trade-mark and a certificate of registration for the same was duly issued and for many years past has been used by the company as a trade-mark for its straight rye and straight bourbon whisky.

The Gaines Company, availing itself of certain acts of Congress, began and has ever since maintained the bottling of the "Old Crow" in bond and it was then and has ever since remained the only "Old Crow" whisky bottled in bond and has an extensive sale throughout the United States and in foreign countries; and when so bottled in bond it is known as and called "Old Crow Bottled in Bond," is so marked, and commands a high price.

1913, § 639; Colorado, Courtright's Colorado Statutes, § 6377 (1877); Nevada, Revised Laws 1912, § 2317 (1901), § 2319 (1907); California, Statutes 1869-70, p. 304.

[15] Compare U. S. Census (1910) Vol. VI, p. 390; Report, Department of Agriculture (1914) p. 148.

The Rock Spring Company is a corporation, has a distillery in the county of Daviess, Kentucky, and is the owner of a distillery situated therein known as Distillery No. 18, operated by Silas Rosenfield, one of the defendants.

The Rock Spring Company, in fraud of the Gaines Company's rights and in infringement of its trade-mark, made or caused to be made and sold or caused to be sold in Kentucky a certain spurious straight bourbon whisky, not the product of the Gaines Company, and *315 branded the same with the words "Celebrated Old Crow Whisky Bottled in Bond," have caused the same to be bottled in bond, have applied to the labels thereon the words "Old Crow" in script type, and have caused the same to be sold and transported in interstate commerce, and this with the intent to mislead and deceive the public, and are doing so and will continue to do so unless restrained.

An injunction is prayed and an accounting.

Demurrers were filed by the Rock Spring Company and Rosenfield, which were overruled, and they then answered, pleading a prior adjudication based upon the following alleged facts: A suit was brought in the United States Circuit Court for the Eastern Division of the Eastern District of Missouri by W. A. Gaines & Company against Abraham M. Hellman and Moritz Hellman charging infringement of the trade-mark and unfair competition. The bill was subsequently amended making Max Kahn, administrator with will annexed of the estate of Abraham M. Hellman, deceased, a party to the suit. Upon the issues framed a decree was entered in favor of the complainants, an injunction granted and an accounting ordered.

The decree was reversed by the United States Circuit Court of Appeals for the Eighth Circuit with directions to dismiss the bill on the ground that the evidence clearly showed that the predecessors in business of the appellants therein had adopted the words "Old Crow" as a trade-mark for whisky as early as the year 1863 and the evidence failed to show that the predecessors of the Gaines Company had used the words as a trade-mark prior to the year 1870.

A petition for certiorari to review the decision was denied by the Supreme Court of the United States.

Other proceedings were had in the suit pending its appeal and afterward. The suit, *316 however, was finally dismissed on the merits because of the decision of the Court of Appeals and the action of the Supreme Court of the United States.

Defendants are in privity with the parties recovering under those decisions and decrees and are manufacturing whisky under contracts of agency from them or their successors and neither have nor claim any right except through such contract.

The Hellman Distilling Company filed a petition to be permitted to intervene, which was denied. (C. C.) 179 Fed. 544.

After hearing, a decree was entered sustaining the plea of former adjudication based on the decree of the District Court for the Eastern District of Missouri and accordingly and for that reason the bill of complaint, so far as it sought relief for any infringement of the trade-mark "Old Crow" in connection with its use on whisky was dismissed. And it was further decreed that the registration of the trade-mark July 20, 1909, could not and did not invalidate or nullify the estoppel.

The decree was reversed by the Circuit Court of Appeals and thereupon this certiorari was applied for and allowed.

Messrs. Luther Ely Smith, of St. Louis, Mo., and William T. Ellis, of Owensboro, Ky., for petitioners.

Messrs. Edmund F. Trabue, of Louisville, Ky., James L. Hopkins, of St. Louis, Mo., and Daniel W. Lindsey, of Frankfort, Ky., for respondent.

Mr. Justice McKENNA, after stating the case as above, delivered the opinion of the Court.

The decree of the District Court for the Eastern District of Missouri, directed by the decision of the United States Circuit Court of Appeals for the Eighth Circuit, *is* 317 pleaded in bar, and whether it is such depends upon the issues that were made or passed upon in those courts.

The bill of complaint in the case alleged that in 1835 one James Crow (he is the James Crow of this suit) invented and formulated a novel process for the production of whisky which he did not patent or seek to patent but kept for his own use until his death in 1855.

During all of the time after 1835 the whisky so produced was known and styled as "Old Crow" whisky and the designation was adopted and used as a trade-mark.

After the death of Crow one William F. Mitchell, to whom Crow had communicated his secret process, continued the distillation so designated and in 1867 a partnership, styled Gaines, Berry & Co., obtained possession of the distillery wherein the whisky distilled by the indicated process continued to be produced by the same process until the partnership was succeeded by W. A. Gaines & Co., and the latter company succeeded also to all of the partnership assets of the other and continued to produce the whisky until the incorporation of the complainant, when all these assets were acquired by it.

When the name "Old Crow" was applied by Crow it was a valid trade-mark and since its adoption it has always been applied to the whisky produced by the indicated secret process, and since that time has indicated to the public whisky distilled on Glenn's creek,

in Woodford county, Kentucky, and nowhere else.

Complainant caused the same to be registered in the Patent Office under the provisions of the act of Congress so providing. The value of the trade-mark is $500,000 and an integral part of the good will of complainant's business and the whisky is of greater value than any other of equal age.

Since January, 1903, the defendants, in *318 violation of complainant's rights and good will, have made or caused to*be made and sold in the city of St. Louis a certain spirituous or alcoholic fluid not made under complainant's process and have labeled it with the words "Old Crow" without license from the complainant and against its consent. Such unlawful use will greatly lessen the value of complainant's business and good will, and complainant is without adequate remedy at law.

There was the usual prayer for an accounting and an injunction.

There was a supplemental bill to the same effect, but charging that A. M. Hellman & Co. had become the successors of the original defendants and had continued the acts alleged in the original bill.

To the bill the defendants answered, with denials, and alleged the use of the word "Crow", "Old Crow" and "J. W. Crow" in connection with their own business upon packages of whisky and in their and their predecessor's business from 1863 and prior thereto; that the whisky sold by complainant was an unrefined, harmful and deleterious article and that the whisky sold by them was a brand largely free from impurities.

The defendants also filed a cross-bill which, however, was not insisted upon.

These, then, were the issues, and upon them and the evidence adduced to sustain them the Circuit Court entered a decree establishing complainant's right to the word "Old Crow" as a trade-mark, enjoined the use thereof by defendants and found them guilty of unfair competition in business and ordered an accounting. The Circuit Court of Appeals reversed the decree.

The latter court made a careful review of the evidence, denominating it a mass of the relevant and irrelevant, and felt that it was not necessary to consider the comparative excellence of the whiskies, and remarked that the evidence did "not show that Glenn's *319 creek in any way entered into the composition of the whisky" and that*"there was no secret about the process employed by Crow nor did it differ materially from that employed by every other distiller of the same period." To the objection that the "designative words" were rarely used by the Hellmans and that their product was of inferior quality, the court replied that the right to use could not be measured by the extent to which the Hellmans employed it, "whether more or less frequently," nor "by the overshadowing comparative amount of the complainant's [Gaines & Co.'s] sales under the designation 'Old Crow' whisky, nor by asserted superiority of its product."

The court concluded as follows:

"(1) That inasmuch as the defendants' predecessors in business prior to the use or the adoption of the designative word 'Crow' or the words 'Old Crow' as a trade-mark, employed those words in descriptive terms in connection with their business as dealers in whisky in St. Louis, Mo., and said predecessors and the defendants so continued to use the same, to a limited extent, up to the time of the institution of this suit, in good faith, they are not guilty of infringing the complainant's claimed trade-mark; and (2) that the defendants are not guilty of having engaged in unfair competition with the complainant in the prosecution of their business."

It will be observed that the issues in that case were the same as those in the present case as to the right to the use of the word "Crow" with any of its qualifications. But in this case there is another ground of recovery alleged; that is, the application for and the receipt of the certificate of registration for the word as a trade-mark for straight rye and straight bourbon whisky. The District Court, however, adjudged that the decree of the Circuit Court in Missouri and its affirmance by the Circuit Court of Appeals constituted a bar to this suit. To the judgment of the Circuit Court of Appeals *320 of the*Sixth Circuit, reversing the action of the District Court, this certiorari is directed.

[1] The Circuit Court of Appeals, however, did not yield to all of the views of the Gaines Company. It refused to decide, as urged to do, that the defendants in this suit were not in privity with the defendants in the other and it rejected the contention that the use of the trade-mark established in the Hellman Company for a blended whisky was not an adjudication of the right to use it upon a straight whisky. In the rulings on both contentions we concur. The first needs no comment; we adopt that of the court on the second. The court said that:

"Whatever the extended classifications and subclassifications of the Patent Office practice may contemplate, neither the common law nor the registration statute can intend such confusion as must result from recognizing the same trade-mark as belonging to different people for different kinds of the same article. Established trade-marks directly indicate origin; but if they have any value, it is because they indirectly indicate kind and quality; and to say that the seller of a blended whisky might properly put upon it a mark which was known to stand for a straight whisky, or vice versa, would be to say that he might deceive the public not only as to the origin, but also as to the nature and quality, of the article."

The philosophy of this might be questioned. But it seems to have become established, and, however it may be disputed in reason, there is an opposing consideration. As said by Circuit Judge Sanborn in Layton Pure Food Co. v. Church & Dwight Co. (C. C. A.) 182 Fed. 35, 39, 104 C. C. A. 475, 479 (32 L. R. A. [N. S.] 274):

"Uniformity and certainty in rules of property are often more important and desirable than technical correctness."

And this reasoning prevailed with the Circuit Court of Appeals which, after citing cases, said that it was forced to think "that whatever was adjudicated regarding complainant's title to the trade-mark applies to its use of both kinds of whisky." And, of course, conversely we may say that whatever was decided against its title to its trade-mark applies to its use on both kinds of whisky. In other words, if defendants were adjudged to have title to the words "Crow" or "Old Crow" on blended whisky, they have a right to use it on straight whisky without infringing any right of complainant. We come back, therefore, to the question as to what was adjudged in the prior suit.

[2] To this question the Court of Appeals of the Sixth Circuit gave great care and in an opinion of strength decided the negative of it. The court, in concession to the argument, assigned a prior use to the Hellmans, but expressed the view that the existence of such "general or prima facie exclusive right is not inconsistent with an inability to enforce it against some persons and under some circumstances." And it was added:

"Instances may arise where the affirmative conduct or the laches of the first appropriator, and with reference to what he was at first entitled to call an infringement, has been such that on the principles of estoppel or the rule of laches a court of equity cannot tolerate that he should enforce against the later user the right which might have been originally perfect. * * * Under these considerations and upon reference to the pleadings and the proofs in the Hellman Case, we conclude that the latter case is of the class where the refusal to give an injunction to the first appropriator of the mark may be justified upon the ground of his laches or estoppel; and so this ground of support must be considered in determining what is the true basis of that decree."

The court hence concluded that it, the decree, did not adjudge title to the Hellmans but adjudged them a "defensive right and nothing more," and, explaining the right, the court said that it "does not extend to any whisky not mixed or blended so as to be of the same general type as that to which defendants [Hellmans] had been making or to trade or territory in which they were not selling when the bill was filed."

We are not able to assent. The court admitted that the language in the body of the opinion of the Circuit Court of Appeals for the Eighth Circuit is consistent with the interpretation petitioners put upon it, that is, "that the trade-mark, in its general, prima facie, affirmative aspect, belonged to the Hellman's prior appropriation"; but the court added that the last paragraph of the opinion indicated "that the two judges (only two sitting) did not unite in putting the decision on that ground." We think this was an oversight. The opinion was that of the court, though delivered by one judge, and the conclusion was the conclusion of the court, and necessarily had to be, else there would have been no decision or decree. And it was thoroughgoing. It is manifest from the excerpts we have made from the opinion that the judgment of the court was not limited as to time or territory; nor did the pleadings so limit it. The complainant in that case (respondent here) alleged that it was the sole and exclusive owner of the trade-mark and had used it from 1835 to the present time, being virtually the successor of the first producer of the product.

Defendants (petitioners) contested the claim and asserted a right in themselves based on prior adoption and continuous use, and that right was adjudged to them.

Decree of the Circuit Court of Appeals reversed and that of the District Court affirmed.

(246 U. S. 353)

PENDLETON v. BENNER LINE.

(Argued March 11 and 12, 1918. Decided March 25, 1918.)

No. 178.

1. SHIPPING ⊂⊃53 — LOST CARGO — SUIT BY CHARTERER AS BAILEE AGAINST OWNER.

Though the charter party provided that bills of lading should be signed without prejudice to the charter, and they were signed by the master or agents of the vessel, yet where the charterer held itself out as a common carrier, solicited and accepted cargoes, fixed and received freights, and signed or had the bills of lading signed in its office, the charterer, suing at the request of insurers who had paid the loss, may recover on the shipowner's warranty of seaworthiness despite the contention that there was no bailment to it.

2. SHIPPING ⊂⊃137—LIMITATION OF LIABILITY.

Where the managing owner of a vessel, in the name of a partnership of which he was a member, signed a charter party, he cannot escape liability for breach of warranty of seaworthiness under Act June 26, 1884, c. 121, § 18, 23 Stat. 57 (Comp. St. 1916, § 8028), providing for limitation of shipowner's liability, for the contract was personal as to such owner, and so did not fall within the statute.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Libel by the Benner Line against Fields S. Pendleton and another, copartners doing business under the firm name of Pendleton Bros. A decree of the District Court against the named respondent, which limited his liability (210 Fed. 67), was, on appeal to the Circuit Court of Appeals, reversed and remanded (217 Fed. 497, 133 C. C. A. 349), and respondent brings certiorari. Affirmed.

Messrs. Harvey D. Goulder, of Cleveland, Ohio, and Avery F. Cushman, of New York City, for petitioner.

Mr. D. Roger Englar, of New York City, for respondent.

*354 * Mr. Justice HOLMES delivered the opinion of the Court.

This is a libel brought by the Benner Line against the Pendleton brothers upon a charter party purporting to be made between "Pendleton Bros., agents of the schooner, 'Edith Olcott'" and the libelant, and signed "Pendleton Brothers." The ground of the suit is that the vessel was unseaworthy at the beginning of the voyage and that by reason thereof she sank and her entire cargo was lost. Both Courts below held that the unseaworthiness was proved, and on the evidence that question may be laid on one side. As one of the Pendleton brothers was not interested in the vessel he was dismissed from the suit without objection. The other, the petitioner, who signed the firm name, being a part owner, was held by the District Court to be bound by the warranty of seaworthiness contained in the contract, but entitled to the statutory limitation of liability. Act of June 26, 1884, c. 121, § 18, 23 Stat. 57 (Comp. St. 1916, § 8028); 210 Fed. 67. The Circuit Court of Appeals held that the statute did not cover the case. 217 Fed. 497, 133 C. C. A. 349. A decree was entered against the petitioner for the total loss. Both Courts agreed that the Benner Line although owning none of the cargo was entitled to sue for the loss of it and this proposition and the matter of the applicability of the Act of 1884 are the two questions argued here.

*355 [1] The ground on which the right of the Benner Line to *recover the value of the cargo is denied is that the anomalous doctrine by which a bailee can recover the value of goods that he does not own (The Beaconsfield, 158 U. S. 503, 507, 15 Sup. Ct. 860, 39 L. Ed. 993), stands on the bailment, and that here there was no bailment to the Benner Line. The charter party provides that bills of lading be signed without prejudice to the charter. The bills of lading were signed by the master or agents of the vessel (the Benner Line), and, it is contended, bound only the vessel. The charter was not a demise of the ship, and it may be assumed, as the bill of lading seems to assume, that the technical possession of the goods was in the ship owners, since they remained in possession of the ship. The Benner Line has not paid or been called upon to pay anything to the owners of the cargo, but brings this suit at the request of the underwriters on the same, who have paid for the loss.

But as was observed by the Courts below, the Benner Line held itself out to the public as a common carrier, solicited and received the merchandise that it offered to transport by acceptance of such merchandise contracted to be answerable for the transportation, chartered the vessels to carry what it received, employed the stevedores who put it aboard, fixed and received the freight and signed or had the bills of lading signed in its office. It determined the vessel on which the cargo should go as against the owners of it or of the ship. The cargo went in the space it had hired. We agree with the lower Courts that the Benner Line did not disappear from its contract to carry the goods when the bills of lading were signed and that it would have been answerable to the owners, or to the insurance companies when they became subrogated to the owners' rights, if they had elected to sue it. The owners of the vessel had warranted the seaworthiness of the ship to the charterer, of course in contemplation that a cargo would be shipped as to which they would be liable in some form. Wherever in theory of law *356 the *technical possession may have been, we do not perceive why the charterer should be denied full damages upon the express contract when its liability over also was determined by contract exactly as was expected. The ground upon which bailees have been allowed to recover the full value of goods from wrongdoers has been stated for centuries to be their liability over. Y. B. 9 Ed. IV, 34, pl. 9, is an example of what has been repeated from that day to this. See Brewster v. Warner, 136 Mass. 57, 59, 49 Am. Rep. 5. Whatever may be the inadequacy, in history or theory, of the reason as applied to torts, it applies with real force to contract relations like those in this case. The whole question is hardly more than technical as there is no doubt that this suit really represents the owners' interests since it is brought at the request of the insurers who have paid the loss.

[2] On the proposition that the petitioner is entitled to limit his liability under the act of 1884 it is urged that the act is an absolute limit, irrespective of privity or knowledge, in regard to contracts as well as torts, and that this contract, if it bound the petitioner at all, did so only as an indirect result of its execution. The last point hardly is intelligible. The petitioner signed the charter with the name Pendleton Brothers, which included himself, and apart from the fact that although described as agents the Pendleton brothers purport to be contracting parties, if we look only to the principals the petitioner was one of them as part owner of the vessel. The contract was between human beings and the petitioner by his own act knowingly made himself a party to an express undertaking for the seaworthiness of the ship. That the statute does not limit liability for the personal acts of the owners done with knowledge is established by Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110. It was said in that case, 222 U. S 106, 32 Sup. Ct. 27, 56 L. Ed. 110, that section 18 leaves the owner "liable for his own fault, neglect and contracts." The principle was held to *apply to contracts less per- *357 sonal than this in Great Lakes Towing Co. v. Mill Transportation Co., 155 Fed. 11, 83

C. C. A. 607, 22 L. R. A. (N. S.) 769, and in The Loyal, 204 Fed. 930, 123 C. C. A. 252. We are not disposed to disturb the very strong and deliberate intimations of Richardson v. Harmon in their application to the present case. It is said that the owners did their best to make the vessel seaworthy and that if it was not so the failure was wholly without the privity or knowledge of the petitioner. But that is not the material question in the case of a warranty. Unless the petitioner can be discharged from his contract altogether he must answer for the breach whether he was to blame for it or not.

Decree affirmed.

MEMORANDUM DECISIONS

Disposed of at October Term, 1917

No. 767. Hugo YANYAR, plaintiff in error, v. The UNITED STATES of America; and No. 768. Otto YANYAR, plaintiff in error, v. The UNITED STATES of America. March 11, 1918. In error to the District Court of the United States for the District of Rhode Island. Mr. John W. Davis, Sol. Gen., of Washington, D. C., for the United States.

PER CURIAM. Judgments affirmed upon the authority of Arver v. The United States, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. —.

No. 823. Jacob ROUSS, petitioner, v. The ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. March 11, 1918. For opinion in Supreme Court, see 169 App. Div. 629, 155 N. Y. Supp. 557; in Court of Appeals, see 221 N. Y. 81, 116 N. E. 782. Mr. Charles E. Le Barbier, of New York City, for petitioner. Messrs. George W. Wickersham and Einar Chrystie, both of New York City, for respondent. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

No. 832. Alfred T. PETERSON, petitioner, v. The UNITED STATES of America. March 11, 1918. For opinion below, see 246 Fed. 118. Messrs. R. A. Ayers, of Big Stone Gap, Va., W. S. Cox, of Gate City, Va., and Bond & Bruce, of Wise, Va., for petitioner. Mr. John W. Davis, Sol. Gen., of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

No. 837. Anne Marie BERG et al., petitioners, v. Charles D. BAKER. March 11, 1918. For opinion below, see 164 N. W. 588. Mr. Halvor Steenerson, of Crookston, Minn. (Messrs. Gunderson & Leach, of Alexandria, Minn., Hilton & Thompson, of Fergus Falls, Minn., and Samuel Herrick, of Washington, D. C., of counsel), for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied.

No. 842. Mattie RIEGER, petitioner, v. Robert ABRAMS. March 11, 1918. For opinion below, see 167 Pac. 76. Mr. Dallas V. Halverstadt, of Seattle, Wash. (Messrs. Wilmon Tucker, Ivan L. Hyland, and F. W. Crary, all of Seattle, Wash., of counsel), for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Washington denied.

No. 846. ERIE RAILROAD COMPANY, petitioner, v. Edwin J. HILT, Jr., an infant, by his next friend, et al. March 11, 1918. For opinion below, see 246 Fed. 800. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

No. 850. CAPITAL SAVINGS BANK & TRUST COMPANY, petitioner, v. INHABITANTS OF THE TOWN OF FRAMINGHAM. March 11, 1918. For opinion below, see 246 Fed. 553. Messrs. Charles F. Choate, Jr., and Ralph A. Stewart, both of Boston, Mass., for petitioner. Messrs. Alfred Hemenway and Edwin H. Abbot, Jr., both of Boston, Mass., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

No. 851. Edward B. PRYOR et al., as receivers, etc., petitioners, v. Allega WILLIAMS. March 11, 1918. For opinion below, see 200 S. W. 53. Petition for a writ of certiorari to the Supreme Court of the State of Missouri granted.

No. 854. The CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, petitioner, v. L. J. RAY, administratrix, etc. March 11, 1918. For opinion below, see 168 Pac. 999. Messrs. R. J. Roberts, C. O. Blake, W. H. Moore, and J. E. Du Mars, all of El Reno, Okl. (Mr. M. L. Bell., of Chicago, Ill., of counsel), for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

No. 855. McCLINTIC-MARSHALL CONSTRUCTION COMPANY, petitioner, v. Elnora FORGY. March 11, 1918. For opinion below, see 246 Fed. 193. Messrs. O. H. Dean, W. D. McLeod, and H. M. Langworthy, all of Kansas City, Mo., for petitioner. Messrs. C. W. Prince, Edw. A. Harris, John E. Westfall, James N. Berry, and Daniel V. Howell, all of Kansas City, Mo., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 867. HAMBURG-AMERIKANISCHE-PACKETFAHRT AKTIEN-GESELLSCHAFT, etc., et al., petitioners, v. The UNITED STATES of America. March 11, 1918. For opinion below, see 250 Fed. 747. Mr. Walter C. Noyes, of New York City, for petitioners. Mr. John W. Davis, Sol. Gen., of Washington, D. C., and Mr. Charles Warren, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 874. ILLINOIS CENTRAL RAILROAD COMPANY, petitioner, v. Alline SKINNER, administratrix, etc. March 11, 1918. For opinion below, see 177 Ky. 62, 197 S. W. 552. Messrs. Trabue, Doolan & Crawford, of Louisville, Ky., Wheeler & Hughes, of Paducah, Ky., and R. V. Fletcher, of Chicago, Ill. (Mr. Blewett Lee, of Chicago, Ill., of counsel), for petitioner. Messrs. Jno. K. Hendrick and Frank N. Burns, both of Paducah, Ky. (Mr. David A. Baer, of Washington, D. C., of counsel), for respondent. Petition for a writ of certiorari to the Court of Appeals of the State of Kentucky denied.

No. 885. Frank A. BONE, petitioner, v. COMMISSIONER OF MARION COUNTY. March 11, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted.

For opinion below, see 249 Fed. 211.

No. 886. The MICHIGAN CENTRAL RAILROAD COMPANY, petitioner, v. The UNITED STATES of America. March 11, 1918. For opinion below, see 246 Fed. 353. Messrs. Frank E. Robson and J. Walter Dohany, both of Detroit, Mich. (Mr. Henry Russel, of Detroit, Mich., of counsel), for petitioner. Mr. John W. Davis, Sol. Gen., of Washington, D. C., Mr. G. Carroll Todd, Asst. Atty. Gen., and Mr. Henry S. Mirchell, Sp. Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 896. GUARANTY TRUST COMPANY OF NEW YORK, petitioner, v. KINGDOM OF ROUMANIA. March 11, 1918. For opinion below, see 250 Fed. 341. Mr. Frank M. Patterson, of New York City (Mr. Franklin H. Mills, of New York City, of counsel), for petitioner. Messrs. White & Case, of New York City (Mr. John M. Hartfield, of New York City, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 898. GRAYSONIA-NASHVILLE LUMBER COMPANY et al., petitioners, v. Alvin D. GOLDMAN, trustee. March 11, 1918. For opinion below, see 247 Fed. 423. Messrs. H. S. Priest, T. E. Francis, and Morton Jourdan, all of St. Louis, Mo. (Mr. G. T. Priest, of St. Louis, Mo., of counsel), for petitioners. Messrs. W. E. Hemingway, G. B. Rose, D. H. Cantrell, J. F. Loughborough, and V. M. Miles, all of Little Rock, Ark., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 251. The BATESVILLE SOUTHWESTERN RAILWAY COMPANY et al., plaintiffs in error, v. M. H. MIMS. Jan. 4, 1918. In error to the Supreme Court of the State of Mississippi. For opinion below, see 111 Miss. 574, 71 South. 827. Messrs. Thos. A. Evans, of Memphis, Tenn., and Roger Montgomery, of Tunica, Miss., for plaintiffs in error. Mr. W. R. Wood, of Charleston, Miss., for defendant in error. Dismissed with costs, per stipulation.

No. 187. JOHN GUND BREWING COMPANY, appellant, v. The GREAT NORTHERN RAILWAY COMPANY et al. March 18, 1918. Appeal from the District Court of the United States for the District of Minnesota. Messrs. Frederick W. Zollman, of St. Paul, Minn., Robert Crain, of Washington, D. C., and Louis R. Frankel, of St. Paul, Minn. (Mr. Levi Cooke, of Washington, D. C., of counsel), for appellant. Mr. Charles Warren, Asst. Atty. Gen., for the United States. Mr. Alfred Jaques, of Duluth, Minn., for appellee.

PER CURIAM. Judgment affirmed upon the authority of: 1. The Cherokee Tobacco, 11 Wall. 616, 624, 20 L. Ed. 227; Whitney v. Robertson, 124 U. S. 190, 194, 8 Sup. Ct. 456, 31 L. Ed. 386; Ward v. Race Horse, 163 U. S. 504, 511, 16 Sup. Ct. 1076, 41 L. Ed. 244. 2. United States v. 43 Gallons of Whiskey, 93 U. S. 188, 23 L. Ed. 846. See Perrin v. United States, 232 U. S. 478, 483-485, 34 Sup. Ct. 387, 58 L. Ed. 691. 3. Johnson v. Gearlds, 234 U. S. 422, 34 Sup. Ct. 794, 58 L. Ed. 1383.

No. 188. Oliver H. SMITH, Jr., plaintiff in error, v. WASHINGTON-SOUTHERN RAILWAY COMPANY. March 18, 1918. In error to the Court of Appeals of the District of Columbia. For opinion below, see 45 App. D. C. 192. Messrs. James S. Easby-Smith and Ralph B. Fleharty, both of Washington, D. C., for plaintiff in error. Messrs. Frederic D. McKenney, John Spalding Flannery, G. Bowdoin Craighill, and W. Clayton Carpenter, all of Washington, D. C., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Macfarland v. Brown, 187 U. S. 239, 246, 23 Sup. Ct. 105, 47 L. Ed. 159; Macfarland v. Byrnes, 187 U. S. 246, 23 Sup. Ct. 107, 47 L. Ed. 162; Earle v. Myers, 207 U. S. 244, 28 Sup. Ct. 86, 52 L. Ed. 191; Coe v. Armour Fertilizer Works, 237 U. S. 413, 418-419, 35 Sup. Ct. 625, 59 L. Ed. 1027.

No. 196. Anna MARTIN, administratrix, etc., plaintiff in error, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY. March 18, 1918. In error to the Supreme Court of the State of Wisconsin. For opinion below, see 162 Wis. 595, 156 N. W. 1087. Messrs. W. L. Gold and Henry Mahoney, both of Milwaukee, Wis. for plaintiff in error. Messrs. C. H. Van Alstine, H. J. Killilea, and Rodger M. Trump, all of Milwaukee, Wis., for defendant in error.

PER CURIAM. Judgment affirmed with costs upon the authority of Chicago Junction Ry. Co. v. King, 222 U. S. 222, 32 Sup. Ct. 79, 56 L. Ed. 173; Seaboard Air Line Ry. v. Padgett, 236 U. S. 668, 673, 35 Sup. Ct. 481, 59 L. Ed. 777; Seaboard Air Line Ry. v. Koennecke, 239 U. S. 352, 355, 36 Sup. Ct. 126, 60 L. Ed. 324; Great Northern Ry. Co. v. Knapp, 240 U. S. 464, 466, 36 Sup. Ct. 399, 60 L. Ed. 745; Baltimore & Ohio R. R. Co. v. Whitacre, 242 U. S. 169, 37 Sup. Ct. 33, 61 L. Ed. 228.

No. 229. Peter MARSHALL, plaintiff in error, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY. March 18,

1918. In error to the Supreme Court of the State of Minnesota. For opinion below, see 133 Minn. 460, 157 N. W. 638. Mr. Harlan E. Leach, of Owatonna, Minn., for plaintiff in error. Mr. McNeil V. Seymour, of St. Paul, Minn., for defendant in error. Dismissed with costs pursuant to the tenth rule.

No. 320. ILLINOIS CENTRAL RAILROAD COMPANY, plaintiff in error, v. Mrs. Marshal LANIS, administratrix of Marshal Lanis, deceased. March 18, 1918. In error to the Supreme Court of the State of Louisiana. For opinion below, see 140 La. 1, 72 South. 788. Messrs. Gustave Lemle, of New Orleans, La., and Robert V. Fletcher, of Chicago, Ill. (Messrs. Blewett Lee, of Chicago, Ill., and Hunter C. Leake, of New Orleans, La., of counsel), for plaintiff in error. Mr. Girault Farrar, of New Orleans, La., for defendant in error.

PER CURIAM. Judgment affirmed with costs upon the authority of Missouri, Kansas & Texas Ry. Co. v. Wulf, 226 U. S. 570, 576, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; Illinois Surety Co. v. United States, 240 U. S. 214, 221, 36 Sup. Ct. 321, 60 L. Ed. 609; Seaboard Air Line Ry. v. Renn, 241 U. S. 290, 293–294, 36 Sup. Ct. 567, 60 L. Ed. 1006.

No. 810. Edward Jefferson BRYAN, plaintiff in error, v. LOUISVILLE & NASHVILLE RAILROAD COMPANY. March 18, 1918. In error to the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 244 Fed. 650. Messrs. S. Mayner Wallace and Shepard Barclay, both of St. Louis, Mo., for plaintiff in error. Messrs. Henry L. Stone, of Louisville, Ky., Harold R. Small, of St. Louis, Mo., and Edward S. Jouett, of Louisville, Ky., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Bagley v. General Fire Extinguisher Co., 212 U. S. 477, 29 Sup. Ct. 341, 53 L. Ed. 605; Merriam Co. v. Syndicate Publishing Co., 237 U. S. 618, 35 Sup. Ct. 708, 59 L. Ed. 1148; Shulthis v. McDougal, 225 U. S. 561, 32 Sup. Ct. 704, 56 L. Ed. 1205; Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; Norton v. Whiteside, 239 U. S. 144, 146–147, 36 Sup. Ct. 97, 60 L. Ed. 186. Petition for writ of certiorari denied.

No. 845. The VIAVI COMPANY, petitioner, v. The VIMEDIA COMPANY et al. March 18, 1918. For opinion below, see 245 Fed. 289. Mr. John A. Barnes, of Chicago, Ill. (Messrs. New, Miller, Carmack & Winger, of Kansas City, Mo., of counsel), for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 848. Albert G. DICKINSON, petitioner, v. The O. & W. THUM COMPANY. March 18, 1918. For opinion below, see 245 Fed. 609. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 849. The A. K. ACKERMAN COMPANY, petitioner, v. The O. & W. THUM COMPANY. March 18, 1918. For opinion below, see 245 Fed. 609. Messrs. Roger W. Butterfield and Willard F. Keeney, both of Grand Rapids, Mich., for petitioner. Messrs. Fred L. Chappell, of Kalamazoo, Mich., and Jacob Kleinhans, of Grand Rapids, Mich., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 853. TATUM BROTHERS REAL ESTATE & INVESTMENT COMPANY, petitioner, v. W. E. SHENK. March 18, 1918. For opinion below, see 246 Fed. 684. Messrs. Frank B. Shutts and William P. Smith, both of Miami, Fla., for petitioner. Mr. Frederick M. Hudson, of Miami, Fla., for respondent. Petition for a writ of certiorari to the United States Circuit of Appeals for the Fifth Circuit denied.

No. 857. John Fair NEW, petitioner, v. The UNITED STATES of America. March 18, 1918. For opinion below, see 245 Fed. 710. Messrs. Reisner & Honey and R. E. Ragland, both of San Francisco, Cal., for petitioner. Mr. John W. Davis, Sol. Gen., of Washington, D. C., and Mr. William C. Fitts, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 858. Rhodes E. CAVE et al., plaintiffs in error, v. STATE OF MISSOURI ex rel. James P. NEWELL. March 18, 1918. In error to the Supreme Court of the State of Missouri. For opinion below, see 199 S. W. 1014. Messrs. Elliott W. Major, of St. Louis, Mo., Charles G. Revelle, of Jefferson City, Mo., and Selden P. Spencer and George B. Webster, both of St. Louis, Mo., for plaintiffs in error. Messrs. Frank H. Sullivan, of St. Louis, Mo., and Geo. F. Haid, of University City, Mo. (Messrs. Jones, Hocker, Sullivan & Angert, P. T. Barrett, and M. B. Levy, all of St. Louis, Mo., of counsel), for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of: (1) Section 237, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of Congress of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. 1916, § 1214); Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245 U. S. 162, 38 Sup. Ct. 58, 62 L. Ed. —; (2) Wilson v. North Carolina, 169 U. S. 586, 592, 18 Sup. Ct. 435, 42 L. Ed. 865; Taylor & Marshall v. Beckham, 178 U. S. 548, 576, 20 Sup. Ct. 890, 1009, 44 L. Ed. 1187.

No. 879. H. P. MEIKLEHAM, petitioner, v. Mrs. Virginia A. GRAFTON. March 18, 1918. For opinion below, see 246 Fed. 737. Messrs. Nathan Harris, of Rome, Ga., and Arthur G. Powell and Robert C. Alston, both of Atlanta, Ga., for petitioner. Messrs. Geo. E. Maddox, R. A. Denny and J. E. Dean, all of Rome, Ga., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 880. John PATERLINI et al., petitioners, v. MEMORIAL HOSPITAL ASSOCIATION OF MONONGAHELA CITY, PA., et al. March 18, 1918. For opinion below, see 247 Fed. 639. Mr. A. O. Fording, of Pittsburgh, Pa., for plaintiffs in error. Messrs. McIlvain, Murphy, Day & Witherspoon, and Carl E. Gibson, all of Monongahela, Pa., for defendants in error. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

No. 882. UPPER HUDSON STONE COMPANY, petitioner, v. Joseph Leslie WHITE et al. March 18, 1918. For opinion below, see 248 Fed. 893. Mr. Francis Martin, of New York City, for petitioner. Mr. Mark Ash, of New York City, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 884. Judson HARMON et al., receivers, etc., petitioners, v. Lucinda BARBER, administratrix. March 18, 1918. For opinion below, see 247 Fed. 1. Messrs. Morison R. Waite, and John Randolph Schindel, both of Cincinnati, Ohio, for petitioners. Mr. C. B. Matthews, of Cincinnati, Ohio, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 888. Armanis F. KNOTTS, petitioner, v. CLARK CONSTRUCTION COMPANY. March 18, 1918. For opinion below, see 249 Fed. 181. Mr. William J. Whinery, of Hammond, Ind., for petitioner. Messrs. Henry H. Kennedy, Joseph W. Moses, Julius Moses, Hamilton Moses, Walter Bachrach, and S. Sidney Stein, all of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 889. James ALLEN, petitioner, v. CHICAGO & ALTON RAILROAD COMPANY. March 18, 1918. For opinion below, see 249 Fed. 280. Mr. George Cole Otto, of Chicago, Ill., for petitioner. Messrs. Silas H. Strawn and Edward W. Everett, both of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 907. L. B. BEARD et al., petitioners, v. Horace L. PAYNE et al. March 18, 1918. For opinion below, see 247 Fed. 247. Messrs. Nathan A. Gibson, Joseph L. Hull, Thomas L. Gibson, George W. Leopold, Arthur G. Cochran, Ezra Brainerd, Jr., William Hatch Davis, and John Fred Brett, all of Muskogee, Okl., for petitioners. Messrs. Geo. S. Ramsey, of Muskogee, Okl., O. H. Hoss, of Nevada, Mo., Edgar A. de Meules, of Tulsa, Okl., Malcolm E. Rosser, of Muskogee, Okl., Villard Martin, of Tulsa, Okl., and J. Berry King, of Tahlequah, Okl., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 911. Ed SPEAR, petitioner, v. UNITED STATES of America. March 18, 1918. For opinion below, see 246 Fed. 250. Messrs. S. W. Fordyce, Jr., and Truman Post Young, both of St. Louis, Mo., for petitioner. Mr. John W. Davis, Sol. Gen., of Washington, D. C., and Mr. William C. Fitts, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 779. OREGON-WASHINGTON RAILROAD and NAVIGATION COMPANY, plaintiff in error, v. THURSTON COUNTY, State of Washington, et al. March 20, 1918. In error to the Supreme Court of the State of Washington. For opinion below, see 167 Pac. 930. Dismissed with costs on motion of counsel for the plaintiff in error.

No. 806. NAVY YARD ROUTE, plaintiff in error, v. H. E. DEVLIN. March 21, 1918. In error to the District Court of the United States for the Western District of Washington. Dismissed, per stipulation.

No. 746. James HALLAGAN et al., plaintiffs in error, v. Simeon A. DOWELL. March 22, 1918. In error to the Supreme Court of the State of Iowa. For opinion below, see 161 N. W. 177. Dismissed with costs, on motion of counsel for the plaintiffs in error.

No. 115. The GRAND TRUNK WESTERN RAILWAY COMPANY, appellant, v. The UNITED STATES. March 25, 1918. Appeal from the Court of Claims. Mr. L. T. Michener, of Washington, D. C., for appellant. The Attorney General, for the United States.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 242, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. 1916, § 1219]).

No. 203. BALTIMORE & OHIO RAILROAD COMPANY, plaintiff in error, v. James H. SMITH. March 25, 1918. In error to the Court of Appeals of the State of Kentucky. For opinion below, see 169 Ky. 593, 184 S. W. 1108. Messrs. Charles H. Gibson and Wm. W. Crawford, both of Louisville, Ky., for plaintiff in error.

PER CURIAM. Judgment affirmed with costs upon the authority of: 1. Missouri, Kansas & Texas Ry. Co. v. Wulf, 226 U. S. 570, 576, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; Illinois Surety Co. v. United States, 240 U. S. 214, 221, 36 Sup. Ct. 321, 60 L. Ed. 609; Seaboard Air Line Ry. v. Renn, 241 U. S. 290, 293–294, 36 Sup. Ct. 567, 60 L. Ed. 1006. 2. Chicago Junction Ry. Co. v. King, 222 U S. 222, 32 Sup. Ct. 79, 56 L. Ed. 173; Seaboard Air Line Ry. Co. v. Padgett, 236 U. S. 668, 673, 35 Sup. Ct. 481, 59 L. Ed. 777; Seaboard Air Line Ry. v. Koennecke, 239 U. S. 352, 355, 36 Sup. Ct. 126, 60 L. Ed. 324; Great Northern Ry. Co. v. Knapp, 240 U. S. 464, 466, 36 Sup. Ct. 399, 60 L. Ed. 745; B. & O. R. R. Co. v. Whitacre, 242 U. S. 169, 37 Sup. Ct. 33, 61 L. Ed. 228.

No. 228. Frank McKNIGHT, plaintiff in error, v. The STATE OF NEW MEXICO. March 25, 1918. In error to the Supreme Court of the State of New Mexico. For opinion below, see 21 N. M. 14, 153 Pac. 76. Mr. William A. Dunn, of Roswell, N. M., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of McCorquodale v. Texas, 211 U. S. 432, 437, 29 Sup. Ct. 146, 53 L. Ed. 269; Forbes v. State Council of Virginia, 216 U. S. 396, 399, 30 Sup. Ct. 295, 54 L. Ed. 534; St Louis & San Francisco R. R. Co. v. Shepherd, 240 U. S. 240, 241, 36 Sup. Ct. 274, 60 L. Ed. 622; Bilby et al. v. Stewart et al. (decided March 4, 1918), 246 U. S. 255, 38 Sup. Ct. 264, 62 L. Ed. —.

No. 232. H. A. MOSS and J. F. Bradford, plaintiffs in error, v. C. C. MOORE, Peter Martin, and H. D. Pillsbury March 25, 1918 In error to the Supreme Court of the State of California. Mr. A. E. Shaw, of San Francisco, Cal., for plaintiffs in error. Messrs. Burke Corbet,

Julius Kahn, and Alfred Sutro, all of San Francisco, Cal., for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Thomas v. Iowa, 209 U. S. 258, 28 Sup. Ct. 487, 52 L. Ed. 782; Appleby v. Buffalo, 221 U. S. 524, 529, 31 Sup. Ct. 699, 55 L. Ed. 838; Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123, 134, 34 Sup. Ct. 874, 58 L. Ed. 1245.

No. 728. Valentine T. COLLARD, administrator of the estate of Samuel T. Collard, deceased, plaintiff in error, v. PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY. March 25, 1918. In error ot the Court of Appeals of the State of Kentucky. For opinion below, see 185 S. W. 1108.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of: (1) Section 237, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of Congress of September 6, 1916, 39 Stat. 726, c. 448, § 2 (Comp. St. 1916, § 1214). (2) Schlosser v. Hemphill, 198 U. S. 173, 25 Sup. Ct. 654, 49 L. Ed. 1000; Missouri & Kansas Interurban Ry. Co. v. Olathe, 222 U. S. 185, 32 Sup. Ct. 46, 56 L. Ed. 155; Louisiana Navigation Co. v. Oyster Commission of Louisiana, 226 U. S. 99, 33 Sup. Ct. 78, 57 L. Ed. 138.

No. 863. Luis HULLER et al., plaintiffs in error, v. The STATE OF NEW MEXICO on the relation of the NORTHWESTERN COLONIZATION & IMPROVEMENT COMPANY, OF CHIHUAHUA. March 25, 1918. For opinion below, see 168 Pac. 528. Petition for a writ of certiorari to the Supreme Court of the State of New Mexico denied.

No. 870. Frederic W. GOUDY, petitioner, v. Henry Alfred HANSEN, executor, etc., March 25, 1918. For opinion below, see 247 Fed. 782. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

No. 871. GRAND LODGE OF FREE and ACCEPTED MASONS OF the STATE OF MISSISSIPPI et al., petitioners, v. VICKSBURG LODGE, NO. 26, OF FREE and ACCEPTED MASONS et al. March 25, 1918. For opinion below, see 76 South. 572. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied.

No. 897. CRAIG MOUNTAIN LUMBER COMPANY, Limited, petitioner, v. James SUMEY. March 25, 1918. For opinion below, see 170 Pac. 112. Petition for a writ of certiorari to the Supreme Court of the State of Idaho denied.

No. 900. CINCINNATI NORTHERN RAILROAD COMPANY, petitioner, v. Leo GUY. March 25, 1918. For opinion below, see 166 N. W. 667. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied.

No. 902. The CITY OF CLEVELAND, petitioner, v. Viola M. NICHOLS. March 25, 1918. For opinion below, see 247 Fed. 731. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 917. COOPER HEWITT ELECTRIC COMPANY, petitioner, v. GENERAL ELECTRIC COMPANY. March 25, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 262. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY et al., plaintiffs in error, v. ST. PAUL ASSOCIATION OF COMMERCE et al. March 28, 1918. In error to the Supreme Court of the State of Minnesota. For opinion below, see 134 Minn. 217, 158 N. W. 982. Messrs. Asa G. Briggs and E. C. Lindley, both of St. Paul, Minn., W. H. Bremner, of Minneapolis, Minn., James J. Sheean and McNeil V. Seymour, both of St. Paul, Minn., Edward M. Hyzer and Carl C. Wright, both of Chicago, Ill., Charles W. Bunn and Charles Donnelly, both of St. Paul, Minn., and F. W. Root and Alfred H. Bright, both of Minneapolis, Minn., for plaintiffs in error. Mr. Thomas D. O'Brien, of St. Paul, Minn., for St. Paul Ass'n of Commerce. Dismissed with costs on motion of counsel for the plaintiffs in error.

(246 U. S. 357)

NEW YORK LIFE INS. CO. v. DODGE.

(Argued Jan. 21, 1918. Decided April 1, 1918.)

No. 378.

1. INSURANCE ⊜125(2) — LIFE INSURANCE CONTRACT—WHAT LAW GOVERNS.

Where a foreign insurance company licensed to do business in the state of Missouri, issued a life policy to a resident of that state, the contract was a Missouri one.

2. INSURANCE ⊜147(2)—LIFE POLICIES—DUTY TO MAKE LOAN.

A clause in a life policy, issued by a foreign insurer licensed to do business in Missouri, which provided that loans could be obtained by the insured on the sole security of the policy, imposed no obligation on the insurer to make such loans, if the Missouri statute applied and prohibited hypothecation of the reserve as security.

3. INSURANCE ⊜147(4) — LIFE INSURANCE — LOANS—WHAT LAW GOVERNS.

As a state cannot, under Const. U. S. Amend. 14, forbid a citizen from making contracts outside its limits while he remains within, Rev. St. Mo. 1899, § 7897, providing that no policies of life insurance issued by any company authorized to do business in the state shall, after payment of three annual premiums be forfeited by reason of nonpayment, but that the net value of the policy shall be computed, and, after deducting from three-fourths of such value any notes or other evidence of indebtedness given on account of past premium payments, the balance shall be taken as a net single premium for temporary insurance, does not apply to a loan contract entered into between a policy holder, a resident of Missouri, and a New York insurer authorized to do business in Missouri, and which in that state wrote the policy involved, where it was expressly agreed between the parties in the loan agreement, the application for which was transmitted to the insurer's New York office, that the laws of New York, under which the hypothecation of the reserve was valid, should govern.

Mr. Justice Brandeis, Mr. Justice Day, Mr. Justice Pitney, and Mr. Justice Clarke, dissenting.

In Error to the Springfield Court of Appeals of the State of Missouri.

Action by Leo F. Dodge against the New York Life Insurance Company. A judgment for plaintiff was on defendant's appeal affirmed by the Springfield Court of Appeals (189 S. W. 609), and defendant brings error. Reversed.

Messrs. Frank H. Sullivan and James C. Jones, both of St. Louis, Mo., and James H. McIntosh, of New York City, for plaintiff in error.

Mr. James J. O'Donohoe, of St. Louis, Mo., for defendant in error.

*365 *Mr. Justice McREYNOLDS delivered the opinion of the Court.

Defendant in error brought suit January 27, 1915, in circuit court, Phelps county, Missouri, upon a policy dated October 20, 1900, on life of her husband Josiah B. Dodge, who died February 12, 1912. She alleged: That plaintiff in error, a New York corporation, had long maintained local offices and carried on the business of life insurance in Missouri, where she and her husband resided; that in 1900, at St. Louis, he applied for and received the policy, she being named as beneficiary; that premiums were paid to October 20, 1907, when the policy lapsed, having then a net value, three-fourths of which, less "indebtedness to the company given on account of past premium payments" applied as required by the Missouri nonforfeiture statute (section 7897), sufficed to extend it beyond assured's death. Further, that upon application by assured and herself presented at St. Louis the company there made him loans amounting, October 20, 1907, to $1,350, but of this only $599.65 had been applied to premiums. She asked judgment for full amount of policy less loan, unpaid premiums, interest, etc.

Answering, the company admitted issuance of policy, but denied liability because assured borrowed of it, November 1906, at its home office, New York City, $1,350, hypothecating the policy there as security, and then failed to pay premium due October 20, 1907, whereupon in strict compliance with New York law and agreements made there the entire reserve was appropriated to satisfy the loan, *366 and all obligation ceased. The assured being duly notified offered no objection. It further set up that as the loan, pledge and foreclosure were within New York the federal Constitution protected them against inhibition or modification by a Missouri statute, and, if intended to produce such result, section 7897, Rev. Stats. Mo. 1899, lacked validity.

In reply, defendant in error denied assent to alleged settlement, maintained all transactions in question took place in Missouri, and asserted validity of its applicable statutes.

The Springfield Court of Appeals affirmed a judgment for $2,233.45—amount due after deducting loan, unpaid premiums, etc. 189 S. W. 609. It declared former opinions of the state Supreme Court conclusively settled the constitutionality of section 7897, and that the reserve, after paying advances for premiums was thereby appropriated to purchasing term insurance, notwithstanding any contrary agreement. Burridge v. Insurance Co., 211 Mo. 158, 109 S. W. 560; Smith v. Mut. Ben. Life Ins. Co., 173 Mo. 329, 72 S. W. 935. Effort to secure a review by the Supreme Court failed.

Section 7897, Rev. Stats. of Mo. 1899, in effect until amended in 1903, provides:

"No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state, * * * shall, after payment upon it of three annual payments, be forfeited or become void, by reason of nonpayment of premiums thereof but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due, and is not paid, shall be computed * * * and after deducting from three-fourths of such net value, any notes or

other evidence of indebtedness to the company, given on account of past premium payments on said policies, issued to the insured, which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy. * * *"

*367

This section and number 7899 are in the margin.[1]

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*Both defendant in error and her husband, the assured, at all times here material resided in Missouri. Being duly licensed by that state, plaintiff in error, responding to an application signed by Josiah B. Dodge at St. Louis, issued and delivered to him there a five thousand dollar twenty-year endowment policy upon his life, dated October 20, 1900, naming his wife beneficiary but reserving the right to designate another. Among other things, it stipulated:

"Cash loans can be obtained by the insured on the sole security of this policy on demand at any time after this policy has been in force two full years, if premiums have been duly paid to the anniversary of the insurance next succeeding the date when the loan is made. Application for any loan must be made in writing to the home office of the company, and the loan will be subject to the terms of the company's loan agreement. The amount of loan available at any time is stated below, and includes any previous loan then unpaid. Interest will be at the rate of five per cent. per annum in advance."

Continuation after failure to pay premium was guaranteed, also reinstatement within five years. It further provided:

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"Premiums are due and payable at the home office,* unless otherwise agreed in writing, but may be paid to an agent producing receipts signed by one of the above-named officers and countersigned by the agent. If any premium is not paid on or before the day when due, or within the month of grace the liability of the company shall be only as hereinbefore provided for such case." "Any indebtedness to the company, including any balance of the premium for the insurance year remaining unpaid will be deducted in any settlement of this policy or of any benefit thereunder."

By an application addressed to the company at New York accompanied by a loan agreement, both signed at St. Louis and "forwarded from Missouri Clearing House branch office, August 29, 1903," together with pledge of the policy—all received and accepted at the home office in New York City—the assured obtained from the company a loan of $490. Its check for the proceeds drawn on a New York bank and payable to his order was sent to him at St. Louis by mail. Annually thereafter the outstanding loan was settled and a larger one negotiated—all in substantial accord with plan just described. The avails were applied partly to premiums; the balance went directly to assured by the company's check on a New York bank. Copies of last application, loan agreement and instruction which follow indicate the details of the transaction:

Application.

Nov. 9, 1906.

New York Life Insurance Company, 346 & 348 Broadway, New York:

Re Policy No. 2054961.

Application is hereby made for a cash loan of $1,350.00 on the security of the above policy, issued by the New York Life Insurance Company on the life of Josiah B. Dodge, subject to the terms of said company's loan agreement.

*370

*Said policy is forwarded herewith for deposit with said company as collateral security, togeth-

[1] "Sec. 7897. *Policies Non-forfeitable, When.*—No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on and after the first day of August, A. D. 1879, shall, after payment upon it of three annual payments, be forfeited or become void, by reason of non-payment of premiums thereof, but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due, and is not paid, shall be computed upon the actuaries' or combined experience table of mortality, with four per cent. interest per annum, and after deducting from three-fourths of such net value, any notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies, issued to the insured, which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy; and the term for which said temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid; but, if the policy shall be an endowment, payable at a certain time, or at death, if it should occur previously, then, if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium for a pure endowment of so much as said premium will purchase, determined by the age of the insured at date of default in the payment of premiums on the original policy, and the table of mortality and interest aforesaid, which amount shall be paid at end of original term of endowment, if the insured shall then be alive." (R. S. 1889, § 5856, amended —r.) [By act of Missouri Legislature approved March 27, 1903 (Laws 1903, p. 208), this section was amended by substituting for the words "any notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies, issued to the insured, which indebtedness shall then be canceled" the following ones: "Any notes given on account of past premium payments on said policy issued to the insured, and any other evidence of indebtedness to the company, which notes and indebtedness shall be then canceled."]

"Sec. 7899. *Rule of Payment on Commuted Policy.*—If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section 7897, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding: Provided, however, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy within ninety days after the decease of the insured; and provided also, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent. interest per annum of all the premiums that had been forborne at the time of the decease, including the whole of the year's premium in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid." (R. S. 1889, § 5858—t.)

er with said company's loan agreement duly signed in duplicate.

Josiah B. Dodge. Leo F. Dodge.

Forwarded from Missouri Clearing House, Branch Office Nov. 9, 1906. M. F. Bayard, Cashier.

Policy Loan Agreement.

Pursuant to the provisions of policy No. 2054961 issued by the New York Life Insurance Company on the life of Josiah B. Dodge, the undersigned has this day obtained a cash loan from said company of the sum of thirteen hundred fifty dollars ($1,350.00), the receipt of which is hereby acknowledged, conditioned upon pledging as collateral said policy with said company as sole security for said loan and giving assent to the terms of this policy loan agreement; therefore:

In consideration of the premises, the undersigned hereby agree as follows:

1. To pay said company interest on said loan at the rate of five per cent. per annum, payable in advance from this date to the next anniversary of said policy, and annually in advance on said anniversary and thereafter.

2. To pledge, and do hereby pledge, said policy as sole security for the payment of said loan and interest and herewith deposit said policy with said company at its home office.

3. To pay said company said sum when due with interest, reserving, however, the right to reclaim said policy by repayment of said loan with interest at any time before due, said repayment to cancel this agreement without further action.

4. That said loan shall become due and payable—

*371 (a) Either if any premium on said policy or any *interest on said loan is not paid on the date when due, in which event said pledge shall, without demand or notice of any kind, every demand and notice being hereby waived, be foreclosed by satisfying said loan in the manner provided in said policy;

(b) Or (1) on the maturity of the policy as a death claim or an endowment; (2) on the surrender of the policy for a cash value; (3) on the selection of a discontinuing option at the end of any dividend period. In any such event the amount due on said loan shall be deducted from the sum to be paid or allowed under said policy.

5. That the application for said loan was made to said company at its home office in the city of New York, was accepted, the money paid by it, and this agreement made and delivered there; that said principal and interest are payable at said home office; and that this contract is made under and pursuant to the laws of the state of New York, the place of said contract being said home office of said company.

In witness whereof, the said parties hereto have hereunto set their hands and affixed their seals this eighth day of November, 1906.

Josiah B. Dodge. [L. S.]
Leo F. Dodge. [L. S.]

Signed and sealed in presence of Geo. T. Lewis.

Forwarded from Missouri Clearing House, Branch Office, Nov. 9, 1906. M. F. Bayard, Cashier.

Instruction.

Nov. 9, 1906.

New York Life Insurance Company, 346 & 348 Broadway, New York.

Re Policy No. 2054961.

*372 Please deduct from the cash loan of $1,350.00 applied for on Nov., 1906, on the security of the above policy, *an amount sufficient to pay present loan and prem. and int. to Oct., '07.

Josiah B. Dodge. Leo F. Dodge.

Witness: Geo. T. Lewis.

Forwarded from Missouri Clearing House, Branch Office, Nov. 9, 1906. M. F. Bayard, Cashier.

The premium due October 20, 1907, not being paid, the company applied entire reserve in discharge of insured's indebtedness as provided by laws of New York and sent him by mail the following letter:

New York, December 17th, 1907.

Mr. Josiah B. Dodge, 4952 Maryland Ave., St. Louis, Mo.

Re Policy No. 2054961.

Dear Sir: By a loan agreement executed on the 8th day of November, 1906, the above policy on the life of Josiah B. Dodge was pledged to and deposited with the New York Life Insurance Company as collateral security for a cash loan of $1,350.00.

The premium and interest due on said policy on the 20th day of October, 1907, not having been paid, the principal of said loan became due and has been settled according to the terms of the policy, and the policy has no further value.

Yours truly,

John C. McCall, Secretary, by E. M. C.

This was received by assured December 19, 1907, and neither he nor the beneficiary, during his life, offered objection to the action taken.

[1] That the policy when issued to Dodge became a Missouri contract, subject to its statutes, so far as valid and applicable, is undisputed and clear. The controlling doctrine in that regard was announced and applied in Equitable Life Assurance Society v. Clements, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497, New York Life Ins. Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116, and Northwestern Life Insurance Co. v. Riggs, 203 U. S. *243, 27 Sup. Ct. *373 126, 51 L. Ed. 168, 7 Ann. Cas. 1104. In each of those cases the controversy related to the interpretation and effect of an original policy—not a later good faith agreement between the parties. We held that to the extent there stated the state had power to control insurance contracts made within its borders. With those conclusions we are now entirely content; but they do not rule the question presently presented. Here the controversy concerns effect of the state statute upon agreements between the parties made long after date of the policy and action taken thereunder; their essential fairness and accordance with New York laws are not challenged.

[2] Considering the circumstances recited above, we think competent parties consummated the loan contract now relied upon in New York where it was to be performed. And, moreover, that it is one of a kind which ordinarily no state by direct action may prohibit a citizen within her borders from making outside of them. It should be noted that the clause in the policy providing "cash loans can be obtained by the insured on the sole security of this policy on demand, etc.," certainly imposed no obligation upon the company to make such a loan if the Missouri statute applied and inhibited valid hypothecation of the reserve as security therefor as defendant in error maintains. She cannot, therefore, claim anything upon the theory that the loan contract

actually consummated was one which the company had legally obligated itself to make upon demand.

[3] In Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832, we held a Louisiana statute invalid which undertook to restrict the right of a citizen while within that state to place insurance upon property located there by contract made and to be performed beyond its borders. We said, "The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it," and *374 ruled that under the Fourteenth Amendment the right to contract outside for insurance on property within a state is one which cannot be taken away by state legislation. So to contract is a part of the liberty guaranteed to every citizen. The doctrine of this case has been often reaffirmed and must be accepted as established. Nutting v. Mass., 183 U. S. 553, 557, 22 Sup. Ct. 238, 46 L. Ed. 324; Delamater v. South Dakota, 205 U. S. 93, 102, 27 Sup. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733; Provident Savings Ass'n v. Kentucky, 239 U. S. 103, 114, 36 Sup. Ct. 34, 60 L. Ed. 167, L. R. A. 1916C, 572; Adams v. Tanner, 244 U. S. 590, 595, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973.

The court below rested its judgment denying full effect to the loan agreement upon Smith v. Mut. Ben. Life Ins. Co., supra, and Burridge v. Insurance Co., supra. In them the Supreme Court distinctly held section 7897 controlling and the insurer liable upon policies actually issued in Missouri notwithstanding any subsequent stipulation directing different disposition of reserve after default. In the latter it expressly approved the doctrine of the first and, among other things (211 Mo. 171, 109 S. W. 564), said:

"Attending to that section [No. 7897] as it read when the policy issued and when the insured died, it will be observed that the net value of the policy is to be computed. Then from three-fourths of such net value there is to be taken away—what? All indebtedness? Not at all. There shall be taken away 'any notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies.' The residue, if any, then goes automatically to the purchase of temporary or extended insurance. * * * In that [the Smith] case, therefore, the scope and meaning of that clause of our non-forfeiting insurance statute was held in judgment in the stiffest sense and this court decided that the statute was mandatory; that the character of the indebtedness to be deducted from the net value before applying the residue to the purchase of temporary or extended insurance must be looked to and was limited by the clear words of the statute 'to notes or other evidences of indebtedness to the company, given on account of past premium payments' on the policy issued to the insured; and did not include notes and evidences of indebtedness arising in other ways. It is not apparent, assuming the statute be constitutional, how, giving heed to the hornbook maxim, expressio unius, etc., any other conclusion could have been arrived at in reason. It was held furthermore, in effect, that such provisions of law evidenced a sound and just governmental policy, and wrote into every policy of life insurance, coming within its purview, a mandate not to be abrogated in whole, or hedged about or lopped off in detail, by policy provisions, nor to be contracted away otherwise than as prescribed by statute."

*375

Treating the loan to Dodge as made under a New York agreement which Missouri lacked power directly to control, the question presented becomes similar in principle to the one decided in New York Life Insurance Co. v. Head, 234 U. S. 149, 34 Sup. Ct. 879, 58 L. Ed. 1259. There suit was instituted in Missouri upon a policy personally applied for and received while in that state by a citizen of New Mexico. Nine years afterwards, having duly acquired the policy in New Mexico, the transferee wrote from there to the insurer in New York and effected a loan under an agreement like the one now before us. The state courts held the policy a Missouri contract and the loan agreement controlled by its non-forfeiture statute.

Assuming the policy to be a Missouri contract, we declared that state without power to extend its authority over citizens of New Mexico and into New York and forbid the later agreement there made simply because it modified the first one. We said:

"It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state and in the state of New York *376 and there destroy freedom of contract without throwing down the constitutional barriers by which all the states are restricted within the orbits of their lawful authority and upon the preservation of which the government under the Constitution depends."

The reasoning advanced by the Missouri Supreme Court to support its ruling was thus summarized:

"As foreign insurance companies have no right to come into the state and there do business except as the result of a license from the state and as the state exacts as a condition of a license that all foreign insurance companies shall be subject to the laws of the state as if they were domestic corporations, it follows that the limitations of the state law resting upon domestic corporations also rest upon foreign companies and therefore deprive them of any power which a domestic company could not enjoy, thus rendering void or inoperative any provision of their charter or condition in policies issued by them or contracts made by them inconsistent with the Missouri law."

And this argument we declared unsound since the—

"proposition cannot be maintained without holding that because a state has power to license a foreign insurance company to do business within its borders and the authority to regulate such business, therefore a state has power to regulate the business of such company outside its borders and which would otherwise be beyond the state's authority—a distinction which brings the contention right back to the primordial conception upon which alone it would be possible to sanction the doctrine contended for, that is, that because a state has power to regulate its domestic concerns, therefore it has the right to control the domestic concerns of other states."

Under the laws of New York, where the parties made the loan agreement now before

us, it was valid; also it was one which the Missouri Legislature could not destroy or prevent a citizen within its borders from *377 making *beyond them by direct inhibition; and applying the principles accepted and enforced in Insurance Co. v. Head, we think the necessary conclusion is that such a contract could not be indirectly brought into subjection to statutes of the state and rendered ineffective through a license authorizing the insurance company there to do business. As construed and applied by the Springfield Court of Appeals, section 7897 transcends the power of the state. To hold otherwise would permit destruction of the right—often of great value—freely to borrow money upon a policy from the issuing company at its home office and would, moreover, sanction the impairment of that liberty of contract guaranteed to all by the Fourteenth Amendment.

Reversed.

Mr. Justice BRANDEIS, dissenting.

A statute of Missouri (Rev. Stats. 1899, § 7897) prohibited life insurance companies authorized to do business within the state from forfeiting a policy for default in the payment of premiums, if three full years' premiums had been paid thereon. The act provided further that in case of such default the policy should be automatically extended and commuted into paid-up term insurance. And it determined mathematically the length of the term, as that for which insurance could, at a rate prescribed, be purchased with a single premium equal in amount to three-fourths of the reserve or net value less any indebtedness to the company "on account of past premium payments." The obligation imposed upon the company by this statute, as construed by the highest court of the state, could not be modified by contract with the insured whether entered into at the time the policy was written or subsequently. Equitable Life Assurance Society v. Clements, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497; Smith v. Mutual Benefit Life Insurance Co., *378 173 Mo. 329, 72 S. W. 935. Such non-forfeiture laws are an exercise *of the police power; and, as insurance is not interstate commerce, the state's power in this respect is as great over foreign as over domestic corporations. Orient Insurance Co. v. Daggs, 172 U. S. 557, 566, 19 Sup. Ct. 281, 43 L. Ed. 552; New York Life Insurance Co. v. Cravens, 178 U. S. 389, 401, 20 Sup. Ct. 962, 44 L. Ed. 1116; Northwestern Life Insurance Co. v. Riggs, 203 U. S. 243, 27 Sup. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104.

In 1900 Dodge, a citizen and resident of Missouri, applied in that state to the New York Life Insurance Company, a New York corporation, for a policy on his life in favor of his wife. The policy was delivered to the assured in Missouri where the company had an office and was authorized by the Missouri statute to do business; and there the first and later premiums were paid and, until his death, Dodge and the beneficiary lived and the company continued so to do business.

In 1906 Dodge entered into a supplemental agreement with the company by which he nominally borrowed $1,350, pledged his policy as collateral, and agreed that, in case of default in repaying the loan, the company might discharge it by applying thereto the reserve of the policy. In 1907 Dodge made default in payment both of the premium and of the loan. The reserve of the policy was then less than the amount due on the whole loan; but three-fourths of the reserve exceeded that part of the loan which had been applied to the payment of past premiums by $275.79. This excess, if applied in commutation for term insurance, would have extended the policy to December 23, 1912. The company claimed the right to use the whole of the reserve to satisfy the whole of the loan, so applied it, and notified the assured, on December 17, 1907, that its obligation on the policy ceased. Dodge died February 12, 1912. The beneficiary, insisting that by reason of the Missouri statute the policy was still in force when her husband died, brought suit thereon in a state court of Missouri and recovered judgment, which was affirmed by the Springfield Court of Appeals (189 *S. W. *379 609), and the Supreme Court of the state refused a review. The case comes here on writ of error under section 237 of the Judicial Code.[1] The company asserts that the loan agreement was made in New York, and relying upon New York Life Insurance Co. v. Head, 234 U. S. 149, 34 Sup. Ct. 879, 58 L. Ed. 1259, contends that the state court, in denying full effect to that contract, deprived it of liberty, property, and equal protection of the laws in violation of the Fourteenth Amendment.

First. Was the loan agreement in fact made in New York?

The policy was confessedly a Missouri contract. Dodge, so far as appears, was never out of Missouri. Physically every act done by Dodge and the beneficiary in connection with the loan agreement, as with the policy, was done in Missouri: (a) They signed there the application for the loan. (b) They signed there the loan agreement. (c) They signed there the request upon the company to pay itself, out of the $1,350 nominally borrowed, the amount of an earlier loan with interest to October, 1907, and of the premium. (d) He delivered there (at the Missouri Clearing House branch office) the policy given as collateral and these three papers, which were forwarded by that office November 9, 1906, and received in New York three days later. (e) He paid there the balance of the premium, $116.40 in cash; for the sum of $1,350, nominally advanced then, was insufficient to pay off the then existing loan with

[1] Act March 3, 1911, c. 231, 36 Stat. 1156 (Comp. St. 1916, § 1214).

interest and the accrued premium. Throughout these transactions the company was authorized to do business in Missouri and was, in these transactions, actually doing business there. International Harvester Co. v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479.

*380 Nothing was done in New York then except this: The papers received from the Missouri Clearing House branch office were examined and filed in the home office; and certain calculations and appropriate entries in the books and on the papers were made there. No money was paid then to Dodge. The nominal advance was less than the amount, including accrued premium, then due by him to the company; and Dodge balanced the account by paying in Missouri $116.40. In 1903, when a similar loan agreement was made, the nominal amount of the loan exceeded the sum due for premiums by $486.91; and a check for that sum was drawn by the company in New York and sent by mail from there to Dodge in Missouri. In 1904 a further check for $92.10 was sent from New York by the company to Dodge under a similar loan agreement. Under the 1903 agreement the policy was delivered to the company and it had remained in the company's possession at the home office. But when the loan agreement here in question was made, nothing was done in New York except to examine and file the papers and to make the calculations and entries. No discretion was exercised there by the company's official. By the terms of the policy the company had already assented to the amount nominally advanced as a loan and to the rate of interest to be charged. The functions exercised by the officials at New York were limited to determining whether the calculations were correct and whether papers were properly executed and filed.

These acts so done by the company at its home office in connection with the loan agreement were similar in character to those performed when the policy was written. The application for the policy addressed to the company at its home office was likewise delivered at the Missouri Clearing House and forwarded to the home office. The application was considered and accepted in New York. The policy was executed there. It provided that the premiums and the insurance should be payable there. But such acts did not prevent the policy being held to be a *381 Missouri contract. Equitable Life Assurance Society v. Clements, supra; Northwestern Life Insurance Co. v. McCue, 223 U. S. 234, 32 Sup. Ct. 220, 56 L. Ed. 419, 38 L. R. A. (N. S.) 57. Even if the loan agreement be treated as an independent contract, it should, if facts are allowed to control, be held to have been made in Missouri. But the loan agreement was not an independent contract; nor is it to be treated as a modification of the original contract. It was an act contemplated by the policy and was subsidiary to it, as an incident thereof. What was done by the officials at the home onice was not making a New York contract, but performing acts under a Missouri contract.

Second. What is the effect of the provision in the loan agreement that it shall be deemed to have been made in New York?

The provision "that the application for said loan was made to said company at its home office in the city of New York, was accepted, the money paid by it, and this agreement made and delivered there; that said principal and interest are payable at said home office, and that this contract is made under and pursuant to the laws of the state of New York, the place of said contract being said home office of said company" is inoperative. For acts essential to the making of any agreement involving a pledge of the policy were done by Dodge, by the beneficiary, and by the company's agent in Missouri and were subject to the prohibition of a statute of that state which prevented the operation there of inconsistent New York laws. If the laws of Missouri and of New York had left the parties free to contract insurance on such terms as they pleased, they might with effect have elected to be bound by the law of the state of their preference, whatever the place of the contract; in doing so, they would in effect have specified terms of the contract. But provisions in contracts for incorporating the laws of a particular state are inoperative, so far as the law agreed upon is inconsistent with the law of *382 the state in which the contract is actually made. Mutual Life Insurance Co. v. Hill, 193 U. S. 551, 554, 24 Sup. Ct. 538, 48 L. Ed. 788; Knights of Pythias v. Meyer, 198 U. S. 508, 25 Sup. Ct. 754, 49 L. Ed. 1146. Where the validity of a provision is dependent upon the place in which the contract is made, the actual facts alone are significant. Persons resident in Missouri, who enter there into a contract which is specifically controlled by the laws of that state, cannot, by agreeing that a modification inconsistent with the requirements of the Missouri law shall be deemed to have been made elsewhere, escape the prohibition of the Missouri statute. The fact that one of the parties to the contract is a corporation and hence capable of having a residence also in another state, and that some acts in connection with the contract were done by it there, does not affect the result. The company, although a foreign corporation, was, for this purpose, a resident of Missouri, or at least, was present in Missouri. Barrow Steamship Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; Dunlop Pneumatic Tyre Co. v. Actien-Gesellschaft, etc., 1 K. B. (1902) 342.

Third. Even if the rules ordinarily applied in determining the place of a contract, required this court to hold, as a matter of

general law, that the loan agreement was made in New York, it would not necessarily follow that the Missouri statute was unconstitutional, because it prohibited giving effect in part to the loan agreement. There is no constitutional limitation by virtue of which a statute enacted by a state in the exercise of the police power is necessarily void, if, in its operation, contracts made in another state may be affected. Emery v. Burbank, 163 Mass. 326, 39 N. E. 1026, 28 L. R. A. 57, 47 Am. St. Rep. 456; Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003. The test of constitutionality to be applied here is that commonly applied when the validity of a statute limiting the right of contract is questioned, namely: Is the subject-matter within the reasonable scope of regulation? Is the end legitimate? Are the means appropriate to the end sought to be obtained? If so, the act must be sustained, unless the court is satisfied that it is clearly an arbitrary and unnecessary interference with the right of the individual to his personal liberty. Here the subject is insurance; a subject long recognized as being within the sphere of regulation of contracts. The specific end to be attained was the protection of the net value of insurance policies by prohibiting provisions for forfeiture; an incident of the insurance contract long recognized as requiring regulation. The means adopted was to prescribe the limits within which the parties might agree to dispose of the net value of the policy otherwise than by commutation into extended insurance; a means commonly adopted in non-forfeiture laws, only the specific limitation in question being unusual. The insurance policy sought to be protected was a contract made within the state between a citizen of the state and a foreign corporation also resident or present there. The protection was to be afforded while the parties so remained subject to the jurisdiction of the state. The protection was accomplished by refusing to permit the courts of the state to give to acts done within it by such residents (Dodge did no act elsewhere), the effect of nullifying in part that non-forfeiture provision, which the Legislature deemed necessary for the welfare of the citizens of the state and for their protection against acts of insuring corporations. The statute does not invalidate any part of the loan; it leaves intact the ordinary remedies for collecting debts. The statute merely prohibits satisfying a part of the debt out of the reserve in a manner deemed by the Legislature destructive of the protection devised against forfeiture. The provision may be likened to homestead and exemption laws by which creditors are limited in respect to the property out of which their claims may be enforced. When the New York Life Insurance Company sought and obtained permission to do business within the state, and when the policy in question and the loan agreement were entered into, this statute was in existence and was of course known to the company. It has no legal ground of complaint, when the Missouri courts refuse to give to the loan agreement effect in a manner and to an extent inconsistent with the express prohibition of the statute. The significance of the fact that this suit was brought in a Missouri court must not be overlooked. See Bond v. Hume, 243 U. S. 15, 37 Sup. Ct. 366, 61 L. Ed. 565; Union Trust Co. v. Grosman, 245 U. S. 412, 38 Sup. Ct. 147, 62 L. Ed. ——.

New York Life Insurance Co. v. Head, supra, furnishes no support for the contention made by the company here. The facts differ widely in the two cases. There the insured was not a citizen or resident of Missouri and does not appear ever to have been within the state except at the time when the application was made and the policy delivered. Here the insured was at all times a citizen and resident of the state. There the insured had assigned the policy to his daughter, who was a citizen of New Mexico and, so far as appears, had never been within the state of Missouri. Here the insured remained the owner of the policy. There the loan agreement was made by the assignee, a stranger to the policy; and the assignment being accepted and acted upon by the company resulted in a novation of the contract. Here the loan agreement was made by the insured. There every act in any way connected with the loan agreement, whether performed by the company or by the assignee (the insured performed none) was performed in some state or territory other than Missouri. Here every act was performed in Missouri except as above stated. If this court had held constitutional the statute of Missouri as construed by its Supreme Court in that case, it would have sanctioned, not regulation by a state of the insurance of its citizens, but an arbitrary interference by one state with the rights of citizens of other states. On the other hand, to sustain the contention made by the company in this case, would deny to a state the full power to protect its citizens in respect to insurance, a power which has been long and beneficently exercised. For the power to protect will be seriously abridged, if it is held that the state of Missouri cannot constitutionally prohibit those who are its citizens and corporations within its jurisdiction, from contracting themselves out of the limitations imposed by its Legislature, in the exercise of the police power, upon the contracts actually made within the state. And unless it is so abridged, the Missouri non-forfeiture law, as applied to the facts of this case, cannot be held invalid.

Nor does Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832, furnish support to the company's contention. Allgeyer, a citizen and resident of Louisiana had made in New York, with a corporation

organized and doing business there, an open contract for marine insurance to cover cotton to be purchased and shipped. Shipments to be covered were required to be reported by letter addressed to the company at New York. Allgeyer mailed in Louisiana such a letter addressed to New York City. A Louisiana statute made it a crime for any one to do any act to effect insurance in any marine insurance company which had not established a place of business within the state and appointed an authorized agent upon whom process might be served. The insurance company there referred to had not been authorized to do business in Louisiana and actually did no business there. Allgeyer was sentenced for mailing the letter. This court held that the statute was unconstitutional as construed by the state court, because it denied to a citizen of the United States rights guaranteed by the Fourteenth Amendment.

But the case did not require the court to decide, whether a state could prohibit its citizens from making contracts with corporations organized under the laws of and doing *386 business in another state; nor whether the contract there involved had been made in New York; nor whether it was valid. And it did not in fact decide any of those questions; for they were not in issue. It was admitted (a) that the contract there involved —the open insurance policy—had been made in New York and (b) that it was valid. The only question presented to this court was, whether the state, in order more effectually to enforce its foreign corporations act, could prohibit its citizens from doing, within the state, certain acts which were essential to the enjoyment of rights secured by such a valid contract made without the state. In the paragraph near the close of the opinion (165 U. S. 593, 17 Sup. Ct. 432, 41 L. Ed. 832) this is pointedly expressed:

"In such a case as the facts here present the policy of the state in forbidding insurance companies which had not complied with the laws of the state from doing business within its limits cannot be so carried out as to prevent the citizen from writing such a letter of notification as was written by the plaintiffs in error in the state of Louisiana, when it is written pursuant to a valid contract made outside the state and with reference to a company which is not doing business within its limits."

The more elaborate discussion which preceded this paragraph makes clear the ground of the decision.

"In the case before us the contract was made beyond the territory of the state of Louisiana, and the only thing that the facts show was done within that state was the mailing of a letter of notification, as above mentioned, which was done after the principal contract had been made." 165 U. S. 587, 17 Sup. Ct. 430, 41 L. Ed. 832.

"* * * In this case the only act which it is claimed was a violation of the statute in question consisted in sending the letter through the mail notifying the company of the property to be covered by the policy already delivered. We have then a contract which it is conceded was made *outside and beyond the limits of the *387 jurisdiction of the state of Louisiana, being made and to be performed within the state of New York, where the premiums were to be paid and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the state of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the state. It was a mere notification that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification was sent." 165 U. S. 588, 17 Sup. Ct. 431, 41 L. Ed. 832.

"* * * It was a valid contract, made outside of the state, to be performed outside of the state, although the subject was property temporarily within the state. As the contract was valid in the place where made and where it was to be performed, the party to the contract upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act and to give that notification within the limits of the state, any prohibition of the state statute to the contrary notwithstanding. The giving of the notice is a mere collateral matter; it is not the contract iteslf, but is an act performed pursuant to a valid contract which the state had no right or jurisdiction to prevent its citizens from making outside the limits of the state." 165 U. S. 592, 17 Sup. Ct. 432, 41 L. Ed. 832.

Fourth. Furthermore, the right of citizens of the United States which the Allgeyer Case sustained "is the liberty of natural, not artificial persons." Northwestern Life Insurance Co. v. Riggs, supra, 203 U. S. 255, 27 Sup. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104. While a state may not (except in the *388 reasonable exercise of the police*power) impair the freedom of contract of a citizen of the United States, "it can prevent the foreign insurers from sheltering themselves under his freedom." Nutting v. Massachusetts, 183 U. S. 553, 558, 22 Sup. Ct. 238, 46 L. Ed. 324; Phœnix Insurance Co. v. McMaster, 237 U. S. 63, 35 Sup. Ct. 504, 59 L. Ed. 839. The insurance company cannot be heard to object that the Missouri statute is invalid, because it deprived Dodge of rights guaranteed to natural persons, citizens of the United States. Erie Railroad Co. v. Williams, 233 U. S. 685, 705, 34 Sup. Ct. 761, 58 L. Ed. 1155; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 35 Sup. Ct. 167, 59 L. Ed. 364.

In my opinion the decision of the Springfield Court of Appeals should be affirmed.

Mr. Justice DAY, Mr. Justice PITNEY, and Mr. Justice CLARKE concur in this dissent.

MEMORANDUM DECISIONS

Disposed of at October Term, 1917

No. 287. Pedro GUTIERREZ, plaintiff in error, v. Walter B. GRANT, sole surviving executor of the will and estate of Frank B. Cotton, deceased. April 1, 1918. Mr. A. Seymour Thurmond, of El Paso, Tex., for plaintiff in error. Mr. Walter B. Grant, of Boston, Mass., for defendant in error. In error to the District Court of the United States for the Western District of Texas. Dismissed per stipulation.

No. 893. CONSOLIDATION COAL COMPANY, petitioner, v. Carrie SALYER, administratrix, etc. April 1, 1918. For opinion below, see 246 Fed. 794. Mr. Edward C. O'Rear, of Frankfort, Ky. (Allie W. Young, of Morehead, Ky., and J. B. Adamson, of Frankfort, Ky., of counsel), for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 901. W. C. STERRETT, as receiver, etc., petitioner, v. SECOND NATIONAL BANK OF CINCINNATI, Ohio. April 1, 1918. For opinion below, see 246 Fed. 753. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted.

No. 906. COOPER GROCERY COMPANY, petitioner, v. G. H. PENLAND, trustee, etc. April 1, 1918. For opinion below, see 247 Fed. 480. Messrs. W. L. Eason and B. Y. Cummings, both of Waco, Tex., for petitioner. Messrs. W. M. Sleeper, Chas. A. Boynton, Ben. G. Kendall, and J. D. Williamson, all of Waco, Tex., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 908. MARYLAND CASUALTY COMPANY, petitioner, v. FIRST NATIONAL BANK OF MONTGOMERY, Ala. April 1, 1918. For opinion below, see 246 Fed. 892. Messrs. William C. Prentiss, of Washington, D. C., and Walter L. Clark, of Baltimore, Md. (Fred S. Ball and Edmund R. Beckwith, both of Montgomery, Ala., of counsel), for petitioner. Messrs. Horace Stringfellow, B. P. Crum, and Leon Weil, all of Montgomery, Ala. (Steiner, Crum & Weil, of Montgomery, Ala., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 915. COMPANIA PALOMAS DE TERRENOS Y GANADOS et al., petitioners, v. Sigmund LINDAUER et al. April 1, 1918. For opinion below, see 247 Fed. 428. Messrs. James R. Garfield, of Cleveland, Ohio, D. J. Cable, of Lima, Ohio, and Francis C. Wilson, of Santa Fé, N. M., for petitioners. Messrs. Walter D. Hawk and Samuel S. Holmes, both of Chicago, Ill., A. B. Renehan, of Santa Fé, N. M., and Charles A. Douglas, of Washington, D. C., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 935. Erik SANDBERG et al., petitioners, v. John McDONALD, claimant, etc. April 1, 1918. For opinion below, see The Talus, 248 Fed. 670. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted.

No. 936. Paul NIELSEN et al., petitioners, v. RHINE SHIPPING COMPANY, claimant, etc. April 1, 1918. For opinion below, see The Windrush, 250 Fed. 180. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

No. 937. John HARDY et al., petitioners, v. SHEPARD & MORSE LUMBER COMPANY, claimant, etc. April 1, 1918. For opinion below, see The Windrush, 250 Fed. 180. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

Memorandum Decisions Disposed of in Vacation

No. 139. COAL & COKE RY. CO., Plaintiff in error, v. David F. DEAL. July 16, 1917. In error to the United States Circuit Court of Appeals for the Fourth Circuit. For opinion below, see 231 Fed. 604, 145 C. C. A. 490. Dismissed with costs, pursuant to the twenty-eighth rule. Mr. George E. Price, of Charleston, W. Va., for plaintiff in error. Mr. H. W. Houston, of Charleston, W. Va., for defendant in error.

No. 241. John A. BELL, Plaintiff in error, v. Lizzie E. FITZPATRICK. July 31, 1917. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 157 Pac. 334. Dismissed with costs, pursuant to the twenty-eighth rule. Mr. James A. Veasey, of Tulsa, Okl., for plaintiff in error. Mr. Joseph P. Rossiter, of Henryetta, Okl., for defendant in error.

No. 182. CINCINNATI, N. O. & T. P. RY. CO., Plaintiff in error, v. W. E. GOODE. August 15, 1917. In error to the Court of Appeals of the State of Kentucky. For opinion below, see 169 Ky. 102, 183 S. W. 264. Dismissed with costs, pursuant to the twenty-eighth rule. Messrs. John Galvin and Edward Colston, both of Cincinnati, Ohio, for plaintiff in error. Mr. Emmet Puryear, of Danville, Ky., for defendant in error.

(246 U. S. 434)

GREAT NORTHERN RY. CO. et al. v. STATE OF MINNESOTA ex rel. VILLAGE OF CLARA CITY.

(Submitted March 12, 1918. Decided April 15, 1918.)

No. 185.

CONSTITUTIONAL LAW ⟸241, 297 — RAILROADS ⟸95(2) — DUE PROCESS OF LAW — EQUAL PROTECTION.

Laws Minn. 1913, c. 78, § 1 (Gen. St. 1913, § 4256), making it the duty of every railroad company whenever its right of way crosses a public street in a municipality to construct a suitable sidewalk to connect with and correspond to sidewalks constructed by the municipality or owners of abutting property, is not subject to attack under Const. U. S. Amend. 14, as denying due process or equal protection of law to railroad companies, but, in view of the principle that the state is the primary judge of police regulations, should be deemed a valid exercise of the police power.

In Error to the Supreme Court of the State of Minnesota.

Petition by the State of Minnesota, on the relation of the Village of Clara City, for a writ of mandamus against the Great Northern Railway Company and another. On relator's appeal an order sustaining demurrer to the petition was reversed (130 Minn. 480, 153 N. W. 879), and respondents bring error to the Supreme Court of the State of Minnesota. Affirmed.

Messrs. E. C. Lindley, M. L. Countryman, and Thomas R. Benton, all of St. Paul, Minn., for plaintiffs in error.

Mr. C. A. Fosnes, of Montevideo, Minn., for defendant in error.

*435 *Mr. Justice DAY delivered the opinion of the Court.

This suit was brought to compel the railroad companies to build a sidewalk on the south side of Bunde street in the village of Clara City, Minnesota, where the right of way of the railroad companies crosses that street. The right of way of the companies is of the width of 300 feet at the place where Bunde street crosses the same. At or near the center of this right of way the companies have constructed three railroad tracks. There are business houses upon both sides of the right of way, and it becomes necessary for people to cross the same frequently.

The case was decided in the lower court in Minnesota upon demurrer to the petition in mandamus, and the record contains this statement:

"For the purpose of the demurrer it was admitted by relator that that part of the street in question which is occupied by the roadbed or *436 tracks of the respondents was and is properly, securely and sufficiently planked the full width of the street, such planking extending *the full length of the ties and between the tracks as in that particular required by statute; that the sole object and purpose sought to be attained in and by these proceedings is to compel the respondents to construct a sidewalk on one side of the street as it is located across the entire right of way, so that the sidewalk will connect with the said planking in either direction, but not so as to include in such construction the building of any sidewalk or crosswalk along that part of the street now occupied by said roadbed or tracks, which part is already sufficiently and securely planked for crossing purposes."

The general laws of Minnesota contain a provision requiring the planking of railroad crossings where the same cross a public street. Section 4256 of the General Statutes of Minnesota. By amendment of 1913 the following provision was added:

"And a suitable sidewalk shall be constructed by said company to connect with and correspond to sidewalks constructed and installed by the municipality or by owners of abutting property, but cement or concrete construction shall not be required in track space actually occupied by the railroad ties if some substantial and suitable sidewalk material is used in lieu thereof." Laws of Minnesota 1913, chapter 78, section 1.

The lower court in Minnesota dismissed the petition, which judgment was reversed by the Supreme Court of Minnesota, and the railroad company was required to construct the sidewalk at its own expense. 130 Minn. 480, 153 N. W. 879. The court held that the statute was a reasonable exercise of the police power of the state. The contention here made is that the statute as thus enforced denies to the companies due process of law and the equal protection of the law in violation of the Fourteenth Amendment to the federal Constitution.

It is too well settled by former decisions of this court to require extended discussion here—that railroad *companies may be re- *437 quired by the states in the exercise of the police power to make streets and highways crossed by the tracks of such companies reasonably safe and convenient for public use, and this at their own expense. Such companies accept their franchises from the state subject to their duties to conform to regulations, not of an arbitrary nature, as to the opening and use of the public streets for the purpose of promoting the public safety and convenience. This principle was applied by this court in C., I. & W. R. Co. v. Connersville, 218 U. S. 336, 31 Sup. Ct. 93, 54 L. Ed. 1060, 20 Ann. Cas. 1206, wherein the railroad, because of the extension of a street through an embankment upon which the railroad was built, was required to construct at its own expense a bridge across the street. In Northern Pacific Ry. Co. v. Duluth, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630, it was held that a municipality of the state of Minnesota might require a railroad company to repair a viaduct constructed by the city after the opening of the railroad notwithstanding a contract relieving the railroad from making repairs thereon for a term of years, that the police power of the state was a continuing one, and could not be contracted away, and that uncompensated obedience to laws, passed in its exercise, did not contravene the federal Constitution. This case

was followed with approval in St. Paul, Minneapolis & Manitoba R. Co. v. State of Minnesota, 214 U. S. 497, 29 Sup. Ct. 698, 53 L. Ed. 1060. In Chicago, Milwaukee & St. Paul R. Co. v. Minneapolis, 232 U. S. 430, 34 Sup. Ct. 400, 58 L. Ed. 671, this court affirmed a judgment of the Supreme Court of Minnesota requiring a railroad company to build at its own expense a bridge required in order to permit a municipality in that state to construct a canal connecting two lakes within the limits of a public park. In the opinion in that case previous decisions in this court are collected and reviewed.

*438 The Supreme Court of Minnesota in the instant case held that the railroad companies might be required to *construct a sidewalk upon the right of way on both sides of the planked crossing. In the opinion of the court the sidewalk, leading to the crossing, tended to promote the safety and convenience of the public, and, after discussing the well-established authority of the state to require planking at crossings, as to the additional requirement to build the connecting sidewalk, said:

"There can be no controlling difference between the requirement of sidewalk and of planking. Planking is, to be sure, more to prevent persons in vehicles from injury, or the vehicles or teams from damage, by being stalled on the crossing. But, where a crossing is much traveled, safety, to say nothing of convenience, may require a separate space, like a sidewalk, reserved for pedestrians. There is a peculiar peril to travelers on foot, where many vehicles pass and the attention of the drivers is diverted to looking out for trains liable to use the crossing. Again, unless a well-defined walk be provided, there is danger of pedestrians crossing the tracks at places unexpected to those in charge of trains or cars, not to mention the inconvenience where mud and impassable conditions compel those on foot to deviate from the street proper.

"It is said defendant, if obligated to lay a sidewalk across its right of way, might likewise be required to construct sidewalks along such right of way where it borders a highway or street. The sufficient answer is that the statute does not call for anything of the kind.

"The contention is also that defendant has so much larger right of way than it needs or occupies for its three tracks that for the greater distance the sidewalk, as a safety provision, is out of place. It is to be assumed that the right of way is such only as is needed for and devoted to railway purposes, and such as is rightfully *439 exempt from taxes and assessments because of the payment of the gross earnings tax. Within its right of way defendant *may at any time place additional tracks, or change the location of those it maintains, and, for that reason, it also seems proper that the safety of the passage for the traveler for the whole distance should be placed upon the railroad company. The statute merely prescribes that it shall maintain a sidewalk over its legitimate right of way to correspond and connect with the walk maintained under the supervision of the municipality, so as to afford the pedestrians a reasonably safe and convenient crossing."

This court considers a case of this nature in the light of the principle that the state is primarily the judge of regulations required in the interest of the public safety and welfare. Such statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the state in the public interest. We are not prepared to say that this statute is of that character, and the judgment of the Supreme Court of Minnesota is

Affirmed.

(246 U. S. 523)

BETHLEHEM STEEL CO. v. UNITED STATES.

(Argued March 15, 1918. Decided April 15, 1918.)

No. 191.

PAYMENT ⇐82(4) — RECOVERY — VOLUNTARY PAYMENT.

That the Secretary of the Navy refused to cancel a contractor's bond and to notify the surety thereof was no ground for recovery from the United States of premiums paid, where it nowhere appeared that the contractor was obligated to pay premiums until such cancellation.

Mr. Justice McKenna dissenting.

Appeal from the Court of Claims.

Suit by the Bethlehem Steel Company against the United States. From a judgment of the Court of Claims (51 Ct. Cl. 394), denying a part of the relief sought plaintiff appeals. Affirmed.

Mr. James H. Hayden, of Washington, D. C., for appellant.

Mr. Assistant Attorney General Thompson, for the United States.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Bethlehem Steel Company entered into a contract, dated September 27, 1909, with the United States to manufacture and deliver for the Navy large quantities of several groups of armor plates, and agreed to *524 replace any accepted *armor which should prove defective within six months after it had been fastened on the ship. The contract required the company to furnish a bond with sureties in a sum equal to ten per cent. of the total cost of all groups, and provided that "at the end of each calendar year the amount of said bond may be reduced to correspond to the estimated cost of armor then undelivered." The bond was furnished; and delivery of all the armor originally specified was completed May 2, 1911. But on March 26, 1912, plates aggregating at cost prices more than the penalty of the bond were found to be defective, and a part of this was not replaced until November 22, 1912. On January 27, 1912, the company formally requested the Secretary of the Navy to cancel the bond and notify the surety, but he refused to do so except upon certain conditions which were not complied with until May 15, 1912, when the bond was canceled. The company had expended $5,509.62 in payment of premiums on the bond from May 3, 1911, until May 15, 1912, and demanded reimbursement by the government. Payment being refused, suit

was brought in the Court of Claims to recover this amount and also a balance of $3,170.69 for plate delivered. Judgment for the latter sum was entered; but the court held that the company was not entitled to recover for the premiums paid. The case comes here under section 242 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. 1916, § 1219]).

The lower court held that the bond covered merely the original delivery of the armor plate and not the replacement of defective plates; but it refused recovery of the amount paid for premiums after May 3, 1911, on the ground that the payment thereof was voluntary, because the condition of the bond had then been complied with. The government contends that the bond covered the replacement also; that the contract made reduction of the bond permissive, not mandatory; and that the Secretary was, in any event, under no obligation to cancel the *bond prior to the request made January 27, 1912. We have no occasion to consider any of these contentions. It nowhere appears that the company had bound itself to continue to pay premiums until the Secretary canceled the bond and gave the surety notice thereof. So far as disclosed by the record, the payment of premiums was voluntary.

*525

The judgment of the Court of Claims is Affirmed.

Mr. Justice McKENNA dissents.

(246 U. S. 446)

SALT LAKE INV. CO. v. OREGON SHORT LINE RAILROAD COMPANY.

(Argued March 8, 1918. Decided April 15, 1918.)

No. 29.

1. PUBLIC LANDS ⇐29 — ENTRIES — TOWN SITE.

Under the Pre-emption Act (Act Sept. 4, 1841, c. 16, 5 Stat. 455) § 10, excluding from acquisition thereunder all lands within the limits of any incorporated towns, an entryman who filed a declaratory statement and secured a patent to lands within the boundaries of an incorporated town acquired no title thereto, even though the property was never actually occupied as a town site or attempted to be entered as such.

2. PUBLIC LANDS ⇐29—RAILROAD RIGHT OF WAY—GRANT OF PUBLIC WAY.

Public land included within lands granted to a railroad company as a right of way is not excepted because of the mere presence of a squatter thereon, where there was no such exception contained in the act.

3. PUBLIC LANDS ⇐29—ENTRYMAN—RIGHTS OF WAY.

Where an entry on public lands within the corporate limits of a city was invalid under the pre-emption law, and rights of a railroad company to such land as part of its right of way had become vested, Act March 3, 1877, c. 113, 19 Stat. 392, subsequently enacted, cannot be deemed to have divested the rights of the railroad company, and confirmed the pre-emption entry which was originally invalid.

4. PUBLIC LANDS ⇐92 — RIGHT OF WAY — GRANT OF PUBLIC LANDS.

Where, under Act Dec. 15, 1870, c. 2, 16 Stat. 395, a railroad company was granted a right of way over public lands, it is entitled to a right of way over lands within an incorporated city, despite the town-site law, for it could not have been intended that the right of way would stop at the city limits.

In Error to the Supreme Court of the State of Utah.

Action by the Salt Lake Investment Company against the Oregon Short Line Railroad Company, which counterclaimed, pleading title in itself. A judgment for plaintiff was reversed and remanded, with directions to set aside the same and enter judgment in favor of defendant quieting its title (46 Utah, 403, 148 Pac. 439), and plaintiff brings error to the Supreme Court of the State of Utah. Judgment affirmed.

Messrs. W. H. King, E. A. Walton, and M. E. Wilson, all of Salt Lake City, Utah, and T. T. Ansberry, of Washington, D. C., for plaintiff in error.

Messrs. Henry W. Clark, of New York City, and George H. Smith, of Salt Lake City, Utah, for defendant in error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

A small parcel of land in Utah is here the subject of conflicting claims—one under a patent to Malcolm *Macduff issued under the Pre-Emption Act, c. 16, 5 Stat. 453, and the other under an act, chapter 2, 16 Stat. 395, granting a right of way "through the public lands" to the Utah Central Railroad Company. The court below sustained the latter claim, 46 Utah, 203, 148 Pac. 439, and the case is here on a writ of error allowed before the Act of September 6, 1916, c. 448, 39 Stat. 726, became effective.

*441

Macduff's pre-emption claim was initiated by settlement June 10, 1869; his declaratory statement was filed in the local land office July 21 of that year; he paid the purchase price and secured an entry January 19, 1871, and the patent was issued June 5, 1871.

The right of way was granted December 15, 1870. At that time the railroad was completed and in operation for its full length. Cong. Globe, 41st Cong. 2 Sess. 4512, 5635; Moon v. Salt Lake County, 27 Utah, 435, 442, 76 Pac. 222. It was constructed late in 1869 or early in 1870, after Macduff filed his declaratory statement and before he paid the purchase price or secured his entry.

Continuously after 1860 the tract sought to be pre-empted was within the corporate limits of Salt Lake City, as defined by a public statute, but was never actually occupied as a town site nor attempted to be entered as such. The parcel in controversy is within that tract, is also within the exterior lines of the right of way, and is occupied and used for right of way purposes.

The plaintiff in error is the successor in interest and title of Macduff and the defendant in error is the like successor of the Utah Central Railroad Company.

[1, 2] The Pre-Emption Act, § 10, excluded from acquisition thereunder all lands "within the limits of any incorporated town." Thus the land which Macduff sought to pre-empt was not subject to pre-emption, and could no more be entered or acquired in that way than if it were in an Indian or military reservation. See Wilcox v. Jackson, 13 Pet. *445 498, 511, 10 L. Ed. 264. That it was not actually occupied as a *town site, nor sought to be entered as such, is immaterial. As Mr. Justice Miller pointed out in Root v. Shields, 20 Fed. Cas. 1160, 1166, Congress did not confine the exclusion to such lands as were so occupied, or such as were subject to town site entry, but "deemed the short way the best way—to exclude them all from the operation of the act by a general rule." In that case the learned justice held a pre-emption entry of land within the corporate limits of Omaha "illegal and void," and said in that connection:

"Again, the defect in the title was a legal defect; it was a radical defect. It was as if no entry had ever been made. By it Shields did not take even an equity. After he had gone through the process of making the entry, after he received the patent certificate, Shields had no more right, or title, or interest in the land than he had before. And as he had none, he could convey no interest in the land. By the deed which he made, and by the successive deeds which they received, his grantees took no more than he had, which was nothing at all."

In the case of Burfenning v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175, a plaintiff in ejectment relied on a patent issued under the homestead law, which adopted the excluding provision of the pre-emption act, and his title was challenged on the ground that the entry and patent were for land within the corporate limits of Minneapolis. This court observing, first, that the record affirmatively disclosed that the land was in the city limits when the claim was initiated, and second, that the case was not one where a finding by the Land Department on a question of fact resting on parol evidence was sought to be drawn in question, held the patent void under the general rule that:

"When by act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a *patent, transfer no title and may be challenged in an action at law." *449

Applying these views, we think Macduff's settlement and declaratory statement under the pre-emption act were of no effect. They neither conferred any right on him nor took any from the government. His claim was not merely irregular or imperfect, but was an impossible one under the law, and so the status of the land was not affected thereby. The land continued to be subject to the disposal of Congress and came within the terms of the right of way act as much as if he were making no claim to it. Of course, the presence on public land of a mere squatter does not except it from the operation of such an act containing, as here, no excepting clause.

[3] It is said that by the act of March 3, 1877, c. 113, 19 Stat. 392, Congress confirmed or provided for the confirmation of pre-emption claims such as this. Assuming, without so deciding, that the act is susceptible of this interpretation, we think it does not disturb rights which were conferred and became vested under the right of way act more than six years before.

[4] It seems also to be thought that the town-site law in some way prevented the right of way act from reaching public land within the city limits, but on examining both statutes we are persuaded there is no basis for so thinking. Certainly it was not intended that the right of way should stop at the city limits, and, as the town-site law interposed no obstacle, we think the right of way act was intended to and did apply to the public land lying inside those limits over which the railroad had been constructed.

Judgment affirmed.

(246 U. S. 547)

THOMPSON v. UNITED STATES.

(Argued March 12, 1918. Decided April 15, 1918.)

No. 184.

1. COURTS ⊜454—COURT OF CLAIMS—JURISDICTION.

Under Judicial Code (Act March 3, 1911, c. 231) § 162, 36 Stat. 1139 (Comp. St. 1916, § 1153), declaring that the Court of Claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June 1, 1865, under the provisions of Act March 3, 1863, c. 120, 12 Stat. 820, entitled "An act to provide for the collection of abandoned property," and acts amendatory thereof, where the property so taken was sold, and the net proceeds were placed in the treasury, the Court of Claims has no jurisdiction to award to the claimant the proceeds of cotton so seized, where the cotton had been sold to the Confederate States of America, and payment had been made in its bonds, though the seller retained possession of the cotton until the time of the seizure, and at that time the bonds had become worthless, because of the fall of the Confederacy.

2. COURTS ⊜454—COURT OF CLAIMS—JURISDICTION.

Under such section, the Court of Claims cannot be deemed to have jurisdiction of a claim of the above nature, on the theory, that, if not so construed, the section would be ineffective and meaningless, for the intention of the Legislature is to be sought for primarily in the language used, and, where this expresses an intention reasonably intelligible and plain, it must be accepted without modification by resort to construction or conjecture.

3. STATUTES ⊜283(1)—CONSTRUCTION—PRESUMPTIONS.

It will be presumed that Congress, at the time of enacting a statute, had full knowledge

of judicial decisions germane to the subject-matter of the statute.

Appeal from the Court of Claims.

Petition by Robert H. Thompson, administrator of the estate of John H. Thompson, deceased, against the United States, to recover the net proceeds of cotton seized and sold under Act March 3, 1863, providing for the collection of abandoned property. From a judgment of the Court of Claims, sustaining a demurrer to the petition (51 Ct. Cl. 510), petitioner appeals. Affirmed.

Messrs. William B. King, George A. King, and William E. Harvey, all of Washington, D. C., for appellant.

Mr. Assistant Attorney General Thompson, for the United States.

*518 *Mr. Justice CLARKE delivered the opinion of the Court.

This is an appeal from a decision by the Court of Claims sustaining a demurrer and dismissing appellant's petition.

The appellant alleges that his decedent on April 28, 1863, "executed a bill of sale to the Confederate States of America" for seventy-two bales of cotton and received therefor "bonds of the Confederate States government to the nominal value of $5,500." This bill of sale reads as follows:

"72 Bales; Aggregate Weight 37309 at 15 $5,596.35/100

"State of Mississippi, County of Copiah:

"Pine Ridge, April 28/63.

"The undersigned having sold to the Confederate States of America, and received the value of same in bonds, the receipt of which is hereby acknowledged, bales of cotton, marked, numbered and classed as in the margin, which are now deposited at his gin house & shed hereby agrees to take due care of said cotton whilst on his plantation, and to deliver the same at his own expense, at Brookhaven, in the state of Miss. to the order of the Secretary of the Treasury, or his agents, or their assigns.

"J. H. Thompson."

It is further alleged that the appellant has no knowledge as to the disposition made of the bonds received by his decedent and that they became valueless on surrender of the military forces of the Confederate States; that the cotton remained in the possession of his decedent until subsequent to June 30, 1865, when forty-three of the seventy-two bales were taken from him by United States Treasury agents under warrant of the Act of Congress, approved March 3, 1863, entitled "An act to provide for the collection of abandoned property" and for other purposes; that *519 the cotton was sold and the proceeds deposited in the Treasury of the United States, and that "the claimant (appellant) and said decedent have at all times borne true allegiance to the government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the said government, that is to say, if any such acts were committed during the late Civil War between the years 1861 and 1865, a full pardon has been granted therefor by the President of the United States."

[1] Upon the facts thus stated the appellant asserts a right to recover the net proceeds of the cotton seized and sold, based upon the terms of section 162 of the Act of March 3, 1911 (the Judicial Code) which reads as follows:

"Sec. 162. The Court of Claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June the first, 1865, under the provisions of the act of Congress approved March twelfth [third], 1863, entitled 'An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,' and acts amendatory thereof where the property so taken was sold and the net proceeds thereof were placed in the Treasury of the United States; and the Secretary of the Treasury shall return said net proceeds to the owners thereof, on the judgment of said court, and full jurisdiction is given to said court to adjudge said claims, any statutes of limitations to the contrary notwithstanding."

Assuming that the pardon pleaded in the petition and the decisions of this court relieve the appellant of any disability on account of the claimed disloyalty of his decedent (Carlisle v. United States, 16 Wall. 147, 21 L. Ed. 426), it is clear that he can prevail only if his decedent was the owner of the cotton when it was seized, for the Court of *520 Claims is given jurisdiction to hear and determine only "claims of those whose property is taken," and this language can have no other meaning.

In the case of Whitfield v. United States, 92 U. S. 165, 23 L. Ed. 705, it was decided that a sale of cotton, with payment in bonds, under circumstances precisely similar to those we have here, passed title to the Confederate government without formal delivery, so that the vendor ceased to be the owner of the cotton from the time he accepted the bonds.

It is frankly conceded by the appellant that this decision rules the case at bar and we are asked to reconsider and overrule it on various grounds.

It is argued that, because appellant's decedent in this case (as in that) continued in possession of the cotton until his vendee became insolvent and the bonds given in payment became valueless, he had a lien for the value of it, which constituted him the owner within the meaning of the statute.

The report of the Whitfield Case shows that this claim was pressed upon the attention of this court, and that it was rejected for the reason that the bonds were accepted as payment, as fully as if it had been made in money, with all the incidents of such payment. With this conclusion we are satisfied.

[2, 3] It is also argued that Congress, in enacting this section, intended to give a right of recovery to all persons who sold cotton to the Confederate government, which was afterwards seized by the United States under warrant of the Act of March 3, 1863, re-

ferred to, and upon the theory that such sales were void and therefore did not pass title but left the nominal vendors the owners of the cotton, we are urged to so construe the section as to give effect to such supposed intention.

It is asserted that evidence of this intention is to be found in the fact that if not so *551 construed the section will be ineffective and * meaningless, because all claims for*property taken from owners under the Act of March 3, 1863, other than for such as was sold to the Confederate government had been disposed of before its enactment.

Even if the non-existence of other claims for the statute to operate upon were shown, as it is not, by the petition and the attached exhibit, still this contention could not be allowed.

The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture. Gardner v. Collins, 2 Pet. 58, 93, 7 L. Ed. 347; United States v. Goldenberg, 168 U. S. 95, 102, 18 Sup. Ct. 3, 42 L. Ed. 394.

We have found that section 162, relied upon by appellant, is sufficiently clear in meaning, and we cannot doubt that if the Congress had intended by it to change the law, as evidenced by the Whitfield decision, of which we must assume that it had full knowledge (Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238, 245, 22 Sup. Ct. 881, 46 L. Ed. 1144) it would have done so in plain terms, especially in a matter of such great importance as we have here, and that language would not have been used which, as we have seen, confers jurisdiction upon the Court of Claims only in cases which are clearly consonant with and within the scope of that decision.

It results that the judgment of the Court of Claims must be

Affirmed.

(246 U. S. 512)

CHICAGO & N. W. RY. CO. v. UNITED STATES.

(Argued March 27 and 28, 1918. Decided April 15, 1918.)

No. 250.

CARRIERS ⊂=37—CARRIAGE OF LIVE STOCK—VIOLATION OF ACT JUNE 29, 1906 — DUE DILIGENCE.

Act June 29, 1906, c. 3594, 34 Stat. 607 (Comp. St. 1916, §§ 8651–8654), intended to prevent cruelty to animals while in transit, which forbids an interstate railroad carrier from confining animals in cars longer than 36 hours, upon written request, without unloading them for rest, water, and feeding, unless prevented by storm, or by other accidental or unavoidable causes, which cannot be anticipated or avoided by the exercise of due diligence, should be construed with a view to carrying its humanitarian purpose into effect; but the exception in favor of the carrier should be given proper latitude, in the light of practical railroad conditions, so that where, in the exercise of ordinary care, prudence, and foresight, a carrier reasonably expects that, following its determined schedule, the shipment will reach its destination or some unloading place within the prescribed time, the animals may be put in transit, and it is a sufficient compliance with the requirement of due diligence that the carrier thereafter exercises the diligence and foresight which a prudent man, experienced in such matters, would adopt.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Action by the United States against the Chicago & Northwestern Railway Company to recover a penalty for violation of Act June 29, 1906. A judgment for the United States was, on writ of error, affirmed by the Circuit Court of Appeals for the Seventh Circuit Court (234 Fed. 268, 148 C. C. A. 170), and defendant brings certiorari. Reversed and remanded.

Mr. Charles A. Vilas and William G. Wheeler, both of Chicago, Ill., for petitioner.

Mr. Assistant Attorney General Frierson, for the United States.

*Mr. Justice McREYNOLDS delivered the *514 opinion of the Court.

Charging violation of the Act of June 29, 1906 (34 Stat. 607), to prevent cruelty to animals while in transit, the United States sued petitioner for the prescribed penalty and recovered a judgment in the District Court, Northern District of Illinois, which the Circuit Court of Appeals affirmed. 234 Fed. 268, 148 C. C. A. 170.

The statute forbids an interstate railroad carrier from confining animals in cars longer than thirty-six hours, upon written request, without unloading them for rest, water and feeding "unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by *515 the exercise of due diligence and*foresight," and subjects every such carrier "who knowingly and willfully fails to comply" therewith to a penalty. Admitting continuous confinement for more than thirty-six hours petitioner defended upon the ground that it was prevented from unloading within the required period by exculpatory accidental and unavoidable causes.

It appeared: The animals were loaded at Ringsted, Iowa, 438 miles from destination—Union Stock Yards, Chicago—at 6 p. m. October 4th, and as part of a train the car containing them left Clinton, Iowa, 138 miles from Chicago, at 6 p. m. October 5th. The ordinary schedule time between the latter points is nine hours, but without increase of actual moving speed the run had been made in about six. While the train was passing through Proviso, 16 miles from destination, at 2:48 a. m. October 6th a drawbar came

out and derailed a car. A delay of two hours and fifty-two minutes followed—not undue the carrier contends, but unreasonably long the government maintains. Later, at Brighton Park an air hose burst causing further delay of twenty-eight minutes. The car reached the stock yards at 9:05 a. m. October 6th—thirty-nine hours and five minutes after being loaded.

In its charge to the jury the trial court said:

"Your inquiry has to do with the transportation of this car of stock from the point of origin out in Iowa to destination, Union Stock Yards, and if, on the evidence in this case, you conclude that the railway company, by the exercise of due diligence, would have gotten that car of stock from the point of origin to Union Stock Yards inside of thirty-six hours, your verdict should be in favor of the United States and against the defendant, even though you should be of the opinion that these two particular things which have been made the subject of most of the contention here were properly handled by the railway company.

*516 *"Now, in determining this question you take into consideration the distance, among other things, the distance shown by the evidence from the point of origin to destination, what the evidence shows as to the period of time, thirty-nine hours and five minutes consumed from point of origin to destination, not merely from Clinton to Chicago, the whole movement is here for your consideration and to be considered by you in determining whether or not due diligence has been shown by the carrier.

"Now, what is due diligence? Due diligence, as that term is used in this statute means the exercise of foresight bringing to bear on the situation in hand, the transaction in hand, the human intelligence of an average man employed in such business and exercised by a man who has been experienced in railroad business, trained in railroad business so that he knows what should be done in the matter of handling railroads, operating railroads, moving cars—not merely the movement of an engine, the handling of the throttle by an engineer, not merely the handling of the conductor's work, the brakeman's work or the division superintendent's work, but the whole thing involved in the transaction of operation of the railroad in so far as the movement of this train is concerned, and whatever ingenuity, that is to say whatever human intelligence could devise and put in operation, having in mind the practical operation of a railroad, and having in mind the purpose which the law has, to get stock to market within the time mentioned, having in mind the movement of trains, the keeping of a railroad open, what human ingenuity could devise, in so far as human intelligence goes, having the benefit of experience, in the way of safeguards and in the way of provision to get stock from origin to destination within the period of this statutory limit, the railroad company has to do. Of course it is not the law that a railway company may lay out a slow schedule over a long *517 distance and then if just before they get in to destination something happens for which they were not prepared or equipped, merely because if that thing had not happened they might have skinned in within the thirty-six limit they are excused; that is not the law."

The statute must be construed with a view to carrying its humanitarian purpose into effect and the exception in favor of the carrier given proper latitude and enforced in the light of practical railroad conditions. Nothing indicates the running schedule was unduly slow; and the jury were improperly given to understand that, conceding matters were properly handled when accidents occurred at Proviso and Brighton Park, they might nevertheless decide the railroad could have got the car to destination within thirty-six hours if due diligence had been exercised in laying out such schedule. The definition of "due diligence" in the charge was too exacting and misleading. As applied to the facts due diligence did not require, as the court declared, that "whatever ingenuity, that is to say whatever human intelligence could devise and put in operation, having in mind the practical operation of a railroad, and having in mind the purpose which the law has, to get stock to market within the time mentioned, having in mind the movement of trains, the keeping of a railroad open, what human ingenuity could devise, in so far as human intelligence goes, having the benefit of experience, in the way of safeguards and in the way of provision to get stock from origin to destination within the period of this statutory limit, the railroad company has to do."

We find nothing in the act indicating a purpose to interfere directly with the carrier's discretion in establishing schedules for trains; the design was to fix a limit beyond which animals must not be confined, whatever the schedule, except under the extraordinary circumstances stated. In general, unloading can only take place at specially prepared places or final destination. *518 If in the exercise of *ordinary care, prudence* and foresight the carrier reasonably expects that following the determined schedule the containing car will reach destination or some unloading place within the prescribed time it properly may be put in transit. Thereafter the duty is on the carrier to exercise the diligence and foresight which prudent men, experienced in such matters, would adopt to prevent accidents and delays and to overcome the effect of any which may happen—with an honest purpose always to secure unloading within the lawful period. If, notwithstanding all this, unloading is actually prevented by storm or accident the reasonable delay must be excused.

In the Hours of Service Act, 34 Stat. 1415, 1416 (Comp. St. 1916, § 8679), there is a proviso:

"That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen. * * *"

Construing this, in Atchison, T. & S. F. Ry. Co. v. United States, 244 U. S. 336, 343, 37 Sup. Ct. 635, 637 (61 L. Ed. 1175), we said:

"It was not the intention of the proviso, as we read it, to relieve the carrier from the exercise of diligence to comply with the general provisions of the act, but only to relieve it from ac-

cidents arising from unknown causes which necessarily entailed overtime employment and service. United States v. Dickson, 15 Pet. 141 [10 L. Ed. 689]. It is still the duty of the carrier to do all reasonably within its power to limit the hours of service in accordance with the requirements of the law."

This general principle should also be followed in construing and applying the provision of the statute here under consideration.

The judgment below is reversed and the cause remanded to the District Court for further proceedings in accordance with this opinion.

Reversed and remanded.

(246 U. S. 388)

SMITH, Auditor, v. JACKSON.

(Argued March 6 and 7, 1918. Decided April 15, 1918.)

No. 457.

1. JUDGES ⇐22(5) — SALARY DEDUCTIONS — AUDITOR OF CANAL ZONE.

Congress having, by Act Aug. 24, 1912, c. 390, 37 Stat. 565, created a district court of the Canal Zone and provided for the appointment of a judge and fixed the salary attached to the office, the Auditor of the Canal Zone is without authority to refuse to give effect to the congressional acts fixing and appropriating the salary of such judge by withholding such sum as he may think is due from the judge as rent for quarters in property belonging to the United States in the Canal Zone.

2. COSTS ⇐260(5)—VEXATIOUS WRIT—DAMAGES.

Where the Auditor of the Canal Zone, in defiance of the opinion of the Attorney General that he had no right to withhold any portion of the salary of the judge of the district court of the Canal Zone as fixed by Act Aug. 24, 1912, c. 390, made deductions, and, after a judgment issuing a writ of mandamus against him had been affirmed by the Circuit Court of Appeals, prosecuted a writ of error from the Supreme Court to review the same, he was guilty of an abuse of discretion which would ordinarily necessitate the enforcement of Rule 23 (29 Sup. Ct. xix) as to damages; but the matter relating solely to the obligation to perform a public duty, and not involving a monetary judgment, the judgment will be affirmed without damages.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Petition for mandamus by William H. Jackson against H. A. A. Smith, Auditor of the Canal Zone. A judgment for relator was affirmed on writ of error by the Circuit Court of Appeals for the Fifth Circuit (241 Fed. 747, 154 C. C. A. 449), and respondent brings error. Affirmed.

Messrs. B. F. Harrah and Walter W. Warwick, both of Washington, D. C., for plaintiff in error.

Mr. Joseph W. Bailey, of Washington, D. C., for defendant in error.

*389 *Mr. Chief Justice WHITE delivered the opinion of the Court.

Congress provided for a district court of the Canal Zone, the appointment of a judge, and the salary attached to the office. Act of August 24, 1912, c. 390, 37 Stat. 565, § 8 (Comp. St. 1916, § 10044). In due course the salary fixed was definitely appropriated for. It is apparent that some controversy arose as to whether the Auditor of the Canal Zone had the power to refuse to give effect to the act of Congress fixing and appropriating the salary by withholding such sum as he might think was due from the judge as rent for quarters in property belonging to the United States in the Canal Zone. We say this is to be inferred, because in 1915 the Secretary of War submitted to the Attorney General two questions: First, whether the district judge was entitled to the same privilege as to quarters in the Canal Zone there enjoyed by other employés of the government; and second, if not, whether the Auditor had authority to deduct from the salary of the judge before paying it the sum which he considered due for rent of such quarters. Reversing the order in which the questions were asked, the Attorney General came first to reply to the second question and said:

"* * * Without specific authority no portion of the salary of an officer of the United States may be withheld. See 20 Ops. 626 (1893); Benedict v. United States, 176 U. S. 357, 20 Sup. Ct. 458, 44 L. Ed. 503 (1900). * * *"

While it is apparent that this ruling should have put the subject at rest, obviously the misconception of the *Auditor as to the nature of his powers prevented that result from being accomplished and the Auditor refused to carry out the act of Congress and deducted from the salary of the judge, fixed by Congress, not only a charge for rent of quarters, but a sum which he considered due because of the absence of the judge from the Canal Zone during a certain period. The judge thereupon commenced the proceeding which is before us to compel the Auditor to perform his plain duty under the law and pay the salary without the deductions. As the result of the action of the Auditor and the necessity for bringing the suit, the expense was occasioned the United States of calling a judge from the United States to hear the cause and Judge Clayton of the Middle and Northern Districts of Alabama proceeded to the Canal Zone to discharge that duty. He did so, stating the reasons which controlled him in an elaborate and careful opinion making perfectly manifest the error of the action of the Auditor and his wrong in refusing to observe the ruling of the Attorney General in the premises. 241 Fed. 747, 154 C. C. A. 449. From the consequent judgment directing the payment of salary to be made without the deductions the Auditor prosecuted error to the Circuit Court of Appeals for the Fifth Circuit, in which court the judgment below was affirmed, and it is a further writ of error prosecuted by the Auditor from this court to that ruling which brings the subject-matter before us now.

*390

[1, 2] The expense of printing a voluminous record has been occasioned and the views of the Auditor have been pressed before us in a printed argument of more than one hundred pages. We think, however, that we need not follow or discuss that argument, as we are of opinion that it is obvious on the face of the statement of the case that the Auditor had no power to refuse to carry out the law and that any doubt which he might have had should have been subordinated, first, to the ruling of the Attorney *391 General and, second, beyond all possible question to the judgments of the courts below. It follows, therefore, that the prosecution of the writ of error from this court constituted a plain abuse by the Auditor of his administrative discretion. In an ordinary case the situation would be one not only justifying but making it our duty to direct the enforcement of Rule 23, (29 Sup. Ct. xix) as to damages. As, however, the judgment is not one for money but relates solely to the obligation to perform a manifest public duty, and plain as may have been the abuse of discretion committed, we are fain to believe it involved no intentional disregard of official duty, we pass that subject by and our order will be

Judgment affirmed.

(246 U. S. 439)

BOSTON & M. R. R. v. PIPER.

(Submitted March 14, 1918. Decided April 15, 1918.)

No. 208.

1. Carriers ⇐218(5) — Carriage of Live Stock—Limitation of Liability.

A provision in a uniform live stock agreement filed with the Interstate Commerce Commission and covering an interstate shipment which limited the shipper's damages for unusual delay resulting from negligence to the amount actually expended by the shipper in the purchase of food or water for the stock while detained is invalid as a contract exempting the carrier from liability for its own negligence, and cannot be sustained as a contract limiting recovery to an agreed valuation in consideration of a reduced rate.

2. Carriers ⇐30—Rates—Conditions—Filing with Interstate Commerce Commission.

While the legal conditions and limitations in a railroad company's bill of lading, the form of which was duly filed with the Interstate Commerce Commission as part of its tariffs, are binding until changed by that body, illegal conditions and limitations are void though so filed.

In Error to the Supreme Court of the State of Vermont.

Action by E. G. Piper against the Boston & Maine Railroad to recover damages for loss occasioned by delay in delivering cattle as a result of the company's negligence. A judgment for plaintiff was affirmed (90 Vt. 176, 97 Atl. 508), and defendant brings error. Affirmed.

Mr. Edwin W. Lawrence, of Rutland, Vt., for plaintiff in error. Mr. Marvelle C. Webber, of Rutland, Vt., for defendant in error.

*442 Mr. Justice DAY delivered the opinion of the Court.

This suit was brought by Piper against the Boston & Maine Railroad to recover damages for loss occasioned by delay in delivering cattle as a result of the company's negligence. The plaintiff recovered damages and the judgment was affirmed by the Supreme Court of Vermont. 90 Vt. 176, 97 Atl. 508.

The plaintiff shipped the cattle upon paying the reduced rate for shipment thereof under the Uniform Live Stock Agreement containing, among other things, the following:

"The same has been received by said carrier for itself and on behalf of connecting carriers for transportation subject to official tariffs, classifications and rules of the said company and upon the following terms and conditions which are admitted and accepted by the said shipper as just and reasonable. * * * That in the event of any unusual delay or detention of said live stock caused by the negligence of said carrier or its employés or its connecting carriers or their employés or otherwise the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper in the purchase of food and water for said stock while so detained. * * * And E. G. Piper does hereby acknowledge that he had the option of shipping the above-described live stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies as common carriers of the said live stock upon their respective roads and lines, but has voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned."

*443 [1] The tariffs in effect at the time the shipment moved provided for a rate of $42 when the Uniform Live Stock Agreement was signed and that:

"Live stock will be taken at the reduced rates fixed in the tariff only when a uniform live stock contract is executed by the station agent and the consignor, and when the release on the back of said contract is executed by man or men who are to accompany said live stock. If consignor refuses to execute a uniform live stock contract, the live stock will be charged ten (10) per cent. higher than the reduced rates specified herein provided, that in no case shall such higher charge be less than one (1) per cent. per one hundred pounds."

The company's tariffs were duly filed with the Interstate Commerce Commission and contained a copy of the Uniform Live Stock Contract as above set forth.

Interstate shipments of the character here in controversy made upon bills of lading, and under tariffs filed with the Interstate Commerce Commission, have been the subject of frequent consideration in this court. The binding character of the stipulations of the bill of lading and of the rates as fixed in the filed tariffs, have been recognized and en-

forced. St. Louis, Iron Mountain & Southern Ry. Co. v. Starbird, Adm'r, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. Ed. 917, and previous cases in this court therein cited.

The Carmack Amendment (Comp. St. 1916, §§ 8604a, 8604aa) requires the initial carrier to issue a bill of lading, and carriers are obliged to carry the articles shipped at the rates fixed in the published tariffs. Many decisions of this court have held that the carrier may offer to the shipper and the shipper may be bound by a contract which limits recovery to a valuation declared by the shipper in consideration of the reduced rate for the carriage of the freight. This rule was stated in an early case arising after the passage of the Carmack Amendment. Adams Express Co. v. Croninger, 226 U. S. 491, 509, 510, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, and has been frequently reiterated since.

*444 In the cases in which the recovery for the lesser valuation has been affirmed, the shipper was offered an opportunity to recover a greater sum than the declared value upon paying a higher rate to the carrier. The shipper was offered alternative recoveries based upon different valuations upon the payment of different rates, and was held bound by the one chosen. Such contracts of shipment this court has held not to be in contravention of the settled principles of the common law preventing a carrier from contracting against liability for losses resulting from its own negligence, and are lawful limitations upon the amount of recovery binding upon the shipper upon principles of estoppel. Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, followed and approved since the passage of the Carmack Amendment in Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, supra, and see Wells Fargo & Co. v. Neiman-Marcus Co., 227 U. S. 469, 33 Sup. Ct. 267, 57 L. Ed. 600; Kansas Southern R. Co. v. Carl, 227 U. S. 657, 33 Sup. Ct. 391, 57 L. Ed. 683; Chicago, R. I. & Pacific R. Co. v. Cramer, 232 U. S. 490, 34 Sup. Ct. 383, 58 L. Ed. 697; Boston & Maine R. Co. v. Hooker, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593; Atchison, Topeka & Santa Fé R. Co. v. Robinson, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901. Furthermore it has been held that a low valuation will not prevent the application of the rule making the agreement binding upon the shipper. Pierce Co. v. Wells Fargo & Co., 236 U. S. 278, 285, 35 Sup. Ct. 351, 59 L. Ed. 576.

While the rule of the lesser recovery based upon lesser rates, when the shipper has been given the option of higher recovery upon paying a higher rate has been held binding upon the shipper so long as the published tariff remains in force, this court has not held a bill of lading containing a limitation against liability for loss caused by the carrier's negligence, such as is here involved, to be conclusive of the shipper's right to recover. In the previous decisions of this court upon the subject it has been said that the limited valuation for which a recovery may be had does not permit the carrier to defeat recovery because of losses arising from its own negligence, but serves to fix the amount *445 of recovery upon an agreed valuation made in consideration of the lower rate stipulated to be paid for the service.

[2] In the bill of lading, now under consideration, there is an express agreement limiting liability from unusual delay and detention, caused by the carrier's negligence, to the amount actually expended by the shipper in the purchase of food and water for his stock while so detained. This stipulation contravenes the principle that the carrier may not exonerate itself from losses negligently caused by it, and is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate. Such stipulations as are here involved are not legal limitations upon the amount of recovery, but are in effect attempts to limit the carrier's liability for negligence by a contract which leaves practically no recovery for damages resulting from such negligence. While this provision was in the bill of lading, the form of which was filed with the railroad company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact. The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed by that body (Kansas Southern Ry. v. Carl, 227 U. S. 639, 654, 33 Sup. Ct. 391, 57 L. Ed. 683); but not so of conditions and limitations which are, as is this one, illegal, and consequently void.

We find no error in the judgment of the Supreme Court of Vermont, and the same is

Affirmed.

(246 U. S. 391)

SPRING VALLEY WATER CO. v. CITY AND COUNTY OF SAN FRANCISCO et al.

(Argued March 19, 1918. Decided April 15, 1918.)

No. 211.

1. TAXATION ⟹87—PROPERTY SUBJECT TO—FUNDS IN POSSESSION OF DEPOSITARIES — "RECEIVER."

Under Pol. Code Cal. § 3647, declaring that money in litigation in possession of the court or receiver must be assessed and the taxes paid thereon under direction of the court, the term "receiver" embraces any person acting as an agent or depositary of funds for a court, so where preliminary injunctions against enforcement of water rates as fixed by ordinance were granted on condition that the sums collected by the complainant water company in excess of the rates fixed should, pending the outcome of the litigation, be deposited in banks subject to the order of court, such sums are taxable under an assessment against the banks as receivers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Receiver.]

2. TAXATION ⟹423 — ASSESSMENT — SUFFICIENCY OF DESCRIPTION.

In the above case, an assessment describing each bank as "Receiver of Impounded Moneys" and as "Receiver or Depository under Order of Court of the Impounded Moneys," in certain numbered suits, sufficiently described the property assessed, even though no money was in fact deposited in one suit and the assessment assessed as a unit all the moneys impounded in each suit, for the court in exercising its jurisdiction over the moneys having specifically directed their deposit to special accounts in each suit separately, was enabled to distribute the funds after apportioning the tax chargeable to each.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Suits by the Spring Valley Water Company against the City and County of San Francisco and another. Orders directing depositaries to pay taxes assessed against funds in their possession were affirmed by the Circuit Court of Appeals of the Ninth Circuit (225 Fed. 728, 140 C. C. A. 209), and complainant appeals. Affirmed.

*392 *In 1908 the Spring Valley Water Company, the appellant, commenced in the Circuit Court of the United States for the Northern District of California a suit against the City and County of San Francisco to enjoin the enforcement of an ordinance fixing the water rates for that year. A preliminary injunction was granted upon the condition that all sums collected by the Water Company from its customers in excess of the ordinance rates should be deposited in a bank agreed upon by the parties or designated by the court to await the outcome of the litigation. The sums so collected, it was provided, should be received by the bank as a special deposit subject to the order of the court and should be paid out on checks drawn by a special master and countersigned by a judge of the court. Pursuant to a stipulation of the parties the court subsequently designated the Mercantile Trust Company of San Francisco as the depository for the impounded moneys and ordered that the account should be entitled "Spring Valley Water Company—Special Account" and should bear two per cent. interest per annum. Each year following down to 1913 the Water Company brought a similar suit to enjoin the ordinance fixing water rates for the respective year. In four of these five cases a preliminary injunction was granted upon the same condition expressed in the preliminary injunction awarded in the 1908 suit. In the fifth, although a preliminary injunction was granted, no order was made concerning the impounding of sums collected in excess of the ordinance rates, but the parties stipulated that the moneys collected during the year embraced by that suit should also be deposited in the bank designated by the court to await the final outcome of the case. Pursuant to these orders and stipulations the Water Company made deposits of the moneys in the Mercantile Trust Company of San Francisco and from time to time the court, to safeguard the funds, ordered portions of it transferred from that bank to six other banks in San Francisco. The money thus transferred and deposited in the six banks was placed in special accounts subject to the order of the court, to be withdrawn only by check signed by the special master and countersigned by a judge of the court.

The moneys on deposit in each of the seven banks on the first Mondays in March, 1913 and 1914, were by the local officer assessed for taxation for those years. In each assessment the bank was described as "Receiver of Impounded Moneys" and "Receiver or Depository under Order of Court of the Impounded Moneys in Equity Suits numbered 14275, 14735, 14892, 15131, 15569, 15344 and 26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." With the exception of No. 14275 (which was a suit begun in 1907 to enjoin the water rates of that year and in which the court made no order concerning the impounding of funds and no deposits were made by the Water Company) the suits referred to are those which we have previously mentioned. On application of the tax collector of the City and County of San Francisco the District Court of the United States after notice and a hearing directed the payment of the taxes. As there were two assessments against each of the seven banks, the court issued fourteen orders and to reverse the decrees of the court below affirming the action of the trial court fourteen appeals are prosecuted. 225 Fed. 728, 140 C. C. A. 209. While the order under review on this record concerned the assessment of moneys in the possession of the Mercantile Trust Company of San Francisco in

March, 1913, and directed the payment of taxes in the sum of $8,479.89, there is a stipulation that the appeals in the other thirteen cases (numbers 212 to 224) are to be determined by the decision in this.

Messrs. Ira A. Campbell, Edward J. McCutchen, and A. Crawford Greene, all of San Francisco, Cal., and Alex Britton and Evans Browne, both of Washington, D. C., for appellant.

Messrs. Robert M. Searles, and Percy V. Long, both of San Francisco, Cal., for appellees.

*394 * Mr. Chief Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

The sole ground urged for reversal is the invalidity of the assessment (a) because it was not authorized by any statute of the state, and (b) because it did not contain a sufficient description of the property assessed, and we come to consider these objections under two headings.

[1] 1. That the assessment was authorized by the following section of the Political Code of California we think is clear:

"Section 3647. Property and money in litigation. Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court."

Without following and directly answering the argument advanced to sustain the contrary view, we content ourselves with a summary statement of the reasons for our conclusion. Words cannot make clearer than does the language of the text the purpose of the section to tax property or money in litigation in the hands of a court. Indeed the Supreme Court of California has so construed the section. Los Angeles v. Los Angeles City Water Co., 137 Cal. 699, 70 Pac. 770; Bessolo v. City of Los Angeles, 169 Pac. (Cal.) 372. It is further manifest that the taxation of the money deposited in the injunction suits was what was sought to be accomplished by the assessment which was made. *395 The money assessed was in litigation, was in the custody of the court and was by its direction placed in the bank in a special account subject to the control of the court. Moreover the assessment to the bank which held the money for the court was a direct compliance with the terms of the section, the description "receiver" being employed in the statute not in a technical sense but as embracing any person acting as agent or depository of funds for a court. To give to the word the narrower meaning contended for would defeat the obvious and adjudged purpose of the statute.

[2] (b) It is contended that the assessment was invalid for want of sufficient description of the property assessed, first, because the assessment purported to assess moneys impounded in the 1907 injunction suit, No. 14275, when as we have seen no money was in fact deposited in that suit, and second, because the assessment did not separately assess the moneys impounded in each of the six suits but assessed as a unit all the moneys impounded in all the suits.

As to the first, it is apparent that the inclusion of the 1907 suit, No. 14275, could not operate to assess moneys which had no existence and hence the reference to that suit is wholly negligible. As to the second, the assessment referred to the cases by number and designated the court in which they were pending as well as the parties. The court in exercising its jurisdiction over the moneys had specifically directed their deposit to special accounts in each suit separately, thus enabling it at the termination of the litigation to distribute the funds after apportioning the sum of the tax chargeable to each. It is thus clear that not only was there no want of definiteness in the description of the property but no possible detriment to the Water Company could in any event arise because of the method of assessment which was followed.

Affirmed.

(246 U. S. 530)

UNITED STATES v. SOLDANA et al.

(Argued March 4, 1918. Decided April 15, 1918.)

No. 325.

1. INDIANS ⊜35—INDIAN TERRITORY—WHAT CONSTITUTES—"INDIAN COUNTRY."

Where the Indian title to land occupied by the station platform of a railroad company having a right of way through an Indian reservation was extinguished by the grant of the right of way, the station platform was not "Indian country," within Act Jan. 30, 1897, c. 109, 29 Stat. 506 (Comp. St. 1916, § 4137), making it an offense to introduce intoxicating liquor into Indian country.

2. INDIANS ⊜35—INDIAN RESERVATIONS — GRANT OF RIGHT OF WAY UPON — "INDIAN COUNTRY."

Under Act May 1, 1888, c. 213, 25 Stat. 113, creating the Crow Indian Reservation and providing for the granting of railroad rights of way thereon, and Act Feb. 12, 1889, c. 134, 25 Stat. 660, granting a railroad company a right of way through the reservation, and providing in sections 3 and 5 that the railroad should be conducted with due regard for the rights of Indians, and that a breach of the conditions on which the grant was made should operate as a forfeiture of all rights and privileges, the Indian title in the strip granted as a right of way cannot, regardless of the nature of the interest granted, be deemed to have been extinguished, for were it extinguished, the reservation would be divided; hence a station platform on the right of way is Indian country within Act Jan. 30, 1897, forbidding the introduction of liquor therein.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Indian Country.]

In Error to the District Court of the United States for the District of Montana.

Thomas Soldana and Francisco Herrera were indicted for violating Act Jan. 30, 1897, by introducing intoxicating liquor into the Indian Territory. A demurrer was sustained to the indictment, and the United States brings error. Reversed.

Mr. Assistant Attorney General Warren, for the United States.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Act of January 30, 1897, c. 109 (29 Stat. 506),[1] makes it a criminal offense to introduce intoxicating liquors "into the Indian country." For violating that law, Soldana and Herrera were indicted in the District *531 Court of the United States for the District of Montana. The indictment charged that the liquor was introduced "within the exterior boundaries of the Crow Indian Reservation" in that state, but upon "the station platform of the Chicago, Burlington & Quincy Railway Company, at the town of Crow Agency" upon the right of way of said railroad. Defendants demurred, contending that the station platform was not within Indian country, and that, therefore, no offense was alleged. The District Court sustained the demurrer and discharged the prisoners. The case came here under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (Comp. St. 1916, § 1704).

[1] Crow Indian Reservation consists of nearly two and a half million acres located in the southwestern part of Montana. The government agency is at Crow agency which lies north of the middle of the reservation on the Chicago, Burlington & Quincy Railway, which runs through the heart of the reservation from north to south. The right of way is one hundred and fifty feet wide except where additional ground is allowed for stations. Whether or not the station platform is Indian country depends upon the construction to be given to the act of Congress granting the right of way. If the Indian title to the soil on which the platform stands was extinguished by that grant, the platform was not within Indian country. Bates v. Clark, 95 U. S. 204, 24 L. Ed. 471.[2] Did the statutes except from the reservation the land on which the railroad was built and extinguish the Indian title, or did they merely give to the company a right of way or other limited interest in the land on which to construct and operate a railroad? *532

[2] *The statutes to be considered are Act of May 1, 1888, c. 213 (25 Stat. 113) confirming the establishment of the reservation, and Act of February 12, 1889, c. 134 (25 Stat. 660), granting a right of way through the reservation to the Big Horn Southern Railroad. Whatever rights it acquired were transferred to the Burlington under Act of March 1, 1893, c. 192 (27 Stat. 529).

The act of 1888 provided that whenever, in the opinion of the President, public interests require the construction of railroads through any portion of the reservation, the "right of way shall be, and is hereby, granted for such purposes, under such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe." The act of 1889 provided, by section 3, that "the surveys, construction, and operation of such railroad shall be conducted with due regard for the rights of the Indians and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision." Section 5 declared that the grant of the right of way was upon the expressed condition that the grantee and its successors "will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian tribes any further grant of land or its occupancy than is hereinbefore provided: Provided, that any violation of the condition mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railroad company under this act."

Whether these acts should be held to have granted a mere easement or a limited fee or some other limited interest in the land (New Mexico v. United States Trust Co., 172 U. S. 171, 19 Sup. Ct. 128, 43 L. Ed. 407; Northern Pacific Railway v. Townsend, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044; Rio Grande Western Railway v. Stringham, 239 U. S. 44, 36 Sup. Ct. 5, 60 L. Ed. 136), it is clear that it was not the purpose of Congress to extinguish the title of the Indians in *the land* 533 comprised within the right of way. To have excepted this strip from the reservation would have divided it into two, and would have rendered it much more difficult, if not impossible, to afford that protection to the Indians which the provisions quoted were designed to insure. The case of Clairmont v. United States, 225 U. S. 551, 32 Sup. Ct. 787, 56 L. Ed. 1201, which is the basis of the decision in United States v. Lindahl (D. C.) 221 Fed. 143, relied upon by the lower court, involved a statute which extinguished the Indian title.

The judgment of the District Court is Reversed.

[1] This repealed, so far as it was inconsistent, the Act of July 23, 1892, c. 234, 27 Stat. 260 (Comp. St. 1916, § 4136a), which amended Revised Statutes, § 2139, as amended by Act February 27, 1877, c. 69 (19 Stat. 244).

[2] Other cases giving criteria for determining the meaning of "Indian country" are: American Fur Co. v. United States, 2 Pet. 358, 7 L. Ed. 450; Ex parte Crow Dog, 109 U. S. 556, 3 Sup. Ct. 396, 27 L. Ed. 1030; United States v. Le Bris, 121 U. S. 278, 7 Sup. Ct. 894, 30 L. Ed. 946; Dick v. United States, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. Ed. 520; United States v. Celestine, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195; Clairmont v. United States, 225 U. S. 551, 32 Sup. Ct. 787, 56 L. Ed. 1201; Donnelly v. United States, 228 U. S. 243, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710; United States v. Pelican, 232 U. S. 442, 34 Sup. Ct. 396, 58 L. Ed. 676; Pronovost v. United States, 232 U. S. 487, 34 Sup. Ct. 391, 58 L. Ed. 696.

(246 U. S. 544)

STADELMAN et al. v. MINER et al.

(Submitted March 18, 1918. Decided April 15, 1918.)

No. 644.

COURTS ⊂=394(1)—STATE COURT — MODE OF REVIEW—WRIT OF ERROR.

A judgment of the Oregon court of last resort, holding that an order of the county court directing the sale of lands of a decedent to pay debts, made under L. O. L. §§ 1252–1270, was not subject to collateral attack by nonresident heirs of the decedent, though the statutory requirement as to the time of hearing was not observed, and the heirs asserted that to sustain the validity of the sale would deprive them of their property without due process of law, in violation of Const. U. S. Amend. 14, does not involve the validity of a treaty or statute of the United States, or a statute of or authority exercised under the state; hence a writ of error to review such judgment will not lie under Judicial Code (Act March 3, 1911, c. 231, § 237, 36 Stat. 1156), as amended by Act Sept. 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. 1916, § 1214).

In Error to the Supreme Court of the State of Oregon.

Suit by Minnie Evvia Stadelman and others against W. H. Miner and another. A decree for plaintiffs, affirmed on defendant's appeal (83 Or. 348, 155 Pac. 708), was reversed on rehearing (83 Or. 348, 163 Pac. 585), and the conclusion being confirmed on a second petition for rehearing (83 Or. 348, 163 Pac. 983), plaintiffs bring error. Writ dismissed.

See, also, 246 U. S. 311, 38 Sup. Ct. 189, 62 L. Ed. —.

Mr. John M. Gearin, of Portland, Or., for plaintiffs in error.

Mr. Guy C. H. Corliss, of Portland, Or., for defendants in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The statutes of Oregon provide that, when it becomes necessary to sell real estate of a decedent in order to pay his debts (L. O. L. §§ 1252–1270), the *administrator shall file a petition therefor, and that a citation shall issue to heirs known and unknown "to appear at a term of court therein mentioned, not less than ten days after the service of such citation, to show cause, if any exist, why an order of sale should not be made as in the petition prayed for." Section 1254. The statutes also provide for the service of unknown or nonresident heirs by publication for "not less than four weeks, or for such further time as the court or judge may prescribe." Section 1255.

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In 1897 Charles W. Fletcher died intestate in Oregon. His administrator filed in the county court a petition for the sale of the decedent's real estate in order to pay debts; and the citation was ordered to be served upon the unknown or nonresident heirs by publication in a newspaper for four weeks. Publication was made in conformity to the order, the first publication being on June 17, 1902. Under the statute, the state court finds that the hearing on the petition should not have been held before July 24th. It was actually held on July 17th; and an order of sale was then entered by the county court under which the property was sold to Nelson, through whom Miner and Worden claim title by mesne conveyances. The deceased had left surviving two children who were nonresidents, Mrs. Stadelman and Henry H. Fletcher. Thereafter, these two and one Motley (a grantee from them of a part interest in the property) brought, in an appropriate state court of Oregon, an independent suit to quiet title and claimed to own the property on the ground that the order of the county court and the sale to Nelson thereunder were void. A decree was rendered by the trial court in their favor; and it was affirmed on appeal by the Supreme Court of the state, where two curative acts were unsuccessfully invoked to sustain the validity of the Miner and Worden title. 83 Or. 348, 355, 155 Pac. 708, 163 Pac. 585, 983. A petition for rehearing was filed; and on January 30, 1917, the Supreme Court reversed its decision and the decree of the lower court and *dismissed the suit. It held that failure to observe the statutory requirement as to time for hearing was a defect rendering the order voidable merely and not void; that the defect did not operate to deprive the county court of jurisdiction; that the defects could have been availed of only in a direct attack; and that it afforded no basis for a collateral attack, in an independent suit, upon the order and the sale thereunder. 83 Or. 379, 155 Pac. 708, 163 Pac. 585, 983. This conclusion was confirmed by the same court upon a second petition for a rehearing. 83 Or. 388, 155 Pac. 708, 163 Pac. 585, 983.

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At the first argument of the case in the Supreme Court of Oregon, plaintiffs contended that to sustain the validity of the sale under the order of the county court would deprive them of their right to due process of law guaranteed by the Fourteenth Amendment. See memorandum opinion of this court, 246 U. S. 311, 38 Sup. Ct. 189, 62 L. Ed. —, March 18, 1918. Upon this contention the case was brought here under section 237 of the Judicial Code. But under that section, as amended by Act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. 1916, § 1214), a final decree of a state court of last resort can be reviewed here on writ of error only in a suit "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of

their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity." The judgment here involved was entered after the act of September 6, 1916, took effect. There was not drawn in question the validity of any treaty or statute. And challenging the power of the court to proceed to a decision did not draw in question the validity of any authority exercised under the state. Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245 U. S. 162, 38 Sup. Ct. 58, 62 L. Ed. ——; Ireland v. Woods (March 18, 1918) 246 U. S. 323, 38 Sup. Ct. 319, 62 L. Ed. ——. The writ of error is therefore

Dismissed.

(246 U. S. 500)

GENERAL RAILWAY SIGNAL CO. v. COMMONWEALTH OF VIRGINIA ex rel. STATE CORPORATION COMMISSION.

(Argued March 11, 1918. Decided April 15, 1918.)

No. 177.

1. COMMERCE ⟸40(1) — "INTERSTATE COMMERCE"—WHAT CONSTITUTES.

Where a foreign corporation, which manufactured signaling devices, contracted to equip a railroad in another state with such devices, and for that purpose engaged labor and proceeded to install and erect the signal apparatus and mechanism along the line of the railroad company, such corporation was doing an intrastate business, as distinguished from "interstate commerce."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. COMMERCE ⟸69—INTERSTATE COMMERCE—BURDEN UPON.

Acts Va. 1910, c. 53, § 38a, requiring foreign corporations, when obtaining a certificate of authority to do business in the state, to pay an entrance fee, though on the border line, is not invalid as placing a burden on interstate commerce, although the fees prescribed range from $30 for a corporation whose maximum capital stock is $50,000 or under to $1,000 for a corporation with a capital of over $1,000,000 and not exceeding $10,000,000; it not appearing that the fees varied in direct proportion to the capital stock, or that the amounts prescribed were arbitrary or unreasonable.

In Error to the Supreme Court of Appeals of the State of Virginia.

On order of the Corporation Commission of Virginia the General Railway Signal Company was fined for doing business within the state without first obtaining the proper authority, and, the order being affirmed on appeal (118 Va. 301, 87 S. E. 598), defendant brings error. Affirmed.

Messrs. Hugh Satterlee and McGuire & Wood, all of Rochester, N. Y., for plaintiff in error. Mr. J. D. Hank, Jr., Atty. Gen., of Richmond, Va., for defendant in error.

*Mr. Justice McREYNOLDS delivered the *508 opinion of the Court.

[1] Plaintiff in error seeks reversal of a judgment of the Supreme Court of Appeals of Virginia (118 Va. 301, 87 S. E. 598) which affirmed an order of the Corporation Commission imposing a fine upon it for doing business within the state without first obtaining proper authority.

*The essential facts concerning business *509 done as found by the Commission and approved by Supreme Court are these:

"The defendant is a corporation of the state of New York, having an authorized capital of $5,000,000. Its principal office and factory is at Rochester, N. Y., where it owns and operates a large manufacturing plant devoted to the manufacture of materials chiefly used in the construction of railway signals which it sells and constructs all over the world. It has a branch factory at Montreal, Canada, and maintains branch offices in New York City, Chicago, and San Francisco.

"By contract dated the 5th day of May, 1914, with the Southern Railway Company, the defendant agreed to furnish certain materials, supplies, machinery, devices and equipment, as well as all necessary labor, and to install, erect, and put in place certain signals and apparatus shown on the plans described in the specifications, from Amherst to Whittles, Virginia, fifty-eight miles, and to 'complete the entire system and turn same over to the railway company as a finished job,' subject to inspection and acceptance, for $85,597. Similar contracts had been previously made and fully performed, one dated September 6, 1911, covering the lines of the Southern Railway in Virginia from Monroe to Montview, Virginia, 13 miles, for $16,015, and one dated July 18, 1913, from Orange to Seminary, Virginia, 76 miles, for $112,428. The aggregate distance in this state covered by these contracts being 147 miles, and the total consideration being $214,040.

"The purpose of these signals is to promote safety of railway operation and they operate automatically.

"In order to construct these signals as required by the contract it was necessary to employ in this state labor, skilled and unskilled, to dig ditches in which conduits for the wires are placed, to construct concrete foundations, *and *510 to paint the completed structures. The completed structures are along the side of the railway track, about 2 miles apart, and are 22 or 23 feet high. In the language of the witness, Moffett: 'It is necessary to erect the signal mechanism, the masts supporting the mechanism, the houses for protecting the relays, reactors, reactants and other similar electrical devices protected from the weather, then the transformers, high tension line arresters and low tension line arrestors.' The completed structures are permanently attached to the freehold upon concrete bases."

We think the recited facts clearly show local business separate and distinct from interstate commerce within the doctrine announced and applied in Browning v. Waycross, 233 U. S. 16, 34 Sup. Ct. 578, 58 L. Ed. 828.

[2] It is further insisted that as the amount of prescribed entrance fee is based upon maximum capital stock it constitutes a burden on interstate commerce, contrary to the Federal Constitution.

*511 Section 38a, c. 53, Acts of Virginia 1910 (copied in margin),[1] requires every foreign corporation with capital over one million and not exceeding ten million dollars when it obtains a certificate of authority to do local business to pay a fee of one thousand dollars. Inspection of the statute shows that prescribed fees do not vary in direct proportion to capital stock and that a maximum is fixed. In the class to which plaintiff in error belongs the amount specified is one thousand dollars and, under all the circumstances, we cannot say this is wholly arbitrary or unreasonable.

Considering what we said in Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127; St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed. 265; Kansas City Ry. v. Kansas, 240 U. S. 227, 36 Sup. Ct. 261, 60 L. Ed. 617; Kansas City, etc., R. R. Co. v. Stiles, 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176—the two characteristices of the statute just referred to must be regarded as sufficient to save its validity. It seems proper, however, to add that the case is on the border line. See Looney v. Crane Co., 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. ——, International Paper Co. v. Commonwealth of Massachusetts, 246 U. S. 135, 38 Sup. Ct. 292, 62 L. Ed. ——, and Locomobile Co. v. Massachusetts, 246 U. S. 146, 38 Sup. Ct. 298, 62 L. Ed. ——, decided March 4, 1918.

The judgment of the court below is Affirmed.

[1] "Sec. 38a. Every foreign corporation, when it obtains from the State Corporation Commission a certificate of authority to do business in this state, shall pay an entrance fee into the treasury of Virginia, to be ascertained and fixed as follows:

"For a company whose maximum capital stock is fifty thousand dollars or less, thirty dollars; for a company whose capital stock is over fifty thousand dollars, and not to exceed one million dollars, sixty cents for each one thousand dollars or fraction thereof; over one million dollars, and not to exceed ten million dollars, one thousand dollars; over ten million dollars, and not to exceed twenty million dollars, one thousand two hundred and fifty dollars; over twenty million dollars, and not to exceed thirty million dollars, one thousand five hundred dollars; over thirty million dollars, and not to exceed forty million dollars, one thousand seven hundred and fifty dollars; over forty million dollars, and not to exceed fifty million dollars, two thousand dollars; over fifty million dollars, and not to exceed sixty million dollars, two thousand two hundred and fifty dollars; over sixty million dollars, and not to exceed seventy million dollars, two thousand five hundred dollars; over seventy million dollars, and not to exceed eighty million dollars, two thousand seven hundred and fifty dollars; over eighty million dollars, and not to exceed ninety million dollars, three thousand dollars; over ninety million dollars, five thousand dollars: Provided, however, that foreign corporations without capital stock shall pay fifty dollars only for such certificate of authority to do business in this state.

"For the purpose of this act the amount to which the company is authorized by the terms of its charter to increase its capital stock shall be considered its maximum capital stock."

(246 U. S. 498)

DALTON ADDING MACH. CO. v. COMMONWEALTH OF VIRGINIA ex rel. STATE CORPORATION COMMISSION.

(Argued and Submitted March 11, 1918. Decided April 15, 1918.)

No. 176.

COMMERCE ⊂⊃40(3)—"INTERSTATE COMMERCE"—WHAT CONSTITUTES.

A foreign corporation, which had not procured the certificate of authority required by law, brought into the state of Virginia its adding machines before selling them, maintained in the state a stock of machines for exhibition and trial, and sold those machines in the state after their transportation in interstate commerce had been concluded and they had become mingled with the general mass of property in the state. Such corporation rented its machines to customers within the state, and exchanged them for machines of other makes, selling the machines so received and exchanged at will. It also employed a mechanic in the state, and entered into contracts for the repair of its machines, and sold supplies in the state suitable for use upon the machines. *Held*, that a material part of the business of the corporation was intrastate, so that it was subject to fine for failure to procure the certificate of authority.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

In Error to the Supreme Court of Appeals of the State of Virginia.

The Dalton Adding Machine Company was fined by order of the Virginia State Corporation Commission for transacting business in the state without a certificate of authority as required by law, and, the order being affirmed (118 Va. 563, 88 S. E. 167), the Adding Machine Company brings error. Affirmed.

Mr. Thomas A. Banning, of Chicago, Ill., for plaintiff in error.

Mr. J. D. Hank, Jr., Atty. Gen., of Richmond, Va., for defendant in error.

*Mr. Justice McREYNOLDS delivered the opinion of the Court.

Plaintiff in error, an Ohio corporation, complains that the Supreme Court of Appeals of Virginia improperly affirmed an order by the Corporation Commission assessing a fine against it for transacting business in the state without certificate of authority required by law. 118 Va. 563, 88 S. E. 167. That court adopted and approved the Commission's opinion, which, among other things, declared:

"We are of the opinion that the facts of this case demonstrate beyond a peradventure that the Dalton Adding Machine Company is doing a substantial part of its business in this state in the following particulars:

"(a) In bringing its machines into this state before selling them, and in maintaining a stock of machines for exhibition and trial, and in selling such machines in this state, after their transportation in interstate commerce has been concluded and they have become mingled with the general mass of property in this state;

"(b) In renting such machines and collecting rents therefor from its customers in this state at will;

"(c) In buying and exchanging machines for machines made by other manufacturers, and in selling such machines so received in exchange at will;

"(d) In employing a mechanic in this state and entering into contracts for repairing of machines owned by persons in this state from time to time and collecting the charges therefor;

"(e) In keeping on hand in this state certain parts of machines and a stock of paper and ribbons suitable for use upon the machines, which are freely sold from time to time by its agent in Richmond to its customers.

"We think it perfectly apparent that in these *500 particulars the business of the company in this state is not 'commerce among the states,' the freedom of which is guaranteed by the United States Constitution, but that such business, in every essential particular, is business which has been transacted by the company in this state in violation of the statutes referred to."

Beyond serious doubt the above specifications concerning the business carried on in Virginia are supported by the record. A material part of it was intrastate.

The judgment of the court below is

Affirmed.

(246 U. S. 396)

CITY OF MITCHELL v. DAKOTA CENTRAL TELEPHONE CO.

(Argued March 15 and 18, 1918. Decided April 15, 1918.)

No. 198.

1. COURTS ⟸282(1)—FEDERAL COURTS—JURISDICTION.

Where complainant invoked rights under the Constitution of the United States, which were combated by defendant, and federal District Court decided cause on constitutional grounds raised, jurisdiction was shown, though the parties were citizens of the same state.

2. JUDGMENT ⟸720 — CONCLUSIVENESS — MATTERS CONCLUDED.

Where, in a suit in state court by a municipality against a telephone company to recover a percentage of the gross receipts required to be paid by the ordinance under which it was alleged the telephone company was doing business, the company presented its contention that the ordinance had by implication been repealed by a later ordinance, a decision adverse to that contention is a conclusive adjudication against such contention, binding on the company in subsequent litigation concerning its franchises.

3. TELEGRAPHS AND TELEPHONES ⟸10(6) — FRANCHISES — ORDINANCES — IMPLIED REPEAL.

Where a telephone company operating under a franchise to use city streets for long distance lines within and through the state obtained a subsequent franchise to use the streets for its long distance telephone system so as to supply the citizens and the public in general with facilities to communicate by long distance with parties residing in, near, or at a distance from the city, the latter ordinance, in view of the rule that grants of rights and privileges by the state or any of its municipalities are strictly construed, and that whatever is not equivocally granted is withheld, cannot be deemed to have given the telephone company the right to maintain a local telephone exchange, and by implication to have repealed an earlier franchise, giving that right under which the company was operating a local exchange.

Appeal from the District Court of the United States for the District of South Dakota.

Suit by the Dakota Central Telephone Company against the City of Mitchell. There was a decree for complainant, and defendant appeals. Reversed, with directions.

*The Dakota Central Telephone Company, *397 herein called the telephone company, brought suit against the city of Mitchell, herein called the city, to enjoin it from enforcing or attempting to enforce a resolution or ordinance of the city passed March 17, 1913, terminating the right of the telephone company to maintain and operate the company's system of telephones, and requiring the removal of its poles, etc., from the streets, and to declare the resolution or ordinance unconstitutional and void.

The bill alleges the following facts, which are the basis of the contentions of appellant. We state them narratively:

The telephone company is a South Dakota corporation, and under section 554 of the Civil Code of the state has been given the power to operate telegraph and telephone lines within the towns and cities of the state and to use the public grounds, streets, alleys and highways subject to control of the proper municipal authorities as to which of them the lines shall run over and across, and the places where the poles to support the wires shall be located.

Since its incorporation the company has acquired by purchase and construction certain lines of telephone and certain telephone exchanges and has been engaged as a common carrier in transmitting telephone messages, is so engaged in about 85 cities, and has about 265*telephone stations, other than *398 exchanges, situated in South Dakota, North Dakota, and Minnesota, and has also, outside of the lines situated in cities and towns, about 85 exchanges, about 265 stations and about 5,000 miles of telephone lines.

May 11, 1898, the city granted by ordinance to F. E. Elce and his associates, heirs and assigns, a right to use the streets and alleys of the city for the maintenance of a public telephone system. The right granted was not exclusive.

Elce duly accepted the terms and conditions of the ordinance and installed a local telephone system and conducted and operated it until on or about July 8, 1904.

The Dakota Central Telephone Lines, a South Dakota corporation, was given by ordinance dated March 21, 1904, and numbered 174, authority to use the streets of the city for the purpose of operating long distance telephone lines within and through the city "for supplying the citizens of Mitchell, and the public in general, facilities to communicate by lond distance or other electrical devices with parties residing near or at a dis-

tance from Mitchell." In consideration of the ordinance the city was given the right to string wires on the poles of the company for fire alarm purposes.

The ordinance proved insufficient for its purpose and on June 6, 1904, a new ordinance was passed. The latter ordinance amended section 1 of the other so as to enable communication "with parties residing *in*, near or at a distance from Mitchell." The word in italics was the amendment. And the word "lines" in ordinance No. 174 was changed to the word "system" in ordinance No. 180.

At the time the last ordinances (Nos. 174 and 180) were passed the telephone instruments then in general use could not be used successfully for long distance conversations, but there had been developed instruments for such conversations. Such telephones were *399 then known as "long distance telephones" and were only supplied to subscribers at telephone exchanges by special arrangement with the individual subscribers, who desired an instrument efficient for both local and long distance conversations. At said time, however, the art had so far advanced that the public in general were demanding the installation of "long distance telephones" in local telephone exchanges.

Long prior to the adoption of ordinances 174 and 180 the Southern Dakota Telephone Company had constructed in the city of Mitchell and other towns and cities of the state and had secured the consent of Mitchell to the construction in that city of such lines, commonly known as "toll lines" as distinguished from telephone exchanges. In 1903 the Dakota Central Telephone Lines purchased those toll lines and was operating them at the time of and long prior to the adoption of ordinances 174 and 180.

That company, relying upon the consent of the city as expressed in ordinance 174, purchased from Elce the property then and now known as the Mitchell Telephone Exchange, consisting of the poles and other property as well as certain real property used in connection therewith. After entering into the contract to purchase and upon discovering the insufficiency of ordinance 174, the company applied to the city for ordinance 180, and when it was passed completed the purchase from Elce and took possession of the property and owned and operated the exchange with all other exchanges until October 2, 1904, when it sold all of its rights to complainant, Dakota Central Telephone Company, and the latter company has since continuously operated the exchange and toll lines.

Thereafter there was such improvement in telephone instruments and appliances that it became desirable to reconstruct the telephone exchange in the city, and in order to *400 install a telephone system known as the "Automatic" it became necessary to put in permanent underground ways in which to place the wires and cables and otherwise construct and install expensive instruments, and in order to be secure in making such extensive improvements the company applied for and obtained permission by ordinance "to place, construct and maintain through and under the streets and alleys, and public grounds of said city, all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone and other improved appliances." (This is referred to hereafter as the resolution of April 10, 1907.)

Relying on the ordinance (resolution) and the other ordinances, the company began to reconstruct and extend its telephone exchange in the city, and continued such work until the plant was thoroughly prepared for the installation of the "Automatic System." As part of the improvements the company erected a fireproof exchange building, it and the system causing an expenditure of $100,000. The system is now in operation and has about 1,100 subscribers, all of whom are in direct communication and can communicate with persons at all the exchanges and stations of the company's telephone system in South Dakota and Minnesota.

The company has complied with all of the requirements of the ordinance and has acquired a vested right to maintain and operate the exchange and lines described.

The company owns and operates lines from the city to other cities and other states than South Dakota (these are all mentioned in the bill) and the tolls for such interstate communication amount to more than $4,000 a month. It has also contracted with the United States government whereby it receives and transmits and delivers the messages of the officers of the Weather Bureau to 32 cities and towns situated on its lines in South Dakota. It also furnishes telephone service to other officers of the government in various towns and cities and places, and that this service may not be interfered with it seeks relief. *401

The city, assuming it had the right to require the removal of the company's lines and exchange from the city and from the streets and alleys therein, and assuming that the rights of the company would expire May 11, 1913, and further assuming the right to terminate the company's rights, did, on March 17, 1913, notify and request it to remove from the city its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the city and that if it failed to do so, the city would take steps to secure the immediate removal of the described instruments.

At the same meeting the city adopted two other resolutions, one called "Telephone Res-

olution," by which it declared the right of the company terminated from and after May 11, 1913, and in which it directed the officers of the city not to contract with the company for telephone service and on the said date to terminate all relations with the company; the other, called "Fire Alarm Resolution," which also declared the rights of the company terminated May 11, 1913, and then provided for the fire alarm service to take the place of that supplied by the company.

The threatened removal and consequent destruction of the company's telephone system and the deprivation of rights will cause the company damage to the amount of $110,000.

Besides the above facts the bill alleges that the ordinance or resolution of the city for the removal of the poles and lines of the company has the force and effect of a law of South Dakota within the intent and meaning *of section 10, art. 1, of the Constitution of the United States and, so construed, is a law impairing the obligation of the contracts existing between the company and the city. *402

That the value of the company's exchange and lines consists largely in installing the poles, wires, and other apparatus; that if taken down the salvage will be nominal and that therefore the removal thereof will deprive the company of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. That the wrongs done and threatened will also obstruct and interfere with the dispatch and transmission of interstate business in violation of the Constitution and laws of the United States and of the act of Congress regulating interstate commerce.

An injunction was prayed.

The answer of the city in most part tenders only issues of law; in other words, the effect of the ordinances of the city. The following facts, however, are averred, stated narratively: The company, for a long time after the passage of ordinances 174 and 180, made no claim that its local exchange was not maintained and operated under ordinance 135 (ordinance of Elce) or that that ordinance was in any way repealed or superseded or modified by the other ordinances or that the company was operating a local telephone system under those ordinances, but, on the contrary, the company has complied with all of the terms and conditions of ordinance 135.

The company has frequently negotiated with the city for a renewal or extension of its franchise from and after May 11, 1913, but a renewal or extension has not been granted; and both the company and the city have construed ordinance 135 as in full force and effect and it has in no way been repealed, superseded or modified.

The company did not inform the city or any of its officers of its desire to install an automatic telephone *system and made the improvement with full knowledge of the city's attitude, and in the early part of the year 1913 the company attempted to force the automatic system into the city, regardless of the wishes of the municipal authorities, by securing the consent of the individual citizens thereof to the installation of such telephones, and immediately upon learning of such attempt the city council, March 26, 1912, passed separate resolutions defining the city's attitude. *403

The company is operating two systems in the city, a local and a long distance system, the former under ordinance 135 (that granted to Elce), and the latter under ordinances 174 and 180; that the rights under ordinance 135 expired May 11, 1913, that the resolutions of which the company complains apply only to ordinance 135, that is, to the local telephone exchange, and do not and were not intended to apply to the long distance system, and the city expressly denies any purpose or intention to interfere with or molest the company in the maintenance and operation of the long distance system.

The city pleads a judgment rendered in a suit in which it was complainant against the company, by which the rights that the latter now asserts were adjudicated against it, and prays, by reason of the premises, that the bill of the company be dismissed.

After hearing, upon a stipulation of certain facts and oral testimony, a decree was entered adjudging the ordinance of the city of March 17, 1913, unconstitutional and void in that it impaired the obligations of the contract contained in ordinance 180, in violation of section 10, art. 1, of the Constitution of the United States, and deprived the company of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, and enjoined the city from enforcing the ordinance.

This appeal was then allowed.

Messers. Louritz Miller, of Mitchell, S. D. and Edward E. Wagner, of Sioux Falls, S. D., for appellant. Mr. T. H. Null, of Huron, S. D., for appellee.

*Mr. Justice McKENNA, after stating the case as above, delivered the opinion of the Court. *406

Counsel agree that the issues on this appeal are: (1) The jurisdiction of the District Court. (2) The scope and interpretation of ordinances Nos. 174 and 180. (3) Whether the judgment pleaded by the city is res judicata.

[1] The first proposition needs but little comment. The company attacked the ordinance or resolution of the city requiring the company to remove its poles and wires from the streets as an impairment of the contract constituted by other ordinances and hence invoked against the city the contract clause of the Constitution of the United States and also, on account of the asserted destruction

of its property, urged in its protection the due process clause. The city combated both propositions. The District Court, however, sustained both, resting its decision upon the opinion of the Supreme Court of the state in a suit by the city against the telephone company. City of Mitchell v. Dakota Central Telephone Co., 25 S. D. 409, 127 N. W. 582. We shall presently consider this case. For the disposition of the present contention it is enough to say the case was brought by the city to recover a percentage of gross receipts of the company as provided in ordinance 135. In resistance the company contended that the provision was inserted without authority and was illegal and void and contended besides that its rights in the streets were not derived from the city but from section 554 of the Civil Code of the state and that it was not competent for the city to impose conditions upon the company. The court rejected the contentions and held that under the Constitution of the state the city had the right to grant or withhold its consent to the use of its streets, and it necessarily had the right to grant the same upon such terms and conditions as it might to choose to impose.

*407

Applying the case, the District Court sustained the validity of ordinance No. 135, but decided that it expired by limitation of time in May 1913, and that necessarily the rights granted by it terminated on that date, and that the company's rights, if it had any, were derived from ordinance 180 and the resolution of April 10, 1907.[1] The court considered the former a valid exercise of the power of the city and a contract between it and the company which was impaired by the subsequent resolutions.

It will be seen, therefore, that the company invoked rights under the Constitution of the United States and the District Court considered them to be substantial, not formal, and accordingly exercised jurisdiction.

[2, 3] The second and third propositions mingle in discussion. The District Court decided, as we have said, that ordinance 180 constituted a contract between the city and the company, and, exerting the right to interpret it, further decided that it gave the company the right to occupy the streets and compelled an injunction against the city's resolution and attempt to remove it. We shall spend no time in vindication of the exertion of the right; it is an established right of the federal courts, when the contract clause of the Constitution of the United States is invoked, and we pass immediately to the consideration of ordinance No. 180.

*408

As we have seen, it was preceded by some years by ordinance No. 135, and by some months by ordinance No. 174. It was passed, it is contended, to complete the latter; in what respect we shall presently consider.

The case centers upon the ordinance. The telephone company contends that it gives the company the right to operate not merely long distance lines, but a local telephone exchange within the city. In other words, the contention is that it superseded ordinance No. 135 and became a new source of right, a right both of long distance and local exchange. The city opposes this construction and insists that it, the ordinance, confers only the right to maintain a long distance system; that the right to a local exchange was given by ordinance No. 135 and expired with the expiration of that ordinance, May, 1913. And the city urges that its characterization of ordinance No. 180 was sustained by the Supreme Court of the State in City of Mitchell v. Dakota Central Telephone Company, supra.

Counsel are at odds as to the case. It, as we have seen, was brought by the city against the company to recover a certain percentage of the gross receipts of the company, provided to be paid by section 4 of the ordinance No. 135. One of the defenses of the company was that that ordinance was in effect repealed and superseded by ordinance No. 180 so far as it related to the payment of the percentage of the gross proceeds of the company. The Supreme Court decided against the defense, reversing the judgment of the trial court. The court, in answer to the contention of the company, held that ordinance No. 180 did not "have the effect of repealing, qualifying, or modifying ordinance No. 135, and the fact that the defendant [the company] paid the 10 per cent. on its gross proceeds for two years subsequently to the adoption of ordinance No. 180 clearly shows that it did not claim, for a time, at least, that ordinance No. 180 in any manner affected the prior ordinance. * * * There is clearly no inconsistency between the two ordinances; one being for a local city telephone system, and the other being for a long distance telephone system."

*409

The court also decided that the resolution of the city of April 10, 1907, had not the effect of repealing ordinance No. 135, but had only the purpose of giving to the company permission to place its wires underground instead of stretching them on poles in the streets.

The decision would seem to need no comment. It clearly adjudged that the ordinances had different purposes, and that ordinance No. 135 was not repealed in any particular by No. 180, the former applying to the local system and the latter to the long distance system.

The District Court, however, did not give the decision this broad effect but considered

[1] "Be it resolved, by the city council of the city of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct, and maintain through and under the streets, alleys and public grounds of said city all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone and other improved appliances."

that it concluded only "that the two ordinances did not cover so exactly the same field and scope that it could be fairly said that the city intended by the passage of ordinance No. 180 to repeal ordinance No. 135." It is not very obvious how ordinance No. 135 could exist for one purpose and not for all the purposes for which it was enacted; how it could exist for the exaction of a revenue from the system and not exist for the system; how it could coexist for nine years with No. 180 and yet have been superseded by the latter. Besides the Supreme Court distinguished between the two ordinances, declaring that there was no inconsistency between them, "one being for a local city telephone system, and the other being for a long distance telephone system." The decision, indeed, gave emphasis to the distinction. From the operation of one a revenue was exacted, upon the other no condition was imposed.

*410 It is, however, alleged in the bill that the company had by certain enumerated acts acquired a vested right to maintain and operate its telephone exchange and lines, and to secure its peaceable enjoyment of such rights as against the wrongful acts of the city it brought this suit. This idea is not pressed in the argument and is not sustained by the stipulated facts. The case is rested upon "the scope and interpretation to be placed upon ordinances Nos. 174 and 180," the contention being that they constitute a contract the obligation of which the resolution of the city requiring the removal of its, the company's, poles and wires from the streets, impairs. And such was the decision of the District Court. The basis of the contention and decisions is that those ordinances superseded ordinance No. 135, taking the place of the latter, giving all the rights of a local exchange as the latter did and adding to them the rights of a long distance system; and this conclusion is deduced from the words of the ordinances and explanatory circumstances, the necessary connection, it is said, and the utility of the local system to the long distance system.

First as to the title of the ordinances and the words of each that are said to be determinative of their meaning. The title of No. 174 is as follows:

"An ordinance to grant permission to the Dakota Central Telephone Lines (Inc.), their successors and assigns, the right to erect poles and fixtures, and to string wires for the purpose of operating long distance telephone lines, within and through the city of Mitchell, South Dakota."

Section 1 provides that "the right and privilege given" shall be for a period of twenty years "for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell, and all such rights to be continued on the conditions therein named."

The title of ordinance No. 180 is exactly the same as that of No. 174, except that the word "lines" of the latter is changed to the word "system" by the former. Section 1 of No. 180 is the same as section 1 of No. 174, except certain immaterial changes and except the word "in" in the provision expressing the purpose of the granted privilege to be "to communicate by long distance telephone or other electrical devices, with parties residing *in*, near or at a distance from Mitchell. * * *" *411

Stress is put upon the words "system," "within," "through," "in," and "near," and it is insisted that they were necessarily intended to accommodate the residents of the city and to give them the facilities of local and long distance telephone service and that something more was intended than to give them a mere right to carry long distance telephone wires through the city.

The contention has its strength and persuaded the District Court, but it is countervailed by other considerations. Undoubtedly the inducement of ordinances Nos. 174 and 180 was to give to the residents of the city long distance telephone facilities, but it cannot be said that granting such right inevitably or even naturally repealed or superseded the right to operate a local system which was given and then existed under ordinance No. 135, and which then had nine years to run. Besides, the decision of the Supreme Court is a factor of controlling strength. It explicitly decided that ordinances 135 and 180 had distinct purpose and operation and that the latter did not repeal or supersede the former. The issue was tendered by the company and the decision upon it is conclusive against the company.

But if the decision be not given that extent, as it was not by the District Court, and if it be considered that the latter court had a right, as a federal court, to determine the existence of a contract and its elements, such right does not preclude a deference to the views of the state court, which, moveover, have the support of principles declared by this court, that grants of rights and privileges by the state or of any of its municipalities are strictly construed "and whatever is not unequivocally granted is withheld; nothing passes by mere implication." Water Co. v. Knoxville, 200 U. S. 22, 34, 26 Sup. Ct. 224, 50 L. Ed. 353; Blair v. Chicago, 201 U. S. 400, 471, 26 Sup. Ct. 427, 50 L. Ed. 801. *412

The contentions of the company in the case at bar rest entirely upon implication, the implication of a repeal of one ordinance by another, which is never favored, though the ordinances expressed different purposes and could, and did coexist for such purposes; and this implication is made to depend upon another, that is, that the ordinary meaning of the words "long distance telephone" used in ordinance No. 180 is translated to signify and derive meaning from the function of the instrumentalities employed, such as trans-

mitters, receivers, poles, wires, switching devices and battery systems, etc.

We may conclude the discussion with the observation that if ordinance No. 180 had been intended to embrace and continue the right granted by ordinance No. 135 and to grant a further right of a long distance telephone system, there was a simple and direct way of doing it, clear to every understanding, and it would not have been left to be collected from disputable circumstances and the function of instruments known only to experts. At any rate, as it has been so left, the ambiguity resulting must be resolved against the telephone company. It should have taken care that the right it sought was clearly defined.

It will be observed that the city expressly declares that it does not intend to interfere with or molest the telephone company in the maintenance and operation of the long distance system, and that the resolution or ordinance of which the company complains is directed only to the telephone system provided for in ordinance No. 135. After certain recitations and whereases it is as follows:

*413 "Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and requested forthwith, on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the city of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the city of Mitchell, South Dakota."

Whatever is necessary, therefore, for the maintenance and operation of the long distance system provided for in ordinance No. 180 is not intended to be disturbed. We must leave the adjustment, however, to the District Court.

Decree of the District Court reversed and the case remanded for further proceedings in conformity with this opinion.

(246 U. S. 552)

UNITED STATES v. WHITED & WHELESS, Limited, et al.

(Submitted March 19, 1918. Decided April 15, 1918.)

No. 204.

1. PUBLIC LANDS ⟸123—ACTIONS TO RECOVER VALUE OF LANDS DESCRIBED IN PATENT PROCURED BY FRAUD—LIMITATIONS.

Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 (Comp. St. 1916, § 5114), requiring suits to vacate and annul patents thereafter issued to be brought within six years after the date of the issuance, does not apply to an action by the United States to recover the value of public lands described in a patent procured through fraud, for the purpose of the act of which the section was a part, was to restore confidence in patents to public lands, which had been lost by reason of conflicting claims between the government and patentees, and, in view of its sovereignty, limitation statutes do not apply to the United States, unless the intention of Congress to have them so apply clearly appears.

2. PUBLIC LANDS ⟸123—ACTIONS TO RECOVER VALUE OF LAND DESCRIBED IN PATENT PROCURED BY FRAUD—STATUTE.

Act March 2, 1896, c. 39, 29 Stat. 42 (Comp. St. 1916, §§ 4901–4903), deals only with patents erroneously issued under a railroad or wagon grant, and the limitation in section 2 on the recovery by the United States on account of erroneously patented lands sold to a bona fide purchaser has no application to an action to recover the value of public lands described in a patent procured by fraud.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Action by the United States against Whited & Wheless, Limited, and others, to recover the value of public lands described in a patent alleged to have been fraudulently obtained. A judgment for defendants was affirmed on writ of error by the Circuit Court of Appeals to the Fifth Circuit (232 Fed. 139, 146 C. C. A. 331), and the United States brings error. Reversed.

Mr. Assistant Attorney General Kearful, for the United States.

Messrs. T. Alexander and J. D. Wilkinson, both of Shreveport, La., for defendants in error.

*560 *Mr. Justice CLARKE delivered the opinion of the Court.

This is a suit to recover from the liquidating commissioners and the former president of a dissolved corporation the value of public lands described in a patent which it is alleged was procured from the government by the fraudulent conduct of the company and of its president.

[1] A demurrer to the petition was sustained by the District Court, and this judgment was affirmed by the Circuit Court of Appeals on the ground that the cause of action stated was barred by the statute of limitations, which reads as follows:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 (Comp. St. 1916, § 5114).

The patent involved was issued on December 12, 1898, and if this case, commenced on December 29, 1914, were one "to vacate and annul" the patent, plainly it would be barred. But this being a suit to recover damages from the fraudulent procurers of the patent, the question presented for decision is:

"Does the statutory bar to a suit to annul the patent also bar a suit for the value of the land fraudulently procured to be patented?"

The chief argument in support of the judgment of the lower court is that while the government before the period of the statute had expired had two remedies, one to annul the patent and one, affirming the patent, to recover the value of the land, yet they were both based on one right, and that when the statute barred the suit to annul, thereby the

*561 patent became as valid for the future as if it had been properly issued and that this cuts off the right, and leaves the government without further remedy.

This is begging the question. The statute of limitations did not create the right of action in the government or either of the remedies for enforcing that right. It relates to the remedy, and in terms applies only to one remedy, that for annulling the patent. The right of the government, asserted in this case, really springs from the fraudulent obtaining of the patent, not from the patent itself, and this right continues until it is satisfied or cut off by statute, and therefore to say that the barring of one remedy smothers the right to pursue the other is mere assertion, and does not advance us toward a conclusion as to the effect, if any, which such bar may have upon the other remedy, and the question we are considering remains unanswered, but becomes: What was the intention of Congress, confessedly not clearly expressed, with respect to this issue, when it enacted this limitation statute?

Fundamental to the interpretation of the statute which the answering of this question renders necessary, lies the rule of law settled "as a great principle of public policy" that the "United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound" (United States v. Nashville, Chattanooga & St. Louis Ry. Co., 118 U. S. 120, 125, 6 Sup. Ct. 1006, 30 L. Ed. 81), and also the fact that this principle has been accepted by this court as requiring not a liberal, but a restrictive, a strict, construction of such statutes when it has been urged to apply them to bar the rights of the government. Thus, in Northern Pacific Ry. Co. v. United States, 227 U. S. 355, 367, 33 Sup. Ct. 368, 57 L. Ed. 544, the limitation in the Act of March 2, 1896 (29 Stat. 42, c. 29), was held not applicable to a patent erroneously issued for Indian lands under a railroad grant, and in La Roque v. United States, 239 U. S. 62, 68, 36 *562 Sup. Ct. 22, 60 L. Ed. 147, the general language of the very act we are considering was held not applicable to a trust patent for Indian reserved lands.

With this rule of interpretation and of practice under it in mind, let us consider the scope of the limitation provision relied upon, which is found in section 8 of the Act of March 3, 1891 (26 Stat. 1099, c. 561) entitled "An act to repeal timber culture laws and for other purposes."

This act is a very considerable amendment to and revision of laws relating to public lands and, as House Report No. 253, 54th Congress, 1st Session, shows, it grew out of the insecurity and loss of confidence of the public in the integrity and value of patent titles to public lands, which had been occasioned by conflicting claims, chiefly between land grant railroad companies and the government, which had resulted in many suits being commenced to cancel patents. The statute was passed to promote prompt action for annulling patents where cause therefor was believed to exist and to make titles resting upon patents dependably secure when the period of limitation should expire. As might well be anticipated, therefore, this statute, originating in such conditions, was limited in its terms to suits "to vacate and annul" patents, without any reference being made to suits to recover the value of the land when patents were fraudulently obtained, so that only by extravagant interpretation can its bar be made applicable to such suits—and such interpretation we have seen is forbidden.

To this we add that when the Congress really intended to bar by limitation statute the right to recover the value of lands, as well as the lands themselves, such intention found clear expression in the Act of March 2, 1896 (29 Stat. 42), which modified, and in a measure is a substitute for, the section we are considering, by declaring:

"That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands," etc.

*563 And, finally, the decisions of this court furnish clear confirmation of the reality and substantial character of the contention of the government, by holding that when by mistake public officers executed a patent to a railroad company for lands which had afterwards been conveyed to purchasers dealing in good faith, the right of the government to recover such lands was barred, but nevertheless the right remained to sue for and recover the value of the lands so wrongfully received and conveyed. Southern Pacific R. R. Co. v. United States, 200 U. S. 341, 353, 26 Sup. Ct. 296, 50 L. Ed. 507.

Thus the rule and practice for interpreting the act, its language, as well that which is omitted from it as that which is contained in it, and the action of Congress in dealing with a kindred subject-matter, all impel to the conclusion that the omission of language barring the right of the government to recover the value of lands to which a patent had been fraudulently obtained, was intentional and deliberate, to the end that patent titles might be made secure but that persons who had defrauded the government should not be protected by the act in the enjoyment of their ill-gotten gains.

The support for the contention of the defendants in error, contrary to this conclusion, which they claim to find in United States v. Chandler-Dunbar Water Power Co., 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881, is based upon the statement that by the statute "the patent is * * * to have the same effect against the United States that it would have had if it had been valid in the first place." But that is merely an emphatic way of say-

ing that the title is made good. It does not import that the collateral effects of fraud in obtaining the patent are purged. The element of bad faith or fraud was expressly excluded.

[2] While the Circuit Court of Appeals, as we have stated, rested its decision wholly upon the limitation statute, yet, under warrant of the claim in the demurrer that the petition does not state a cause of action, it *564 is further argued in this court, that if it be conceded that the right of recovery by the government is not barred, nevertheless such recovery is limited by section 2 of the Act of March 2, 1896 (29 Stat. 42), to the minimum government price for the land, and since the petition shows that this amount was paid to the government when the patent was issued, there can be no recovery.

But the act of 1896 deals only with patents "erroneously issued under a railroad or wagon-road grant" and the limited recovery allowed is restricted to cases where it shall appear that such erroneously patented lands have been sold to bona fide purchasers. That such a statute can have no application to such a case as we are considering is too obvious for comment.

This doctrine, that where there are two remedies for the protection of a right one may be barred and the other not, is no novelty in the law. So long ago as 5 Pickering, in Lamb v. Clark, pages 193, 198, it was tersely stated as then familiar doctrine that "If an injured party has a right to either of two actions, the one he chooses is not barred, because the other, if he had brought it, might have been." And the principle has frequently been recognized by this and other courts. Lewis v. Hawkins, 23 Wall. 119, 127, 23 L. Ed. 113; Hardin v. Boyd, 113 U. S. 756, 765, 5 Sup. Ct. 771, 28 L. Ed. 1141; Kirkman v. Philips' Heirs, 7 Heisk. (Tenn.) 222, 224; Ivey's Administrator v. Owens, 28 Ala. 641, 649; Ganley v. Troy City Nat. Bank, 98 N. Y. 487, 494.

The conclusions we are here announcing are in entire accord with well-considered opinions by two Circuit Courts of Appeal, that of the Eighth Circuit, in United States v. Koleno, 226 Fed. 180, 141 C. C. A. 178, and in Union Coal & Coke Company v. United States (C. C. A.) 247 Fed. 106, and that of the Ninth Circuit in Bistline v. United States, 229 Fed. 546, 144 C. C. A. 6.

The judgment of the Circuit Court of Appeals is

Reversed.

(246 U. S. 519)

UNITED STATES v. SCHIDER.

(Argued March 6, 1918. Decided April 15, 1918.)

No. 468.

FOOD ⇐7, 15—STATUTE — "MISBRANDED" — "ADULTERATED."

Where defendant sold an imitation of grape essence, artificially prepared from alcohol, water, and synthetically produced imitation oils, under the label "Compound Ess Grape," the article must be deemed "adulterated" and also "misbranded," within Food and Drug Act June 30, 1906, c. 3915, §§ 7, 8, 34 Stat. 769, 771 (Comp. St. 1916, §§ 8723, 8724), declaring that an article shall be deemed adulterated if any substance has been substituted, in whole or in part, for the article, and that the term "misbranded" shall apply to all articles of food, the package or label of which shall bear any statement, design, or device regarding such article which shall be false or misleading in any particular, and the proviso in section 8, declaring that articles of food shall not be deemed adulterated or misbranded if they are labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations or blends, furnishes no excuse, despite defendant's use of the word "compound" in the label; the substance offered for sale being an imitation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adulterate; Second Series, Misbrand.]

In Error to the District Court of the United States for the Southern District of New York.

Joseph L. Schider, trading as "Jos. L. Schider & Co.," was indicted for violating the Food and Drug Act, and, a demurrer to the indictment being sustained, the United States brings error. Reversed and remanded.

Mr. Assistant Attorney General Frierson, for the United States.

Mr. Joseph S. Rosalsky, of New York City, for defendant in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

An indictment containing six counts charged defendant, Schider, with violating the Food & Drug Act of June 30, 1906 (34 Stat. 768, c. 3915 [Comp. St. 1916, §§ 8717–8728]), by delivering for shipment in interstate commerce food contained in a bottle plainly labeled as follows: *520

Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York.

Each count alleged the article was an imitation of grape essence artificially prepared from alcohol, water and synthetically produced imitation oils and contained no product of the grape nor any added poisonous or deleterious ingredient; and that the word "imitation" nowhere appeared.

The first count further alleged it was "unlawfully adulterated in that an imitation grape essence artificially prepared from alcohol, water and synthetically produced imitation essential oils had been wholly substituted for a true grape product, which the article purported to be"; and the second that it was "unlawfully adulterated in that an imitation grape essence artificially prepared from alcohol, water and synthetically produced imitation essential oils, had been mixed with the said article so as to reduce and

lower and injuriously affect the quality and strength of the said article."

The third, fourth, fifth and sixth counts, in varying ways, further alleged misbranding so as to deceive and mislead in that the label indicated a true grape product, whereas the article was not such but an imitation artificially prepared, one which contained nothing from grapes.

The trial court sustained a demurrer to each count upon the view that, properly construed the Food & Drug Act did not apply to facts stated.

Pertinent portions of the act follow:

"Sec. 7. That for the purposes of this act an article shall be deemed to be adulterated: * * *

"First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

* * "Second. If any substance has been substituted wholly or in part for the article. * * *

"Sec. 8. That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the state, territory, or country in which it is manufactured or produced.

"That for the purposes of this act an article shall also be deemed to be misbranded: * * *

"First. If it be an imitation of or offered for sale under the [distinctive] name of another article. * * *

"Second. If it be labeled or branded so as to deceive or mislead the purchaser, * * *

"Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: Provided, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: * * * Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale. * * *" 34 Stat. c. 3915, pp. 768, 770, 771.

The obvious and undisputed purpose and effect of the label was to declare the bottled article "a compound essence of grape." In fact, it contained nothing from grapes and was a mere imitation.

Within the statute's general terms the article must be deemed adulterated since some other substance had been substituted wholly for the one indicated by the label; and, also, it was misbranded, for the label carried a false and misleading statement.

Defendant relies on the proviso in section 8 which declares articles of food shall not be deemed adulterated or misbranded if they are "labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale." But we are unable to conclude that by simply using "compound" upon his label a dishonest manufacturer exempts his wares from all inhibitions of the statute, and obtains full license to befool the public. Such a construction would defeat the highly beneficent end which Congress had in view.

We have heretofore said:

"The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it." United States v. Antikamnia Co., 231 U. S. 654, 665, 34 Sup. Ct. 222, 225 (58 L. Ed. 419, Ann. Cas. 1915A, 49). "The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality." United States v. Lexington Mill Co., 232 U. S. 399, 409, 34 Sup. Ct. 337, 340 (58 L. Ed. 658, L. R. A. 1915B, 774).

And see United States v. Coca-Cola Co., 241 U. S. 265, 277, 36 Sup. Ct. 573, 60 L. Ed. 995, Ann. Cas. 1917C, 487.

The stuff put into commerce by defendant was an "imitation" and if so labeled purchasers would have had some notice. To call it "compound essence of grape" certainly did not suggest a mere imitation but on the contrary falsely indicated that it contained something derived from grapes. See Frank v. United States, 192 Fed. 864, 113 C. C. A. 188. The statute enjoins truth; this label exhales deceit.

The trial court erred in sustaining the demurrer. Its judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

(246 U. S. 424)

INTERNATIONAL & G. N. RY. CO. et al. v. ANDERSON COUNTY et al.

(Argued March 25 and 26, 1918. Decided April 15, 1918.)

No. 243.

1. COURTS ⊜493(1)—MORTGAGES—FORECLOSURE—JURISDICTION OF COURT.

Termination of proceedings brought in the federal court to foreclose a mortgage on railroad property terminates the jurisdiction of that tribunal, and the purchaser is not immune from a suit in the state court relating to the management of the property, on the theory that the federal court was the only proper forum having jurisdiction.

2. COURTS ⊜489(1)—STATE COURTS—JURISDICTION.

Jurisdiction of state courts to decide as to an alleged public duty on the part of a railroad within the borders of the state would not be taken away by a foreclosure sale and order in the federal court freeing the purchaser of the property from obligations of the mortgagor company, in the absence of further action by the federal court.

3. RAILROADS ⊜194(7)—MORTGAGES—FORECLOSURE—EFFECT.

A sale of the property and franchises of a Texas railroad company under mortgage fore-

closure proceedings had in the federal court did not free the property in the hands of the purchaser from the burden of the state law forbidding the removal of the general offices, machine shops, and roundhouses from the point at which they were located.

4. RAILROADS ⊂⊃194(7) — LOCATION OF OFFICES—STATUTORY PROVISIONS.

Where the original railroad company, a Texas corporation, whose property and franchises were acquired by defendant, also a Texas company, as a result of a series of mortgage foreclosures and consolidations, had contracted, in consideration of an issue of county bonds, to maintain its general offices, machine shops, and roundhouses at a city within the county, Texas Office-Shops Act March 27, 1889 (Acts 21st Leg. c. 106, § 1; Rev. St. 1911, art. 6423), which provided that every railroad company chartered by the state, or owning or operating a line within the state, should permanently maintain its general offices at the place named in its charter or, if no certain place were named there, at such place as it should have contracted to locate them, and that, if located in a county that had aided the company by an issue of bonds in consideration of the location being made, they should not be changed, applied, and precluded a change by defendant, although its articles of incorporation fixed the place for its general offices as another city, for the provision in the law making the maintenance of offices at the place the railroad has contracted to keep them, conditional on no place being named in its charter, does not mean that articles framed under a general law can get rid of contracts that otherwise would bind.

5. RAILROADS ⊂⊃196 — STATUTES — ACCEPTANCE.

Rev. St. Tex. 1911, art. 6624, provides that the charter of a sold-out railroad shall pass to the purchaser, subject to article 6625, authorizing such purchasers to form a new corporation, but that no right shall be acquired in conflict with the present Constitution and laws. The Office-Shops Act (article 6423) provides that if the offices, shops, etc., are located in a county which has aided the railroad in consideration of such location, the same shall not be changed. *Held*, that a new corporation could not move offices and shops so located, as it is subject to the "limitations imposed by law."

6. COMMERCE ⊂⊃58—BURDEN ON INTERSTATE COMMERCE—TEXAS OFFICE-SHOPS ACT.

The restriction upon a corporation organized to take over a sold-out railroad, under Rev. St. Tex. 1911, arts. 6624, 6625, imposed by the Office-Shops Act (article 6423), preventing removal of offices and shops from a county which has issued bonds in consideration of location of such offices and shops, is not invalid, as imposing a burden upon commerce between the states, although the railroad is engaged in such commerce, since the burden, if any, is indirect.

7. JUDGMENT ⊂⊃231—FORM—PERPETUAL REQUIREMENTS.

A judgment against a railroad based on the Office-Shops Act (Rev. St. Tex. 1911, art. 6423), and requiring perpetual maintenance of railroad offices and shops at a place in a certain county, was not in improper form, as purporting to be perpetual, since the word "perpetual" added nothing to the requirement, which would be perpetual until the law was changed.

In Error to the Court of Civil Appeals, Sixth Supreme Judicial District, State of Texas.

Action by Anderson County, the City of Palestine, and others against the International & Great Northern Railway Company and others. A judgment for plaintiffs was affirmed, on defendants' appeal, by the Texas Court of Civil Appeals (174 S. W. 305), and defendants bring error. Affirmed.

Messrs. H. M. Garwood and Samuel B. Dabney, all of Houston, Tex., for plaintiffs in error.

Messrs. F. D. McKenney, of Washington, D. C., T. B. Greenwood, of Austin, Tex., and A. G. Greenwood and W. C. Campbell, both of Palestine, Tex., for defendants in error.

*428 * Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit brought by the defendants in error to prevent the Railroad Company, plaintiff in error, from moving its machine shops, roundhouses, and general offices from the City of Palestine and from maintaining any of them elsewhere. An injunction was issued as prayed; the judgment was affirmed by the Court of Civil Appeals, 174 S. W. 305, in accordance with intimations of the Supreme Court of Texas at an earlier stage, 106 Tex. 60, 156 S. W. 499, and an application to the latter Court for a writ of error was refused. The case is brought here upon voluminous assignments of error which may be summed up in the propositions that the State Court was without jurisdiction because of certain foreclosures in the Courts of the United States, that the judgment disregarded rights secured by the decrees of those Courts, and that it gave effect to a statute which as applied burdened interstate commerce, impaired the obligation of contracts, etc., and was contrary to Article 1, Sections 8 and 10, and to the Fourteenth Amendment of the Constitution of the United States.

429 The facts begin with the predecessors of the plaintiffs in error. The Houston & Great Northern Railroad Company, a local road, was chartered by a special Act on October 26, 1866. About March 15, 1872, it contracted with the citizens of Palestine in the County of Anderson in consideration of the issue of bonds by the county to maintain its general offices, machine shops and round houses at that place. The International Railroad Company was chartered in like manner on August 5, 1870. In 1872 the two companies agreed to consolidate and this agreement was ratified by the stockholders of each in 1873. A special Act of April 24, 1874, authorized the consolidated company, known as the International & Great Northern Railroad Company, to issue bonds secured by mortgage and provided that all acts theretofore done in the name of either of the companies should be of the same binding effect upon the new one that they were upon the old. In 1875 the new company in consideration of the erection of houses for its employés renewed the contract of the Houston & Great Northern and at about the same time it resolved that its general offices should be removed to Palestine. We see no reason for

reopening the findings below that the alleged contracts were made. The offices were removed and there they remained, subject to some immaterial interruption, until 1911. The machine shops and roundhouses are still there. Each of the two constituent companies had executed mortgages before the date of the original agreement of the Houston & Great Northern and each executed another before the contract of the consolidated company in 1875. These mortgages were all foreclosed in 1879 and the property conveyed to a corporation, still called the International & Great Northern Railroad Company, by a deed that conveyed all the franchises and chartered powers of the original roads. The foreclosure is one fact relied upon for the defence.

The purchasing company in its turn executed mortgages, one of which, including, *430 like the earlier ones that we have mentioned, the franchise to be a corporation,* dated in 1881, is the source of the plaintiff in error's title, by a foreclosure in 1910–1911. Before this last foreclosure took place two statutes were enacted in Texas that are important. The first, known as the Office-Shops Act, approved March 27, 1889, c. 106, Rev. Civil Stat. 1911, art. 6423, provided that every railroad company chartered by the State or owning or operating a line within the State should permanently maintain its general offices at the place named in its charter, and if no certain place were named there, at such place as it should have contracted to locate them, otherwise at such place as it should designate; also that it should maintain its machine shops and round houses at the place where it had contracted to keep them, and that if the offices, shops or round houses were located on the line of a railroad in a county that had aided such railroad by an issue of bonds in consideration of the location being made, then such location should not be changed; 'and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization.' A violation of the Act entails forfeiture of the charter, with a penalty of $5,000 a day for every day of violation. Rev. St. art. 6425. An Act approved two days later, March 29, 1889 (Acts 21st Leg. c. 24), with provisos that no rights should be acquired inconsistent with the present Constitution, that the main track once constructed and operated should not be removed, etc., authorized purchasers of sold-out railroads to form a new corporation, whereas previously the purchaser had continued the franchises of the old under the original grant. A law of September 1, 1910, (Acts 4th Called Sess. c. 4), further emphasized the change of policy by excluding a succession to the old charter unless coupled with an acceptance of certain liabilities, and providing that the charter should pass subject to the provisions and limitations imposed and to be imposed by law. Rev. St. art. 6625. *431

*The mortgage of 1881 last mentioned was foreclosed by proceedings in the Circuit Court of the United States. A decree of May 10, 1910, while reserving jurisdiction of the property, ordered a sale, which, after postponements, took place on June 13, 1911, and was confirmed the next day. On September 25, 1911, the railroad and franchises were finally discharged from the possession and control of the receiver and the Court. Before that date the plaintiff in error was incorporated under the Act of 1889 and general laws and took the conveyances under the foreclosure decree. Within the time allowed it had filed in Court a repudiation of any agreement on the part of any of its predecessors to maintain their offices and shops at Palestine, and later gave notice to that effect to officials of Anderson County and Palestine. The articles of incorporation fixed the place for the general offices as Houston.

[1, 2] The railway company denies the jurisdiction of the State Court and sets up that the court of the last foreclosure is the only proper forum. But a decree of foreclosure does not render the purchaser and property foreclosed sacrosanct. The Circuit Court had finished the case and had given up possession and control before this suit was brought. Shields v. Coleman, 157 U. S. 168, 178, 179, 15 Sup. Ct. 570, 39 L. Ed. 660; Wabash R. R. Co. v. Adelbert College, 208 U. S. 38, 55, 28 Sup. Ct. 182, 52 L. Ed. 379. Even if it were true that the foreclosure sale and order carried an immunity from the present demand that the railway was entitled to set up, in the absence of action on the part of the Court of the United States, it would not take away the power of the State Court to decide as to the existence of an alleged public duty on the part of a railroad within the territory where the court sat. Ricaud v. American Metal Co. (March 11, 1918) 246 U. S. 304, 38 Sup. Ct. 312, 62 L. Ed. ——.

[3] But the foreclosures did not have the supposed effect. They no more removed all human restrictions than they excluded the authority of ordinary courts. Suppose* that a special act incorporating the mortgagor had provided in terms evidently intended to reach beyond foreclosure that the general offices were to remain forever at Palestine, it hardly would be argued, and certainly would not be argued here or in Texas with success, that the requirement could be touched by a decree. But if the law made that requirement, it hardly matters whether the restriction was imposed by charter or otherwise or whether the remote reason for it was a contract or a general notion of public policy. The State Courts hold that when the law on any ground fixes the place of the offices and shops the obligation is indelible by foreclosure. We see no reason why their decision should not prevail. *432

[4] It is contended that the Office-Shops Act of 1889 does not touch the plaintiff in error by its term and that if it be construed to do so it is unconstitutional. On the construction of the Act it seems to us that there can be no doubt. It is true that the provision requiring the general offices to be maintained at the place where the railroad had contracted to keep them is conditioned on no place being named in the charter, but of course this does not mean that articles framed under a general law can get rid of contracts that otherwise would bind, and in our opinion it is equally plain that no distinction was intended between the contract by the present road and one by its predecessor, if the office and shops 'are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made.' 'Then,' the statute says, 'said location shall not be changed.' The construction of the Act by the State Court is beyond criticism upon this point.

[5] It is said that the Act so construed would infringe the constitutional rights of the parties to the mortgage of 1881, which the plaintiff in error took by foreclosure. * But it will be remembered that the mortgagor under the law then in force merely had succeeded to the original contractors, freed from their unsecured debts, no doubt, but, it well might be held, not freed from the obligation in question. Also it was found by the Courts below that the sale under which the mortgagor took in 1879 was not a bona fide sale, and so was not a sale that put the purchaser in a position other than that of mortgagor. Apart from these considerations we should be slow to say that it was not within the power of a state legislature dealing with a corporation of the state to fix the place of its domicile and principal offices, in the absence of other facts than those appearing in this case. But furthermore when the Office-Shops Act was on the statute book the plaintiff in error took out a charter under general laws that expressly subjected it to the limitations imposed by law. It is said that this does not make the plaintiff in error adopt an otherwise unconstitutional statute. But even if, contrary to what we have intimated, the Act could not otherwise have affected those particular corporations, it was a law upon the statute books and was far from a mere nullity, and if it was made a condition of incorporation that this restriction should be accepted, the plaintiff in error cannot complain. Interstate Consolidated Street Ry. Co. v. Massachusetts, 207 U. S. 79, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555. We agree with the State Courts that the condition was imposed.

[6, 7] The acceptance of the charter by the plaintiff in error disposed of every constitutional objection but one. It is said that the restriction imposes a burden upon commerce among the States, since the road concerned has expanded and now is largely engaged in such commerce. The jury found that it imposed no such burden, upon an issue submitted to them in accordance with the desire of the plaintiff in error, although not in the form that it desired. So far as the question depended upon the testimony adduced the verdict must be accepted, and although no doubt there might be cases in which this Court would pronounce for itself, irrespective of testimony, whether a burden was imposed, we are not prepared to say that in this instance the State has transcended its powers. The burden if any is indirect. Some complaint is made of the form of the judgment, as purporting to be perpetual. But the word perpetual adds nothing to a requirement that the office and shops should be maintained in Palestine. The requirement is perpetual until the law is changed. When and how it may be changed is not before us now. Other objections are urged and other details are adverted to in the very lengthy printed arguments, besides those with which we have dealt, but we deem it unnecessary to go farther. Upon the whole case we are of opinion that the judgment below should be affirmed.

Judgment affirmed.

(246 U. S. 450)

CUDAHY PACKING CO. v. STATE OF MINNESOTA.

(Argued April 26, 1917. Decided April 15, 1918.)

No. 32.

1. COMMERCE ⊜72 — INTERSTATE COMMERCE — TAXATION OF PROPERTY AND GOODS THEREIN.

A state may tax property within its borders, although used in interstate commerce.

2. COURTS ⊜366(6)—STATE DECISIONS—CONCLUSIVENESS.

The theory of the state as to the nature of a tax upon property employed in interstate commerce, while not conclusive on the national courts, should not be rejected, unless it can be said to be ill founded.

3. COMMERCE ⊜73—INTERSTATE COMMERCE—BURDEN UPON—TAXATION.

Laws Minn. 1907, c. 250, as amended by Laws Minn. 1909, c. 473, and Laws Minn. 1911, c. 377, imposing a tax on freight line companies such as those furnishing refrigerator cars to railroads, computed upon the gross earnings of the companies from the operation of their line within the state, is valid, and does not impose a burden on interstate commerce, though the cars of such company were largely used in such commerce, it appearing from the original and the amendatory acts that it was intended to use the gross earnings of the property merely as a criterion to determine the value of the property, and to tax only the property itself.

4. COMMERCE ⊜73—INTERSTATE COMMERCE—BURDEN UPON—TAXATION.

The act is not invalid because the usual tax rate if applied to the cash value of the cars taken separately would result in an appreciably lower tax, for the state is not confined to tax-

ing the cars as separate articles, but may tax the entire property, tangible and intangible, constituting the car line as used within its limits, and may tax the same at its real value as part of a going concern.

5. TAXATION ⊂⊃47(7)—EXCESSIVE TAXATION.
Though the receipts of railroads from shipments in such refrigerator cars, less the rentals paid, were included in the gross earnings of those railroad companies transporting the cars, and thus furnished a basis for computing for taxation the value of the property owned or operated by such companies, for railway purposes, the law is not subject to attack on the ground that there was a double assessment, first against the owner of the car line, and then against the railroad, since the receipts from the shipments arose not only from the use of the cars, but from the use of the tracks, locomotives, fuel, and labor provided by the railroad companies.

In Error to the Supreme Court of the State of Minnesota.

Action by the State of Minnesota against the Cudahy Packing Company to enforce collection of taxes. A judgment for the state was affirmed on defendant's appeal (129 Minn. 30, 151 N. W. 410), and defendant brings error. Affirmed.

Messrs. Robert E. Olds, Frank B. Kellogg, and Cordenio A. Severance, all of St. Paul, Minn., for plaintiff in error.

Messrs. Lyndon A. Smith and William J. Stevenson, both of St. Paul, Minn., for State of Minnesota.

*451 *Mr. Justice VAN DEVANTER delivered the opinion of the Court.

A tax, for each of the years 1907 to 1912 inclusive, imposed under a law of Minnesota (Acts 1907, c. 250; 1909, c. 473; 1911, c. 377) against the Cudahy Packing Company as a freight line company, and sustained by the Supreme Court of the state (129 Minn. 30, 151 N. W. 410), is here in question. Whether the tax constitutes an unconstitutional restraint or burden on interstate commerce is the matter for decision.

The company is an Illinois corporation and operates plants in Iowa, Missouri and Kansas for slaughtering live stock and converting the same into fresh meats and other articles of commerce. It sells the products throughout the United States, maintains branch houses in several states, including three in Minnesota, and owns a line of refrigerator cars wherein the products are shipped to the branch houses and places of consumption. Under a contractual arrangement it supplies these cars to the railroads for use in such transportation and receives therefor a fixed compensation per mile of travel. In the territory embracing Minnesota this compensation or rental is one cent per mile whether the cars be loaded or empty. Usually the cars are moved to particular destinations with loads of the company's products and are returned empty to be loaded again, but where it is practicable to do so the railroads are free to carry other freight in them on the *return trip. The company pays the usual tariff rates for the transportation of its products, just as though the railroads owned the cars, and also bears the expense of all repairs save such as become necessary through negligent handling by the railroads. The use made of the cars in Minnesota consists in transporting the company's products (a) across the state from points without on one side to points without on another, (b) from points without to points within the state and the reverse, and (c) between points within the state. Of their total mileage in the state 90 per cent. is in interstate and 10 per cent. in intrastate transportation. The average number of cars in the state per day ranges from 10 to 12. *452

The cash value of each car, as a separate article of tangible property, is from $700 to $900, and the intangible property incident to their combined use under the contractual arrangement with the railroads is also, as the record shows, of substantial value. The tax in question is all that is assessed against the company in respect of the cars or the intangible property. It has other tangible property in the state, not part of its car line, whereon it pays the usual local taxes.

The receipts of the railroads from shipments carried in these cars in Minnesota, less the compensation or rental paid to the company, are added to the other gross earnings of the railroads from business in the state and the total is taken as the value for purposes of taxation of the property which the railroads own or operate in the state for railway purposes.

As construed and applied by the state court, the Minnesota law requires a freight line company, meaning a company furnishing or leasing cars to railroads for freight transportation, to report annually its gross earnings from the operation of its car line within the state and to pay, in lieu of other taxes on the property so employed, a tax fixed at a stated per cent. of such earnings. That court holds that this law is an exertion of the power of the state to tax the property within its limits from which the earnings are derived and is intended to embody a practical method of reaching and valuing that property, tangible and intangible, for taxing purposes. *453

[1] In so far as the property constituting this car line is regularly or habitually used or employed in Minnesota it is within the taxing power of the state, although chiefly devoted or applied to interstate transportation. Pullman's Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; Adams Express Co. v. Ohio, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683; Id., 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; American Refrigerator Co. v. Hall, 174 U. S. 70, 19 Sup. Ct. 599, 43 L. Ed. 899; Union Refrigerator

Co. v. Lynch, 177 U. S. 149, 20 Sup. Ct. 631, 44 L. Ed. 708. This is not questioned; but it is insisted that the tax imposed is not a property tax but one laid directly on the gross earnings. Of course, if it is laid on the earnings as such, they being derived largely from interstate commerce, it is an unconstitutional restraint or burden on such commerce and void. Fargo v. Michigan, 121 U. S. 230, 7 Sup. Ct. 857, 30 L. Ed. 888; Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200; Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031. On the other hand, if what is done is to reach the property and not to tax the gross earnings, the latter being taken merely as an index or measure of the value of the former, it well may be that the objection urged against the tax is untenable; for, as this court has said, "by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack" as restraining or burdening such commerce. St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350, 367, 35 Sup. Ct. 99, 59 L. Ed. 265; Postal Telegraph Co. v. Adams, 155 U. S. 688, *454 15 Sup. Ct. 268, 360, 39 L. Ed. 311; Wisconsin & Michigan Ry. Co. v. Powers, 191*U. S. 379, 387, 24 Sup. Ct. 107, 48 L. Ed. 229; Fargo v. Hart, 193 U. S. 490, 499, 24 Sup. Ct. 498, 48 L. Ed. 761; Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, supra.

[2, 3] As before stated, the state court regards the tax as imposed in respect of the property rather than the earnings, and the same view seems to be taken by the Legislature, for the Act of 1909 speaks of the tax as "a tax upon its [the company's] property" and the Act of 1911 says "the value of such property [that used within the state] for purpose of taxation is to be determined" by reference to the gross earnings from the mileage within the state. True, this local view is not conclusive on this court, but it cannot be rejected unless it can be said to be ill founded.

The question of the nature and effect of taxes more or less like this has been repeatedly considered in this court. In some instances its solution has been attended with considerable difficulty, for while the controlling general principles have long been well settled it has not been easy to apply to all the varying situations presented. A short reference to two recent cases in which the earlier decisions were reviewed will leave little to be said in solving the question here. We refer to Meyer v. Wells Fargo & Co., 223 U. S. 298, 32 Sup. Ct. 218, 56 L. Ed. 445, and United States Express Co. v. Minnesota, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459, both decided on the same day. The former involved a tax in Oklahoma of a stated per cent. of the gross receipts of an express company doing both a local and an interstate business in that state. The statute (Laws Okl. 1910, c. 44, § 2) called the tax a "gross revenue tax" and declared that it was to be "in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets" of the company. We held that the tax could not be sustained as a tax on the gross earnings, they being partly derived from interstate commerce, and also held that it could not be regarded as a property tax, because, as the statute disclosed, all the property of the company in the state was to be reached and valued in another way. The other case involved a tax in Minnesota of a *designated per cent. of the gross earnings *455 of an express company from business done in that state, the business being partly local and partly interstate commerce. The statute declared that the tax was to be in lieu of other taxes on the company's property, and the state court held that it was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as a measure of the value of the property for taxing purposes. We accepted and gave effect to that holding, not as being conclusive on us, but on the grounds that the property from which the earnings were derived was not to be otherwise taxed, that the tax was part of a system intended to reach the full value of the company's property in the state as reflected by the gross earnings, and that the amount of the tax did not appear to be in excess of what would be legitimate as an ordinary tax on the property, valued with reference to its use as part of a going concern. The case dealing with the Oklahoma tax was distinguished by pointing out that that tax could not be regarded as a property tax, because it was to be in addition to another tax reaching the full value of the company's property in the state.

The law imposing the present tax is closely patterned after the one exacting the tax upheld in United States Express Co. v. Minnesota, and contains the same declaration that the tax shall be in lieu of other taxes on the property. The statutes differ only in minor details and are both parts of a general system which the state applies to railroads, telephone lines and the like. So, unless this tax be otherwise distinguishable, it must, under the decision in that case, be regarded as a property tax and not as laid on the gross earnings.

[4] Because the usual tax rate, if applied to the cash value of the cars taken separately, would result in an appreciably lower tax, it is insisted that the tax imposed is in excess of what would be legitimate as an ordinary tax *on the property. But the contention proceeds on an erroneous assumption. The state is not confined to taxing the cars *456

or to taxing them as separate articles. It may tax the entire property, tangible and intangible, constituting the car line as used within its limits, and may tax the same at its real value as part of a going concern. The record makes it reasonably certain that the property, valued with reference to its use and what it earns, is worth considerably more than the cash value of the cars taken separately—enough more to indicate that the tax is not in excess of what would be legitimate as an ordinary tax on the property taken at its real or full value.

[5] Because the receipts of the railroads from shipments in these cars, less the rental paid to the company, are made a factor in valuing for taxation the property on which the railroads are taxed, it is contended that the cars are taxed twice, once to the company and again to the railroads, and are excessively valued. The contention apparently assumes that the receipts from such shipments arise solely from the use of these cars, whereas they arise in part from the use of the tracks, locomotives, fuel, labor and the like provided by the railroads. Not improbably only a minor part is fairly attributable to the use of cars. In any event, the company has an interest in the car line which yields it a rental of one cent for each mile of travel. This interest is taxable and the state values it for that purpose by the rental received. In valuing the property on which the railroads are taxed the amount of the rental is deducted from their earnings. This plainly discloses a purpose to avoid taxing the same property twice or at more than its value, measured by what it earns.

We think the tax is not distinguishable from that sustained in United States Express Co. v. Minnesota.

Judgment affirmed.

(246 U. S. 413)

CITY OF COVINGTON v. SOUTH COVINGTON & C. ST. RY. CO.

(Argued March 19 and 20, 1918. Decided April 15, 1918.)

No. 225.

1. STREET RAILROADS ⟸28(2)—FRANCHISES—DURATION.

An ordinance granting "all the right and authority that" the city had "the capacity to grant, to construct, hold and operate a street railroad upon and along" named streets, which provided for termination of the rights conveyed only in event of the failure of the grantees to keep their covenants, must be deemed a perpetual franchise, although a prior ordinance "prescribing the terms and conditions of street passenger railroads within" the city provided that "all contracts made under the provisions of this ordinance shall be for the term and period of twenty-five years," since this prior ordinance did not address itself to the construction or scope of future ordinances.

2. STREET RAILROADS ⟸28(2)—FRANCHISE—DURATION.

Where plaintiff street railway company, operating under a perpetual franchise, was authorized by an ordinance "granting the right of way over certain streets" to contract with another street railway company, operating under a 25-year franchise having then 8 years to run, for the right of way held by the latter and to occupy and use the streets specified in the contract of that road with the city "subject to the conditions, limitations and restrictions contained in the ordinances regulating" plaintiff's right to streets occupied by it, and, in accordance with the ordinance, plaintiff purchased the other company's lines, it thereby acquired a perpetual franchise therefor; for the language of the ordinance conveyed more than a license to purchase what the vendor had, the title and the operative words importing a grant.

3. MUNICIPAL CORPORATIONS ⟸680, 681(7)—FRANCHISES—PERPETUAL FRANCHISES.

Under Laws Ky. 1849–50, c. 237, art. 1, § 2, and article 2, § 19, vesting the streets in the city and giving the municipality exclusive control over the same, and in view of Acts Ky. March 13, 1878, and April 5, 1878 (Laws 1877–78, cc. 423, 813), extending the rights of a street railroad company having a perpetual franchise, a Kentucky municipality must be deemed to have had authority to grant the perpetual franchise to a street railroad company.

Mr. Justice Clarke and Mr. Justice Brandeis dissenting.

Appeal from the District Court of the United States for the Eastern District of Kentucky.

Bill by the South Covington & Cincinnati Street Railway Company against the City of Covington. From a decree for complainant, defendant appeals. Affirmed.

Messrs. A. E. Stricklett and Frederick W. Schmitz, both of Covington, Ky., for appellant.

Messrs. Alfred C. Cassatt, Richard P. Ernst, and Frank W. Cottle, all of Cincinnati, Ohio, for appellee.

* Mr. Justice HOLMES delivered the opinion * 414 of the Court.

This is a bill in equity brought by the appellee to restrain the City of Covington from carrying out an *ordinance of July 14, 1913, *415 that provides for the grant of a twenty-year franchise for a street railway over certain streets to the best bidder. The plaintiff claims a right by grant and contract over the same streets, which will be interfered with, and sets up article 1, § 10, and the Fourteenth Amendment of the Constitution. The defendant says that the plaintiff's grant has expired, and that if it purports to be perpetual it was beyond the power of the city. These are the two propositions argued. The District Court granted the injunction as prayed and the city appealed.

[1] We will consider first the scope of the ordinances and contract under which the plaintiff makes its claim. On January 21, 1870, Edward F. Abbott, S. J. Redgate and their associates were incorporated, with perpetual succession, as the Covington and Cincinnati Street Railway Company, with power to construct railways in the City of Covington along such streets as the council might grant the right of way to, and along such

roads out of the city as the companies owning the roads might cede the right to use. The company was authorized to purchase and hold such routes and railway tracks as might be deemed necessary for its use, and to connect with and use the tracks of other railways in the vicinity upon equitable terms. Just before their incorporation, on December 13, 1869, an ordinance was passed by the city granting, according to the terms of a contract executed on December 23, 1869, to Abbott and Redgate, "their associates, successors and assigns," "all the right and authority that [the city had] the capacity to grant, to construct, hold and operate a street railroad upon and along" the streets named. The only provision for a termination of the rights conveyed was in case of a failure of the grantees to keep their covenants. On December 28, 1874, an ordinance was passed *416 extending the time for completing the work under the Abbott contract, renewing the terms of the same but somewhat changing the route, and on January 28, 1875, another authorized an extension to a suspension bridge across the Ohio. On May 1, 1875, Abbott and his associates conveyed all their rights under the foregoing ordinances and contract to the corporation that they had formed, and the title of the corporation was recognized by an ordinance of June 21, 1875. On January 25, 1876, Abbott and others were incorporated with perpetual succession as the South Covington and Cincinnati Street Railway Company, the appellee, with substantially the same powers that were granted to the Covington and Cincinnati Company, and on December 20, 1876, the last-named corporation conveyed its rights to the appellee. The latter has whatever rights were acquired by Abbott, as was recognized by an ordinance of October 13, 1881.

As there is no hint at any limitation of time in the grant to Abbott, and on the other hand the city grants all the right and authority that it has the capacity to grant, there can be no question that the words taken by themselves purport a grant in perpetuity more strongly than those held to have that effect in Owensboro v. Cumberland Telephone & Telegraph Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. Ed. 1389. The fact chiefly relied upon to narrow their operation is found in the terms of "an ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington" passed on December 15, 1864, before the dealings with Abbott. By section 13 "all contracts made under the provisions of this ordinance shall be for the term and period of twenty-five years." It is contended that this by implication governs later transactions. But there is little ground for even an argument upon the point. The ordinance is providing for proposals and a contract with the best bidder, concerning routes contemplated by a rival of the Covington and Cincinnati, the Covington Street Railway Company incorporated on February 9, 1864 (afterwards bought up by the appellee). The contracts referred to in section 13 are primarily at least contracts of those who should acquire the franchises offered, such as in fact were made. In no sense is the Abbott contract a contract under that ordinance. It was a contract under the ordinance of 1869, which established its substance and even its form. The ordinance of 1864 did not address itself to the construction or scope of future ordinances, but only of certain contracts of which Abbott's was not one. We regard the matter as too plain to be pursued into greater detail. This part of our decision covers all the grants to Abbott including the right to lay tracks to the suspension bridge. *417

[2] There were extensions of the plaintiff's rights by acts of the Legislature of March 13, and April 5, 1878 (Laws 1877–78, cc. 423, 813), in general terms that there seems to be no reason for supposing more limited in time than the original grant. See section 3. The only part of this branch of the case needing further discussion concerns the rights acquired by the plaintiff through the purchase of its rival's, the Covington Street Railway's, lines. This company, under the ordinance of 1864 that we have mentioned got a franchise limited to twenty-five years, but with provisions that there should be a new bid after that time and that the successful bidder, if other than the Covington Street Railway Company, should purchase its property upon a valuation. It did not lose the value of that property by the ending of its right of use. On June 8, 1882, the plaintiff, already having a general authority by its charter, was authorized by "an ordinance granting the right of way over certain streets * * * to" the plaintiff, to contract with the Covington Street Railway Company for the right of way held by the latter and to occupy and use the streets specified in the contract of that road with the city "subject to the conditions, limitations and restrictions contained in the ordinances regulating its (the plaintiff's) right to the streets now occupied by said South Covington and Cincinnati Street Railway Company." This grant was on condition that the plaintiff should remove the tracks by which it connected with the suspension bridge under the ordinance of January 28, 1875, and give up its rights to the same, which as we have said were rights in fee. It got other access to the bridge over the Covington Street Railway line, but we agree with the district judge that it is not to be supposed that it would give up its perpetual right for a franchise having eight years to run over a less convenient route, so far as this part of its purchase was concerned. We agree also that the language of the ordinance conveys more than a license to purchase what the vendor had. The title and the operative words import a grant and

the reference to the ordinances regulating the plaintiff's right in the streets adopts as the measure these, not the contract with the selling road. The ordinance was followed by the contemplated contract in July, 1882. Some further grants need no special mention. We are of opinion that the plaintiff's right in this part of its system also is a right in fee.

[3] The question of the power of the city to grant a perpetual franchise needs but few words. By statute the streets were "vested in the city" and the authorities of the city were given "exclusive control over the same" and in another section the council was given "exclusive power to establish and regulate * * * all sidewalks, streets, alleys, lanes, spaces and commons of the city." Acts 1849–50, c. 237, art. 1, § 2, p. 239, and article 2, § 19, p. 247. No decision of the State Court is brought to our attention that calls for any hesitation in following the authority of Owensboro v. Cumberland Telephone & Telegraph Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. Ed. 1389, and pronouncing the authority complete. Wolfe v. Covington & Lexington R. R., 15 B. Mon. (Ky.) 404. A street railroad is one of the ordinary incidents of a *419 city street and stands on a different footing from the steam roads habitually run over separate rights of way. See, also, Act of March 13, 1878, c. 423, and Act of April 5, 1878, c. 813, §§ 1, 3.

Decree affirmed.

Mr. Justice CLARKE dissenting.

I have so recently stated my reasons for not concurring in opinions which seemed to me, by inference and construction, to raise limited, into perpetual, grants of rights in city streets, that I shall not repeat them here (City of Owensboro, Kentucky, v. Owensboro Water Works Co., 243 U. S. 166, 174, 37 Sup. Ct. 322, 61 L. Ed. 650; Northern Ohio Traction & Light Co. et al. v. State of Ohio, decided January 28, 1918, 245 U. S. 574, 38 Sup. Ct. 196, 62 L. Ed. ——), but shall confine myself to a brief statement of the facts and conclusions of law which lead me to dissent from the court's opinion in this case.

The opinion of the court begins with the grant to Abbott et al., in December, 1869, but in my judgment that grant cannot be correctly interpreted without beginning five years earlier, in 1864, with an ordinance passed by the city, which is general in its terms and is described in the record of council as "an ordinance defining the obligations of any company or individual to whom privilege may be granted to use the streets of the city for street railroad purposes." It is entitled, "An ordinance prescribing the terms and conditions on street passenger railroads within the City of Covington." This ordinance contained these provisions:

"This ordinance shall continue and be in force from and after its passage. All contracts under the provisions of this ordinance shall be for the term and period of twenty-five years."

And so far as the record shows it has never been repealed.

Pursuant to the terms of this general ordinance, a contract was entered into as of March 9, 1865, with the Covington Street Railway Company, giving it the right to operate a street railway on designated streets, again "for the period of twenty-five years from its date." *420

More than four years later, on May 13, 1869, Abbott and others made an application to the council for a franchise and the company holding the prior grant, which was then operating a railway, protested against the making of a grant to Abbott, and warned the city that it claimed the right to operate on all its streets and that another grant could not lawfully be made.

But at the meeting at which this protest was filed, without any special authority from the Legislature, this grant was made to Abbott. It is from the language of this grant that the court derives a perpetual franchise, and it reads:

"Be it ordained by the city council of Covington that all the authority and right that the city of Covington has the capacity to be, and the same is hereby granted to E. F. Abbott et al. * * * to construct, hold and operate a street railroad," upon designated streets.

I cannot bring myself to think that this is the language men would use who were intending to grant perpetual rights in city streets, but rather it seems to be the cautious describing of what the councilmen thought a doubtful right under a doubtful remnant of authority, remaining after the grant to the other company which was threatening litigation if this further grant were made, and that they thought it subject to the limitation of twenty-five years in the general ordinance of 1864. And be it noted that this grant, made without special authority from the Legislature, is dated December 13, 1869; that the Covington & Cincinnati Street Railway Company, the predecessor of the defendant in error, was not chartered for more than a year after the date of this grant to Abbott, from which all the rights of the defendant in error are claimed to flow; and that it did not acquire the grant until 1875 in which year the first construction work was done under it. *421

Some twenty years after the grant to Abbott the city of Covington granted, this time to the Cincinnati Covington & Rosedale Company, a franchise which was expressly limited to fifty years and which, recognizing that the general ordinance of December 15, 1864, was still effective, required that the grantee should conform to all the requirements of that ordinance "except in so far as the same has been repealed."

In the street railroad case of Louisville City Ry. Co. v. City of Louisville, 8 Bush (Ky.) 415, the Court of Appeals of Kentucky, construing the charter of the city of Louisville, granting jurisdiction over streets, in

scope, not less than that granted by the Covington charter, declared:

"Under the general power of a municipal government to control and regulate the use of the streets of a city, it cannot grant to any person or corporation the right to lay down a railway in a street. * * * The right of the general council to contract with a railway company grows out of the special acts of the Legislature heretofore quoted."

Whether this statement was necessary to the decision of the case then under consideration or not, in the following year it was paraphrased and adopted in a Covington Street Ry. Co. Case, 9 Bush (Ky.) 127, and, almost twenty years after that it was again approved in a Covington Case, 90 Ky. 390, 14 S. W. 361.

Thus, during the entire period covered by the grants here involved, it was the law of the state, as its highest court understood and announced it, that the city of Covington did not have, under its charter, power to make a street railway grant, "without special authority so to do from the Legislature."

*422 That this was also the opinion of the Legislature of the state and of that part of the bar of the state concerned with the grants here involved is conclusively shown by the fact that in the charter of every one of the three street railway companies concerned herein there is a special grant of power to the city of Covington to make the contemplated contract for the use of its streets for street railway purposes.

This obscurely worded grant, thus made to Abbott without special legislative authority, is not helped out by subsequent recognition by the city, for we find the parties, almost from the beginning of its term, dealing with each other constantly at arm's length, the city claiming that the grant was, at most, limited to twenty-five years, and the railway company claiming it to be perpetual.

For instance, as early as 1887, when the right to use electric power was granted, a typical provision was inserted in the ordinance, accepted in writing by the company:

"That nothing in this ordinance shall be construed to nor shall it give to said railway any further or longer time than it now has to operate its lines."

Again, in 1892, for a reduction of fare and other considerations the city agrees "for the period of twenty years after the acceptance of this ordinance" not to offer for sale any of the rights or franchises of the defendant in error in the said streets; and it was not until after the expiration of this period that the proposition to grant a new franchise was made, which the decision of the court permanently enjoins.

This is sufficient of detail to indicate why I am of opinion that the meager and equivocal grant of 1869 should not be regarded as helped out by the subsequent dealings of the assignees of it with the city.

Under the circumstances thus presented, with limited franchises granted before and after this grant to individuals, but never one unlimited in terms with the city contending always that this franchise was for twenty-five years only, and with the courts, Legislature, and bar of the state united in thinking that there was no power in the municipality to make even a limited street railroad grant without special legislative warrant, I cannot bring myself to consent to construe, as the court does, an obscurely worded clause of a single sentence, found in a grant to individuals, of the right to construct an insignificant horse railroad, which the son of the grantee in an affidavit alleges required an expenditure of only $48,000, so as to impose upon the municipality "the unspeakable burden" of a perpetual franchise to operate street railroads in its streets.

*423 Fully realizing the futility, for the present, of dissenting from what seems to me to be an unfortunate extension of the doctrine of the Owensboro Case, 230 U. S. 58, 33 Sup. Ct. 988, 57 L. Ed. 1389, I deem it my duty to record my dissent, with the hope for a return to the sound, but now seemingly neglected, doctrine of Blair v. Chicago, 201 U. S. 400, 463, 26 Sup. Ct. 427, 50 L. Ed. 801, declaring that a corporation which would successfully assert a private right in a public street must come prepared to show that it has been conferred "in plain terms," "in express terms," and that any ambiguity in the terms of the grant must be resolved in favor of the public and against the corporation "which can claim nothing which is not clearly given." The reason given by the court for this rule is that "grants of this character are usually prepared by those interested in them," and that "it serves to defeat any purpose, concealed by the skillful use of terms, to accomplish something not apparent on the face of the act." This is declared to be "sound doctrine which should be vigilantly observed and enforced."

Believing that the application of this wise rule to the decree before us must result in its reversal, I dissent from the opinion of the court.

Mr. Justice BRANDEIS concurs in this dissent.

(246 U. S. 525)

LOUISVILLE & N. R. CO. v. HOLLOWAY

(Submitted March 15, 1918. Decided April 15, 1918.)

No. 209.

1. DEATH ⟸104(6) — DAMAGES — INSTRUCTIONS.

In an action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]), an instruction that plaintiff's measure of recovery was such an amount in damages as would fairly compensate the widow of the deceased employé for the loss of pecuniary benefits she might reasonably have received if deceased had not been killed, while general, was correct, and was not objectionable as implying that the verdict should be for the aggregate of the several benefits payable at different times, without making any al-

lowance for the fact that the whole amount of the verdict would be presently paid.

2. TRIAL ⟸256(13)—INSTRUCTIONS—GENERAL INSTRUCTIONS.

In an action for death, where the court gave a correct general instruction as to the measure of recovery, defendant was entitled to have instruction supplemented by other more particular ones.

3. DEATH ⟸103(4)—ACTIONS—DAMAGES.

In an action under the federal Employers' Liability Act for the death of an employé, defendant is not entitled to have it declared as a matter of law that the sum awarded as damages should be treated on the basis that it would return an income at the rate of 6 per cent. per annum, the legal rate of interest, or that deceased would not have survived his probable expectancy.

4. COURTS ⟸394(25)—SUPREME COURT—REVIEW OF LOCAL PRACTICE.

Where an action under the federal Employers' Liability Act is tried in a state court, questions purely of local practice are not reviewable by the Supreme Court of the United States on writ of error to the highest state court.

5. COURTS ⟸394(24)—SUPREME COURT—EXCESSIVE DAMAGES—REVIEW OF VERDICT.

In an action under the federal Employers' Liability Act, tried in the state court where a judgment for plaintiff was affirmed by the highest state tribunal, the question of the excessiveness of damages cannot be reviewed in the federal Supreme Court on writ of error.

6. DEATH ⟸104(4)—DAMAGES.

In an action under the federal Employers' Liability Act, a judgment of the state court based on the theory that in estimating the widow's pecuniary damage the jury might consider not only amounts expended for her support and maintenance, but what she would otherwise have received from her deceased husband, is not objectionable as allowing consideration as benefits of savings which the deceased might have accumulated.

In Error to the Court of Appeals of the State of Kentucky.

Action by E. S. Holloway, administrator of the estate of John G. Holloway, deceased, against the Louisville & Nashville Railroad Company. A judgment for plaintiff was affirmed on defendant's appeal (168 Ky. 262, 181 S. W. 1126), and defendant brings error to the Court of Appeals of the state of Kentucky. Affirmed.

Mr. B. D. Warfield, of Louisville, Ky., for plaintiff in error.

Messrs. Clay & Clay, of Henderson, Ky., for defendant in error.

*526 *Mr. Justice BRANDEIS delivered the opinion of the court.

Holloway, a locomotive engineer, was killed on the Louisville & Nashville Railroad while engaged in the performance of his duties. His administrator brought, for the benefit of his widow, an action under the federal Employers' Liability Act in a state court of Kentucky and recovered a verdict of $32,900. The judgment entered thereon was reversed by the Court of Appeals (163 Ky. 125, 173 S. W. 343); and, at the second trial, a verdict was rendered for $25,000. Judgment was entered on this verdict, and was affirmed with ten per cent. damage by the Court of Appeals (168 Ky. 262, 181 S. W. 1126. The case comes here under section 237 of the Judicial Code. The errors assigned in this court and now insisted upon are these:

The first assignment: That the Court of Appeals erred in approving the giving of an instruction and the refusal of another[1] by which the trial judge had denied to the *company the benefit of the rule declared in Chesapeake & Ohio Ry. v. Kelly, 241 U. S. 485, 491, 36 Sup. Ct. 630, 60 L. Ed. 1117, L. R. A. 1917F, 367, that in computing damages recoverable for the deprivation of future financial benefits, the verdict should be based on their present value. *527

The third assignment: That the Court of Appeals erred in refusing to reverse the judgment of the trial court on the ground that the damages were excessive, and in holding as part of the loss of benefits the widow might have received and which the jury was entitled to consider "not only her support and maintenance of $50.00 a month, but in addition thereto, one-half of the savings, which decedent might have accumulated if he had lived out his allotted span" of life.

[1-4] First. The instruction given, though general, was correct. It declared that the plaintiff was entitled to recover "such an amount in damages as will fairly and reasonably compensate" the widow "for the loss of pecuniary benefits she might reasonably have received" but for her husband's death. This ruling did not imply that the verdict should be for the aggregate of the several benefits *528 payable at *different times, without making any allowance for the fact that the whole amount of the verdict would be presently paid at one time. The instruction bore rather an implication to the contrary; for the sum was expressly stated to be that which would "compensate." The language used was simi-

[1] The instruction given was: "The measure of recovery if you find for the plaintiff, being such an amount in damages as will fairly and reasonably compensate the widow of the said John G. Holloway, deceased, for the loss of pecuniary benefits she might reasonably have received if the deceased had not been killed, not exceeding the amount claimed; to wit: $50,000.00."

The instruction refused was: "The court instructs the jury that if they shall find for the plaintiff, their verdict cannot, in any event, exceed a sum which will yield, at interest at 6 per cent., a sum which will represent the proven pecuniary benefits which Mrs. Holloway received from her husband in his lifetime, and had reasonable expectation of receiving from him if he had not been killed. And the court further instructs the jury that the amount so awarded by them should be diminished by such amount as that, by using the interest and a part of the principal sum each year, the principal sum will have been exhausted at the expiration of decedent's expectancy of 28.62 years."

No other instruction on the measure of damages was given; and none was requested except an instruction, not now insisted upon, limiting the recovery specifically to $13,737.60.

lar to that in which this court has since expressed, in Chesapeake & Ohio Ry. v. Kelly, supra, 241 U. S. 489, 36 Sup. Ct. 630, 60 L. Ed. 1117, L. R. A. 1917F, 367, the measure of damages which should be applied[2]. The company had, of course, the right to require that this general instruction be supplemented by another calling attention to the fact that, in estimating what amount would compensate the widow, future benefits must be considered at their present value. But it did not ask for any such instruction. Instead it erroneously sought to subject the jury's estimate to two rigid mathematical limitations: (1) That money would be worth to the widow six per cent., the legal rate of interest; (2) that the period during which the future benefits would have continued was 28.62 years—the life expectancy of the husband according to one of several well known actuarial tables. The company was not entitled to have the jury instructed as matter of law either that money was worth that rate, or that the deceased would not in any event have outlived his probable expectancy. See Chesapeake & Ohio Ry. v. Kelly, supra, 241 U. S. 490–492, 36 Sup. Ct. 630, 60 L. Ed. 1117, L. R. A. 1917F, 367. Nor need we determine whether the local rule of practice, that if instructions are offered upon any issue respecting which the jury should be instructed and they are incorrect in form or substance it is the duty of the trial court to prepare or direct the preparation of a proper instruction upon the point in place of the defective one (see Chesapeake & Ohio Ry. v. De Atley, 241 U. S. 310, 316, 36 Sup. Ct. 564, 60 L. Ed. 1016), was applicable in the case
*529 at bar. That is a question of state law, with which we have no concern. *In the De Atley Case, the Kentucky Court of Appeals assumed for the purposes of its decision that the local rule applied, and was thereby led to decide a question of federal law. Consequently we had and exercised jurisdiction to review its decision upon that question.

[5, 6] Second. The third assignment, in so far as it relates to the refusal of the Court of Appeals to reverse the judgment "on the ground that the damages are excessive," is not reviewable here. Southern Railway Co. v. Bennett, 233 U. S. 80, 86, 34 Sup. Ct. 566, 58 L. Ed. 860. It does not appear in the case at bar, as it did in Chesapeake & Ohio Ry. v. Gainey, 241 U. S. 494, 496, 36 Sup. Ct. 633, 60 L. Ed. 1124, that the action of the Court of Appeals in sustaining the verdict was necessarily based upon an erroneous theory of federal law. As to the alleged error of the Court of Appeals in holding as part of the benefit the widow might have received "not only her support and maintenance of $50.00 a month, but in addition thereto, one-half of the savings, which decedent might have accumulated," it is a sufficient answer that the trial court did not give any instruction on that subject, nor was it requested to give any, and that the Court of Appeals did not hold as stated that the widow could share in the loss to the estate. It held that the pecuniary benefit which the jury was entitled to consider in estimating the widow's damages was not merely what she would have spent for maintenance and support, but what she would otherwise have received from her husband.

Affirmed.

[2] "The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased."

(246 U. S. 533)

UNITED STATES v. WEITZEL.

(Argued March 7, 1918. Decided April 15, 1918.)

No. 567.

1. BANKS AND BANKING ⟸256(3)—OFFENSES —"AGENT."

A receiver of a national bank appointed by the Comptroller of the Currency under Rev. St. § 5234 (Comp. St. 1916, § 9821), being an officer of the United States instead of the bank, is not an agent of the bank within section 5209 (Comp. St. 1916, § 9772), denouncing the offense of embezzlement and making false entries by every president, director, cashier, teller, clerk, or agent of a national bank; the conclusion being strengthened by the principle of noscitur a sociis, in view of the position of the word "agent" in the section.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Agent.]

2. BANKS AND BANKING ⟸256(3)—STATUTES ⟸241(1)—OFFENSES—CONSTRUCTION.

Statutes creating and defining crimes are not extended by intendment because the court thinks the Legislature should have made them more comprehensive. Therefore Rev. St. § 5209, denouncing the offense of embezzlement or making false entries by a president, director, cashier, teller, clerk, or agent of a national bank, cannot by implication be extended so as to embrace receivers appointed by the Comptroller of the Currency, on the ground that otherwise there would be no statute applying to embezzlement by such receivers.

In Error to the District Court of the United States for the Eastern District of Kentucky.

Fred W. Weitzel was indicted under Rev. St. § 5209, for embezzlement, and, a demurrer having been sustained on the ground that he did not fall within the terms of the act, the United States brings error. Affirmed.

Mr. Assistant Attorney General Warren, for the United States.

Mr. A. E. Stricklett, of Covington, Ky., for defendant in error.

*Mr. Justice BRANDEIS delivered the
*540 opinion of the Court.

The Comptroller of the Currency is charged with the duty of supervising national banks. When he deems it necessary to take

possession of the assets of a bank and assume control of its operations, he appoints a receiver under Revised Statutes, § 5234 (Comp. St. 1916, § 9821). Weitzel, so appointed receiver, was indicted in the District Court of the United States for the Eastern District of Kentucky under Revised Statutes, § 5209 (Comp. St. 1916, § 9772), for embezzlement and making false entries. That section does not mention receivers, but provides that "every president, director, cashier, teller, clerk, or agent"* of a national bank who commits these offences shall be punished by imprisonment for not less than five nor more than ten years. The government contended that the receiver was an "agent" within the meaning of the act. A demurrer to the indictment was sustained on the ground that he is not. The court discharged the prisoner and the case comes here under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (Comp. St. 1916, § 1704).

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[1] The receiver, unlike a president, director, cashier, or teller, is an officer, not of the corporation, but of the United States. In re Chetwood, 165 U. S. 443, 458, 17 Sup. Ct. 385, 41 L. Ed. 782. As such he gives to the United States a bond for the faithful discharge of his duties; pays to the Treasurer of the United States moneys collected; and makes to the Comptroller reports of his acts and proceedings. Revised Statutes, § 5234. Being an officer of the United States he is represented in court by the United States attorney for the district, subject to the supervision of the Solicitor of the Treasury. Section 380 (Comp. St. 1916, § 556); Gibson v. Peters, 150 U. S. 342, 14 Sup. Ct. 134, 37 L. Ed. 1104. And because he is such officer, a receiver has been permitted to sue in the federal court regardless of citizenship or of the amount in controversy. Price v. Abbott (C. C.) 17 Fed. 506. In a sense he acts on behalf of the bank. The appointment of a receiver does not dissolve the corporation. Chemical National Bank v. Hartford Deposit Co., 161 U. S. 1, 7, 16 Sup. Ct. 439, 40 L. Ed. 595; the assets remain its property, Rosenblatt v. Johnston, 104 U. S. 462, 26 L. Ed. 832; the receiver deals with the assets and protects them for whom it may concern, including the stockholders; and his own compensation and expenses are a charge upon them. Section 5238 (Comp. St. 1916, § 9825). But a receiver is appointed only when the condition of the bank or its practices makes intervention by the government necessary for the protection of noteholders or other creditors.[1] While the receivership

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continues the corporation is precluded from dealing by its officers or agents in any way with its assets. And when all creditors are satisfied or amply protected the receiver may be discharged by returning the bank to the control of its stockholders or by the appointment of a liquidating agent under Act of June 30, 1876, c. 156, 19 Stat. 63. Whether, as the government assumes, such statutory agent who is elected by the stockholders is included under term "agent" as used in section 5209, we have no occasion to determine. The question was expressly left undecided in Jewett v. United States, 100 Fed. 832, 840, 41 C. C. A. 88, 53 L. R. A. 568. But the assumption, if correct, would not greatly aid its contention. The law can conceive of an agent appointed by a superior authority; but the term "agent" is ordinarily used as implying appointment by a principal on whose behalf he acts. The fact that in this section the words "clerk or agent" follow "president, director, cashier, teller" tends, under the rule of noscitur a sociis, to confirm the inference. United States v. Salen, 235 U. S. 237, 249, 35 Sup. Ct. 51, 59 L. Ed. 210. Furthermore, the term "agent of a bank" would ill describe the office of receiver.

[2] Section 5209 is substantially a reenactment of section 52 of the Act of February 25, 1863, c. 58, 12 Stat. 665, 680, the first National Bank Act. It is urged by the government, that the punishment of defalcation by a receiver is clearly within the reason of the statute and that, unless the term "agent" be construed as including receivers, there was no federal statute under which an embezzling receiver of a national bank could have been prosecuted, at least until the Act of February 3, 1879, c. 42, 20 Stat. 280, (Comp. St. 1916, § 10265), made officers of the United States so liable therefor; and, indeed, cannot now be, because he should not be held to be an officer. The argument is not persuasive. Congress may possibly have believed that a different rule should be applied to an officer of the United States who is selected by the Comptroller for a purpose largely different from that performed by officers of the bank, and who gives bond for the* faithful discharge of his duties. Furthermore a casus omissus is not unusual, particularly in legislation introducing a new system.[2] The fact that in 1879 Con-

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[1] See Revised Statutes, §§ 5234, 5141, 5151, 5191, 5201, 5205, 5208 (Comp. St. 1916, §§ 9821, 9678, 9746, 9762, 9767, 9770).

[2] For example: 1. Extortion by Government "officers": Act of March 3, 1825, c. 65, § 12, 4 Stat. 118 (R. S. § 5481 [Comp. St. 1916, § 10253]); United States v. Germaine, 99 U. S. 508, 25 L. Ed. 482; amended by Act of June 28, 1906, c. 3574, 34 Stat. 546 (Comp. St. 1916, § 10253), to include "clerk, agent, or employé," and every person assuming to be such officer, etc. 2. Mailing obscene writings: Act of July 12, 1876, c. 186, 19 Stat. 90 (R. S. § 3893 [Comp. St. 1916, § 10381]); United States v. Chase, 135 U. S. 255, 10 Sup. Ct. 756, 34 L. Ed. 117; amended by Act of Sept. 26, 1888, c. 1039, 25 Stat. 496, to include "letters," Andrews v. United States, 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023; 3. Intimidating witness: Act of April 20, 1871, c. 22, § 2, 17 Stat. 13 (R. S. § 5406 [Comp. St. 1916, § 10306]); Todd v. United States, 158 U. S. 278, 15 Sup. Ct. 889, 39 L. Ed. 982; amended by Criminal Code (March 4, 1909, c. 321, 35 Stat. 1113 [Comp. St. 1916, § 10306]) § 136, to include witnesses before a "United States commissioner or officer acting as such," as well as

gress should have found it necessary to enact a general law for the punishment of officers of the United States who embezzle property entrusted to them, but not owned by the United States, shows both how easily a casus omissus may arise and how long a time may elapse before the defect is discovered or is remedied. Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive. Todd v. United States, 158 U. S. 278, 282, 15 Sup. Ct. 889, 39 L. Ed. 982; United States v. Harris, 177 U. S. 305, 20 Sup. Ct. 609, 44 L. Ed. 780.

The judgment of the District Court is Affirmed.

(246 U. S. 457)

MANUFACTURERS' RY. CO. et al. v. UNITED STATES et al. (two cases).

(Argued March 21 and 22, 1917. Decided April 15, 1918.)

Nos. 24, 25.

1. COMMERCE ⟸87 — INTERSTATE COMMERCE COMMISSION—RATES.

While Interstate Commerce Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384, as amended by Act June 18, 1910, c. 309, § 12, 36 Stat. 551 (Comp. St. 1916, § 8583), places on carriers the burden of proving that an increased rate or proposed increased rate is just and reasonable, the Interstate Commerce Commission in a proceeding by petitioner, a terminal railway company in which shippers served by it joined, to require trunk line railroads to re-establish former absorptions of such railway's charges on the ground that the continued practice of absorbing the charges of a terminal association, the stock of which was owned by the trunk line railroads, constituted a discrimination against shippers on the line of petitioner, having found that terminal railway was a common carrier, and that there was no discrimination, may assume that the through rates charged by the trunk line railroads which had been in effect before the cancellations of the absorptions were reasonable.

2. COMMERCE ⟸87 — INTERSTATE COMMERCE COMMISSION—ESTABLISHMENT OF RATES.

Though a large shipper controlled the stock of a terminal railway company, whose charges trunk lines refused to further absorb, the Commission, in a proceeding by the terminal company to compel further absorptions, may, under Interstate Commerce Act, § 15, as amended in 1910, fix a maximum for the joint rates which the terminal and trunk line companies might establish without determining the question of the division of the same, so as to prevent undue discrimination in favor of the shipper owning the stock of the terminal company.

3. COMMERCE ⟸87 — INTERSTATE COMMERCE COMMISSION—CONTROVERSIES.

In a proceeding before the Commission to require trunk line railways to absorb charges of a terminal railway company, on the ground of discrimination as trunk lines continued to absorb charges of a terminal association, the stock of which they owned, such terminal railway and shippers served by it having sought no special relief because of the Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. 1916, § 8820 et seq.]) are only entitled to have the Commission consider as a circumstance bearing on the question of discrimination that the terminal association had been adjudicated a combination in restraint of interstate commerce.

4. COMMERCE ⟸85 — INTERSTATE COMMERCE ACT—DISCRIMINATION—QUESTION FOR COMMISSION.

The Interstate Commerce Act, § 3 (Comp St. 1916, § 8565), and section 15, as amended in 1910, do not denounce every discrimination, preference, and prejudice, but only those that are undue or unreasonable, and the question whether a discrimination, preference, or prejudice is unreasonable is for the Commission.

5. COMMERCE ⟸95 — INTERSTATE COMMERCE COMMISSION—ORDERS OF.

Under Interstate Commerce Act, §§ 15, 16, as amended by Act June 29, 1906, c. 3591, §§ 4, 5, 34 Stat. 589, 590, and Act June 18, 1910, c. 309, §§ 12, 13, 36 Stat. 551, 554 (Comp. St. 1916, §§ 8583, 8584), decisions of the Commission as to whether a preference, advantage, or discrimination is undue or unreasonable, made the basis of administrative orders operating in futuro, will not be disturbed by the courts except upon a showing that they are unsupported by the evidence, were made without hearing, exceed constitutional limits, or for some other reason amount to an abuse of power.

6. COMMERCE ⟸95 — INTERSTATE COMMERCE COMMISSION—ORDERS OF.

That the evidence would have warranted a different finding by the Commission, and its first order was contrary to the last, does not warrant disturbance of a finding that the refusal of trunk line railways to absorb the charges of a terminal railway was not unjust, unreasonable, or discriminatory.

7. CARRIERS ⟸32(2)—INTERSTATE COMMERCE —DISCRIMINATIONS.

That the trunk line railways entering a common point absorbed the terminal charges of a terminal association, the stock of which they owned, does not as a matter of law entitle the terminal railway company, though a common carrier, which had no trunk line, and did terminal switching only, to precisely the same treatment.

8. COMMERCE ⟸89—FEDERAL COURTS—DISTRICT COURTS—JURISDICTION.

Act Oct. 22, 1913, c. 32, 38 Stat. 219 (Comp. St. 1916, § 992), vested in the federal District Courts only the same jurisdiction that was formerly vested in the Commerce Court by Act June 18, 1910; hence where the Commission while recognizing a terminal railway as a common carrier and fixing maximum joint rates failed to fix the allowances and divisions of rates which might be accorded by the trunk lines, the District Court is without jurisdiction in the first instance to exercise such administrative authority.

9. COMMERCE ⟸85 — INTERSTATE COMMERCE COMMISSION—SUSPENSIONS.

Where, pending proceedings on complaint of a terminal railway and its controlling stock-

witnesses before "courts." 4. Introducing liquor into Indian country: Act of March 15, 1864, c. 33, 13 Stat. 29 (R. S. § 2139 [Comp. St. 1916, § 4136a]); Sarlls v. United States, 152 U. S. 570, 14 Sup. Ct. 720, 38 L. Ed. 556; amended by Act of July 23, 1892, c. 234, 27 Stat. 260 (Comp. St. 1916, § 4136a), to prohibit the introduction of "ale, beer, wine, or intoxicating liquor or liquors of whatever kind," as well as "ardent spirits." 5. Perjury: Act of March 3, 1869, c. 130, 15 Stat. 326; Act March 3, 1825, c. 65, § 13, 4 Stat. 118 (R. S. § 5211 [Comp. St. 1916, § 9774]; see also R. S. § 5392 [Comp. St. 1916, § 10295]); United States v. Curtis, 107 U. S. 671, 2 Sup. Ct. 501, 27 L. Ed. 534; amended by Act of Feb. 26, 1881, c. 82, 21 Stat. 352 (Comp. St. 1916, § 9775), to include false swearing before a "notary public" or "any state officer" properly authorized by the state to administer oaths.

holder, which was also the largest shipper, asserting that the action of trunk lines in refusing to longer absorb charges of such terminal railway was discriminatory, one of the trunk lines filed a new tariff absorbing the charges of the terminal to a greater extent than had previously been done, the Commission, in view of the fact that formal and precise findings are unnecessary under Interstate Commerce Act, § 14, as amended by Act June 29, 1906, § 3 (Comp. St. 1916, § 8582), unless damages are awarded, was warranted in suspending the new tariff for more than the 120 days authorized by section 15, as amended in 1910, though no formal hearings were had on the question of the suspended tariff, and in treating the matter as ancillary to the original proceeding, for the question whether the controlling stockholder of the terminal railway would obtain an undue preference or rebate because of the absorptions was involved in both proceedings.

10. Commerce ⊜95—Interstate Commerce Commission—Constitutional Objections.

While, under Interstate Commerce Act, §§ 14–16, as amended, administrative orders of the Commission not calling for the payment of money, if made after due hearing and supported by evidence, are not subject to attack in the courts, nevertheless matters of constitutional right are not to be conclusively determined by the Commission; so while correct practice requires that in ordinary cases all pertinent evidence shall be first submitted to the Commission, and a suit to set aside or annul its order shall only be resorted to where the Commission acts in disregard of the rights of the parties, a party is not debarred from attacking an order of the Commission on constitutional grounds that were not asserted in a hearing before that body.

11. Commerce ⊜95—Interstate Commerce Commission—Findings.

A finding by the Commission that a terminal railway was a common carrier does not have the necessary effect of impressing all of its property with the character of property employed in the service of the public.

12. Commerce ⊜95 — Interstate Commerce Commission — Rates—Evidence—Confiscation.

In view of the rates voluntarily fixed by a terminal railway, a finding by the Commission that an absorption by a trunk line of the terminal railway's charges to the extent of $4.50 per car was unlawful as tending to give a preference or rebate to its controlling stockholder, which was also the largest shipper, *held* not subject to attack as being so unreasonably low as to deprive the terminal railway of its property without compensation.

Appeals from the District Court of the United States for the Eastern District of Missouri.

Petition by the Manufacturers' Railway Company and the St. Louis Southwestern Railway Company against the United States and the Interstate Commerce Commission to enjoin the enforcement of orders of the Commission; together with a petition by the Manufacturers' Railway Company and the Anheuser-Busch Brewing Association and others against the United States and the Interstate Commerce Commission to enjoin orders of the Commission. The petitions were in both instances dismissed, and petitioners in each case appeal. Affirmed.

*460 * These are appeals from final decrees made by the District Court in two cases dismissing petitions filed by the appellants for the purpose of enjoining the enforcement of orders made by the Interstate Commerce Commission. The cases are closely related to each other, were argued at the same time, and will be disposed of in a single opinion.

The facts are intricate, and have been the subject of consideration by the Commission in three reports (21 I. C. C. 304; 28 I. C. C. 93; 32 I. C. C. 100), from which the following résumé is taken:

Situate in South St. Louis, within the limits of the city of St. Louis, Missouri, and on the high ground back from the Mississippi River, are the great industrial plants of the Anheuser-Busch Brewing Association, a corporation, hereinafter called the Brewery, which occupy approximately 126 acres—35 or 40 city blocks—intersected by streets. There are numerous structures, in which are conducted the manufacture and marketing of beer and related products. The tonnage shipped by and to the Brewery is very heavy, amounting to upwards of 40,000 carloads per annum, or approximately one-thirtieth of all the inbound and outbound traffic of the entire city. For a number of years following the establishment of the Brewery its inbound raw materials and outbound products were drawn by horse and wagon from and to the tracks of the St. Louis, Iron Mountain & Southern Railway Company, hereinafter called the Iron Mountain, on the river front. In *461 the year 1885 this method was abandoned and a plant railway operated by steam was substituted. Two years later the plaintiff Manufacturers' Railway Company was incorporated, hereinafter referred to as the Railway, to which control and operation of the plant system was made over. The Railway now has a main line of 2¼ miles, and approximately 23 miles of side tracks. It is engaged exclusively in the switching and delivery of carload freight within the city of St. Louis. The traffic of the Brewery constitutes about 75 per cent. of its total tonnage. At the time of the hearing before the Commission, it owned no cars and only four locomotives; the cars used for the transportation of shipments originating on its line being furnished principally by the St. Louis Refrigerator Car Company, a substantial portion of whose stock is owned by the holders of a majority of the stock of the Brewery. The facilities of the Railway, however, for a considerable period and to a large extent had been available to the public, and it was held by the Commission to be a common carrier, and not a mere industrial or tap line. But a majority of the stock of the Railway was and is owned by the owners of a majority of the stock of the Brewery, so that the same interest controls both properties.

In the year 1888 the Railway leased its

tracks to the Iron Mountain for ten years, and in 1898 renewed the lease for ten years. Up to this time the only outlet from the rails of the Railway was to the main line of the Iron Mountain on the bank of the Mississippi River. In 1903 the Railway undertook a further development of its terminal facilities, and the city authorized several extensions along certain streets, and leased to it a part of a public wharf. In 1908 the Railway declined to grant a further lease to the Iron Mountain, and took over the operation of its property, with the object of enlarging and
*462 extending its facilities, serving the public in that *portion of the city generally, and connecting with all St. Louis lines by a junction with the St. Louis Transfer Railway.

The principal terminal facilities of the city of St. Louis are dominated by the Terminal Railroad Association, hereinafter referred to as the Terminal, a corporation whose capital stock is owned in equal shares by the 14 trunk lines entering that city. The Terminal, or its proprietary or tenant lines, owns or controls all bridges and ferries giving access to terminals within and lines directly entering St. Louis, so that no interstate shipment can enter or leave the city except over those lines. In St. Louis there are three industrial centers naturally requiring terminal facilities. The northern section of the city along the Mississippi River is one of these, and is served by a considerable mileage of the Terminal and the rails of nine of the trunk lines. In the western section, in what is known as the Mill Creek Valley, there are many industries served by a considerable mileage of the Terminal and the rails of four of the trunk lines. In South St. Louis the companies rendering terminal service are the Manufacturers' Railway and the Iron Mountain. The St. Louis Transfer Company, one of the subsidiaries of the Terminal, has a line along the river bank, physically available only to a negligible extent, and the lines of the Iron Mountain generally follow the bank of the river and reach such industries as are adjacent thereto. For a considerable distance along the river in this section of the city there is a steep grade to be overcome in reaching industries situate back from the river, and to confine these industries to the terminal facilities of the Iron Mountain would require a team haul up from the bank of the river. The Railway's terminals reach the high ground referred to, and besides its connection with the Iron Mountain it constructed in 1908 a viaduct
*463 leading over the Iron Mountain tracks and then descending to *their level and forming a connection with the tracks of the Transfer Railway, which lie between the Iron Mountain and the river. Through the Transfer Railway it reaches the Terminal, and through the Terminal reaches all the trunk lines that enter St. Louis. The Transfer Railway is a corporation whose stock is owned by the Wiggins Ferry Company, whose stock in turn is owned by some of the trunk lines that own and control the Terminal.

The St. Louis Southwestern Railway Company, a trunk line hereinafter called the Cotton Belt, does not reach St. Louis with its own rails, but enters East St. Louis via the rails of the Iron Mountain, over which it has trackage rights. In serving industries within St. Louis it uses the facilities of the Terminal and of the various carriers within the city, including the Railway.

By ordinance of the city of St. Louis the Railway is prohibited from charging more than $2 per car for local switching. Prior to March 1, 1910, and including the entire 20-year period covered by the leases of the Railway to the Iron Mountain, the trunk lines applied their St. Louis rates to traffic originating at or destined to industries served by the Railway, absorbing and paying to the Railway, after the termination of the Iron Mountain lease, a switching charge of from $3 to $5.50 per car, said to average about $4.50. The result of this was that shippers served by the Railway received their transportation at the St. Louis rates without paying anything additional for the terminal service performed by the Railway.

At the same time the trunk lines absorbed the terminal charges of the Terminal (about $3 per car), and similar allowances or absorptions were made by the trunk lines to twelve other industrial lines in and about the city.

About December 31, 1909, the trunk lines *464
by concerted *action notified the Railway that from and after March 1, 1910, they would cancel the tariffs wherein they had applied the St. Louis rates to industries on the Railway and had absorbed the Railway's terminal charges. Similar notice was given to the twelve other industrial lines, and accordingly the allowances were canceled at the date notified, but the practice of absorbing the charges of the Terminal was not discontinued.

On March 4, 1910, the Railway and certain shippers on its line, including the Brewery, filed a complaint against the trunk lines before the Commission (I. C. C. Docket No. 3151), in which it was alleged that the tariff cancellations were in effect an unjust and unlawful refusal by the trunk lines longer to continue through routes and joint rates theretofore established; that said action constituted an unlawful discrimination as between industries and shippers on the lines of the Railway and other industries and shippers in St. Louis, and subjected the traffic of the Railway to undue and unreasonable disadvantage, and gave undue and unreasonable preference to the shipping public in other parts of St. Louis; and further that the concerted action of the trunk lines was the result of an unlawful combina-

tion and conspiracy, in violation of the Sherman Anti-Trust Law (Comp. St. 1916, § 8820 et seq.). Complainants asked that through routes and joint rates be re-established to and from points on the Railway from and to points on each of the trunk lines and points beyond, and that proper and reasonable divisions of the through or joint rates be established. There was also a prayer for reparation and for general relief.

The trunk lines answered, evidence was taken (none, however, being introduced by the trunk lines beyond such as was brought out by examination of complainants' witnesses), and, after a hearing, the Commission, under date June 21, 1911, filed a first report *465 of its conclusions. 21 I. C. C. 304. It declared that the Railway was a*common carrier, within the provisions of the first section of the Commerce Act, and not a mere plant facility of the Brewery; that it supplied reasonable and necessary terminal facilities to many industries besides the Brewery; and that the payment of it by the trunk lines of a reasonable and just portion of the St. Louis rates for the terminal service rendered by it was not unlawful; that the action of the trunk lines in canceling the divisions and absorptions which for many years had been included in the St. Louis rates had subjected complainant shippers and a considerable portion of the public of South St. Louis to the payment of unjust and unreasonable transportation charges and to undue discrimination and disadvantage; that there had been in effect a failure on the part of the complainant carrier and defendants to agree to the apportionment or division of the rates or charges, and this situation under the statute imposed upon the Commission the duty of adjusting the matter; that in view of the peculiar features of the case detailed in the report (including the heavy shipments to and from the Brewery, and the fact that the same interests owned a majority of the stock of the Railway and of the Brewery), it was important that the allowances to the Railway and the services rendered by it to its patrons in consideration of such allowances should be equitably adjusted, and that the trunk lines should closely guard these features in making any allowances or divisions to the Railway, in order to avoid the charge of unjust discrimination or undue preference or advantage; but that the record before the Commission did not present a sufficient basis for a satisfactory determination of the question as to the reasonable and just division or allowance to the Railway, and the further question as to whether a part of the service performed by it was or was not plant facility service. These questions were reserved for further examination.

After the hearing, and before the making *466 of this first*report, practically all of the carriers published and filed tariffs stating allowances or divisions with the Railway. These were suspended by the Commission pending its decision, and upon the making of the first report an order was entered canceling the suspensions, effective July 15, 1911. No other order was made at that time.

Thereafter a supplemental hearing was had upon which additional evidence was submitted by the trunk lines, and as a result the Commission filed its second report, dated June 21, 1913 (28 I. C. C. 93), but still made no order. In this report the Commission (page 105) adhered to its former conclusion that the Railway was a common carrier subject to the act, but in other respects materially modified its views, now holding: That the payments, formerly made out of their through rates by the trunk lines to the Railway were absorptions in compensation for services rendered to the trunk lines, and were not divisions of joint rates as for services rendered for the shippers served by the Railway, as they would be considered under joint rates prescribed by order of the Commission; that in the absence of any undue discrimination with respect to these absorptions the Commission could make no lawful order with reference thereto; that the defendant trunk lines, in delivering freight at the St. Louis rates to points on the rails of the Terminal and in refusing to bear the expense of similar delivery by the Railway upon its rails, were not subjecting the shippers located on and served by the Railway to undue prejudice and disadvantage; that therefore the only lawful order the Commission could make was in the establishment of joint rates, under which that part of the service performed by the Railway would be in the contemplation of the Commerce Act a service performed for the shipper, to be paid for by him, and not a service rendered for the trunk lines, the expense of which could be required by the Commission to be borne *467 by them; that the trunk line rates to* St. Louis not being shown to be unreasonable in themselves, the joint rates with the Railway necessarily must be in excess of these by the amount of the Railway's part of the through charge, and that joint through rates should be established on that basis. Taking up the question of the amount to be added to the trunk line rates in making the joint rates, the existing allowances being, as stated, from $3 to $5.50 per car, and complainants asking for a uniform allowance of $4.50 per car, said to be lower on the average, the Commission called attention to the fact that the Railway's rate for local shipments between any points on its line was $2 per car, fixed as a maximum by city ordinance; for intraplant movements, availed of only by the Brewery—that being the only industry having need for such service—$1 per car; and for weighing movements 25 cents per car; and that the Railway had a contract with the Cotton Belt under which it handled shipments for the latter, under certain exemptions from liability for damage, for $1 per

car, and had offered the same contract to other carriers. Considering these facts with the other testimony submitted on this phase of the case, the Commission expressed the opinion that the division of the joint rates accruing to the Railway should not exceed $2 per car, saying:

"However, we shall not by definite finding and order fix these divisions now. This is our original finding with respect to the establishment of joint rates, and the carriers, in accordance with the provisions of the act, will be given an opportunity to agree among themselves."

In conclusion the Commission announced:

"We regard the present allowances, which, as stated, average slightly above $4.50 per car, as effecting unlawful results."

Following the partial decision of the Commission in its first report, most of the trunk lines reinstated the allowances to the Railway, and those allowances, averaging about
*468 $4.50 per car, were being paid at the time of the making of the second report. Pursuant to that report, they were canceled.

In this situation the Railway, the Brewery, and other complainant shippers applied to the Commission for a rehearing, and the case was reargued and taken under advisement November 13, 1913. Pending its decision, and on December 7, 1913, the Cotton Belt and another trunk line, both defendants in I. C. C. Docket No. 3151, published and filed with the Commission tariffs to become effective January 7, 1914, providing for absorption of the switching charges of the Railway up to $4.50 per car. These absorptions were suspended by order of the Commission December 19, 1913, until May 7, 1914, and by an order dated April 20, 1914, were suspended for a further period of six months, or until November 7, 1914. The suspension case was designated as Investigation and Suspension Docket No. 355, and was treated by the Commission as ancillary to the principal case, I. C. C. Docket No. 3151.

Under date July 10, 1914, and prior to the expiration of the second period of suspension, the Commission filed its third and final report, 32 I. C. C. 100. It affirmed the findings and conclusions contained in the second report, with an "interpretation"; still dealt with the Railway as a common carrier; held that the trunk lines by their action in canceling the allowances to the Railway while continuing to absorb the charge of the Terminal, whose stock they owned, did not subject the Railway or its shippers to undue prejudice or disadvantage; that the amounts formerly paid by the trunk lines to the Railway were voluntary allowances and could not be considered by the Commission to be divisions of joint rates which it could by affirmative order establish; that the separate rates of the trunk lines and of the Railway being necessarily regarded upon the record
469 before the Commission as prima facie reasonable, any joint rates which the Commission could by affirmative order require the carriers in the through route to establish would necessarily be higher than the trunk line rates to and from St. Louis by the amount of that part of the through charge which would accrue to the Railway; that while the Commission could not require the trunk lines to participate with the Railway in joint rates no higher than their rates to St. Louis, they might voluntarily participate on that basis, provided that in the division they did not pay to the Railway for its service more than was just and reasonable, and did not thereby in the amount of the excess indirectly refund to the Brewery a part of the through transportation charges paid to them by the Brewery; that the former allowances of $4.50 per car paid by the trunk lines to the Railway were excessive; and, instead of a maximum division to the Railway of $2 per car, as suggested in the second report, upon further consideration the view was expressed that the division accruing to the Railway should not exceed $2.50 per car, subject to modification upon further hearings with respect to divisions if the necessity should arise.

In announcing its purpose to make an order requiring the establishment and maintenance by complainant Railway and defendant trunk lines of maximum joint rates not exceeding the St. Louis rates of the trunk lines by more than $2.50 per car, the Commission declared that when this had been done, whether the carriers in the through routes should establish rates on that maximum basis, or by voluntary agreement on a basis not higher than the St. Louis rates, then, upon failure of the trunk lines and the Railway to agree upon the proper basis of division, and upon request made to the Commission for the purpose, it would fix the divisions upon further investigation as provided in the act; if that inquiry should confirm its present impression that $2.50 per car was a reasonable division to the Railway, that
470 would be granted; and if, on the other hand, the Commission should be convinced by the evidence that $2.50 per car was too much or not enough, it would fix the amount accordingly; and that if not asked by the carriers to fix the divisions, the Commission, upon proper cause appearing, might in its discretion institute an inquiry upon its own motion, under those provisions of the act which forbid the giving or receiving of rebates or undue concessions, directly or indirectly, by any device whatsoever, having in mind particularly the fact of the common ownership of Railway and Brewery stock.

Thereupon an order was made under I. C. C. Docket No. 3151, dated July 10, 1914, requiring the trunk lines and the Railway on or before January 1, 1915, to cease and desist from charging their then present rates on traffic between points on the line of the Railway and points on the trunk lines in other states to the extent that those rates exceeded contemporaneous St. Louis rates

by more than $2.50 per car, and to put in force on or before the same date and maintain thereafter for a period of not less than two years rates applicable to traffic on the Railway not exceeding rates contemporaneously in effect between St. Louis and points in other states by more than $2.50 per car.

At the same time, and upon the basis of the same report, an order was made under I. & S. Docket No. 355, canceling the Cotton Belt tariff that had been suspended by the orders of December 19, 1913, and April 20, 1914.

The former order of July 10 was attacked in a suit brought in the District Court by the Railway, in which the Brewery and other shippers on the line of the Railway intervened as co-petitioners. Answers were filed by the United States and the Interstate Commerce Commission, evidence was taken, and upon final hearing the suit was dismissed, *471 without opinion. No. 25 is an appeal from this decree. The orders of April 20 and July 10 under I. & S. Docket No. 355 were the subject of attack in a suit by the Railway and the Cotton Belt, in which answers were filed by the United States and by the Interstate Commerce Commission, and upon evidence taken the court, without opinion, dismissed the petition. From this decree the appeal in No. 24 was taken.

Messrs. Sidney F. Andrews, Daniel N. Kirby, Edward A. Haid, and Charles Nagel, all of St. Louis, Mo., for appellants.

Messrs. Blackburn Esterline, of Chicago, Ill., and Charles W. Needham, of Washington, D. C., for the United States.

Mr. Joseph W. Folk, of St. Louis, Mo., for Interstate Commerce Commission.

*477 Mr. Justice PITNEY, having made the foregoing statement, delivered the opinion of the Court.

It will be convenient to dispose first of No. 25.

The scope of the order of July 10, 1914, under I. C. C. Docket No. 3151, is simple and limited; the grounds of attack upon it are many and diverse, and based rather upon what it does not, than upon what it does, require to be done. As is pointed out in the prefatory statement, the complaint before the Commission was made by the Railway, the Brewery, and certain other shippers served by the Railway. The respondents were the trunk lines. The complaint charged that the then recent tariff cancellations were in effect a refusal to continue through routes and joint rates from and to points on the line of the Railway; alleged that this constituted unreasonable discrimination between shippers on the line of the Railway and other shippers in the city of St. Louis, and subjected the former to undue prejudice and disadvantage, contrary to section 3 of the Commerce Act (24 Stat. 379, 380, c. 104); and prayed that the trunk lines be required to re-establish the through routes and joint rates as they existed before the cancellations, that the reasonable divisions of the rates be determined, and that due reparation be awarded to the complainants, with such other relief as the Commission might deem necessary. The order under consideration, recognizing through routes as being already in effect (a fact about which there is no dispute), required the Railway and the trunk lines to establish, and for at least two years to maintain, rates not exceeding by more than $2.50 per car the trunk line rates contemporaneously in effect between St. Louis and points in other states.

[1, 2] It is urged that the cancellation of the absorption tariffs on March 1, 1910, constituted an increase of the former rates because it curtailed the service to be rendered under those rates; that the former absorptions presumably resulted in reasonable rates (Interstate Com. Com. v. Chicago, B. & Q. R. R. Co., 186 U. S. 320, 336, 22 Sup. Ct. 824, 46 L. Ed. 1182); that by the "increased rate clause" of section 15 of the Commerce Act as amended in 1910 (36 Stat. 552, ch. 309),[1] the burden was upon the trunk lines to show *479 the reasonableness of the new rates; and that, there being no evidence to sustain their reasonableness per se, the Commission erred in law in failing to set them aside by restoring the former absorptions.

But this clause of section 15, by the fair import of its terms, imposes upon the carrier the burden of proving the new rate to be just and reasonable, only where that question is involved in the hearing; it does not call for proof as to matters not in controversy. As the Commission pointed out in its several reports (21 I. C. C. 308; 28 I. C. C. 100, 101, 103, 105, 110; 32 I. C. C. 102, 105), the complaint was not directed to the reasonableness of the separate rates either of the Railway (one of the complainants) or of the trunk lines. The effort was to require the re-establishment of the former absorptions on the ground that without them the continued practice of absorbing the charges of the Terminal constituted a discrimination as against shippers on the line of the Railway. And when the question of discrimination was finally decided against the contention of the complainants, and the claim of the Railway to be regarded as a common carrier was decided in their favor (both conclusions being supported by adequate evidence), it appearing that through routes actually were in effect after as before the cancellations, the Commission deemed it unnecessary to

[1] "At any hearing involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this act [June 18, 1910], the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

do more at that time than to fix a maximum for the joint rates, and then await the voluntary action of the Railway and the trunk lines about establishing joint rates within the maximum, and agreeing between themselves respecting divisions.

The question of the reasonableness of the allowances or divisions made and to be made to the Railway came into the case incidentally, but inevitably, because of the heavy shipments to and from the Brewery and the community of interest between it and the Railway. Upon this point there was abundant evidence to support the conclusion of *480 the Commission that in making up the* joint rates not more than $2.50 per car should be added to the trunk line rates to St. Louis, and the intimation (not final, and not carried into the order) that any division to the Railway out of the joint rate in excess of $2.50 per car would amount to an undue preference or indirect rebate to the Brewery. Beyond this, no question of separate rates was involved, and the Commission did not err, in view of the issues, in assuming the trunk line rates to be reasonable per se. Although it might have dealt with the divisions in the same order, so far as necessary to prevent undue favoring of the Brewery (O'Keefe v. United States, 240 U. S. 294, 300–302, 36 Sup. Ct. 313, 60 L. Ed. 651), it was within the discretion of the Commission to allow the carriers to make their own agreement upon the subject, as contemplated by the first paragraph of section 15 of the act (36 Stat. 551), subject to its review.

[3] It is insisted that the "advanced rates" resulting from canceling the absorptions were presumptively unreasonable because not established by free competition but by concerted action in furtherance of the aims of the Terminal Railroad Association of St. Louis, held by this court to be an unlawful combination in restraint of interstate commerce. United States v. St. Louis Terminal, 224 U. S. 383, 32 Sup. Ct. 507, 56 L. Ed. 810. But our decision in that case (224 U. S. 412, 32 Sup. Ct. 507, 56 L. Ed. 810; 236 U. S. 207–209, 35 Sup. Ct. 408, 59 L. Ed. 535) left untouched the powers of the Interstate Commerce Commission. Besides, appellants sought no special relief because of the Anti-Trust Act. Hence at the utmost they were only entitled to have the Commission consider the nature and objects of the Terminal Association as circumstances bearing upon the question of discrimination and other questions to which they were pertinent; and this the Commission did, 21 I. C. C. 308, 314; 28 I. C. C. 98, 104–106, 109–110; 32 I. C. C. 102.

[4, 5] It is insisted, however, that the finding to the effect that it was not an undue or unjust discrimination for the trunk lines to *481 refuse to absorb the Railway's charges and thereby extend their flat St. Louis rates to the territory served by the Railway, while doing so with respect to the territory served by the Terminal, is contrary to the indisputable character of the testimony and inconsistent in law with the very facts found by the Commission. To this we cannot accede. It is not any and every discrimination, preference, and prejudice that are denounced by the Commerce Act. Section 3 (Act of February 4, 1887, c. 104, 24 Stat. 379, 380) renders unlawful any "undue or unreasonable" preference or advantage, prejudice or disadvantage. In the same section the requirement of "all reasonable, proper, and equal facilities for the interchange of traffic" is qualified so as not to require one carrier to give the use of its tracks or terminal facilities to another. And in the first paragraph of amended section 15 (36 Stat. 551) it is rates, regulations, or practices that in the opinion of the Commission are "unjustly discriminatory, or unduly preferential or prejudicial," etc., to which the prohibition is to be applied.

Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (Interstate Comm. Comm. v. Alabama Midland Ry., 168 U. S. 144, 170, 18 Sup. Ct. 45, 42 L. Ed. 414), and upon which its decisions, made the basis of administrative orders operating in futuro, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. This results from the provisions of sections 15 and 16 of the Commerce Act as amended in 1906 and 1910 (34 Stat. 589–591, c. 3591; 36 Stat. 551–554, c. 309), expounded in familiar decisions. Interstate Comm. Comm. v. Illinois Central R. R., 215 U. S. 452, 469, 470, 30 Sup. Ct. 155, 54 L. Ed. 280; Interstate Comm. Comm. v. Union Pacific R. R., 222 U. S. 541, 547, 32 *482 Sup. Ct. 108, 56 L. Ed. 308; Procter &* Gamble v. United States, 225 U. S. 282, 297–298, 32 Sup. Ct. 761, 56 L. Ed. 1091; Interstate Comm. Comm. v. Louisville & Nashville R. R., 227 U. S. 88, 91, 33 Sup. Ct. 185, 57 L. Ed. 431.

[6, 7] In the present case the negative finding of the Commission upon the question of undue discrimination was based upon a consideration of the different conditions of location, ownership, and operation as between the Railway and the Terminal. 28 I. C. C. 104, 105; 32 I. C. C. 102. The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed, the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for

the judgment of the Commission upon a matter purely administrative, and this cannot be done. United States v. Louisville & Nashville R. R., 235 U. S. 314, 320, 35 Sup. Ct. 113, 59 L. Ed. 245; Pennsylvania Co. v. United States, 236 U. S. 351, 361, 35 Sup. Ct. 370, 59 L. Ed. 616. The common use of the St. Louis Terminal by the fourteen trunk lines under a single arrangement as to absorption of the terminal charges does not, as matter of law, entitle the Railway which has no trunk line and does terminal switching alone, to precisely the same treatment. United States v. St. Louis Terminal, 224 U. S. 383, 405, 406, 32 Sup. Ct. 507, 56 L. Ed. 810; Louisville & Nashville R. R. v. United States, 242 U. S. 60, 37 Sup. Ct. 61, 61 L. Ed. 152.

Criticism is directed to the somewhat abstruse distinction drawn by the Commission between allowances or absorptions made by trunk lines in compensation for services rendered to them and divisions out of joint rates as for services rendered for the shippers (28 I. C. C. 101–106; 32 I. C. C. 102); but we deem it unnecessary to discuss the point. See Tap Line Cases, 234 U. S. 1, 28, 34 Sup. Ct. 741, 58 L. Ed. 1185. United States v. Butler County R. R. Co., 234 U. S. 29, 35–36, 34 Sup. Ct. 748, 58 L. Ed. 1196; O'Keefe v. United States, 240 U. S. 294, 302, 36 Sup. Ct. 313, 60 L. Ed. 651.

*483 [8] It hardly can have escaped attention that the real complaint of appellants respecting the order now under consideration is directed not to what the order requires to be done, but to what it does not require. It granted a part of the relief for which appellants had applied to the Commission. Recognizing the Railway as a common carrier to which allowances and divisions might be accorded by the trunk lines, and that through routes were in operation between the Railway and those lines, it fixed the maximum joint rates, and went no further for the present. The real ground for resorting to the courts in this case is the failure to fix divisions. In effect the District Court was asked to perform a function specifically conferred by law upon the Commission. But that court has only the same jurisdiction that formerly was vested in the Commerce Court (Act of June 18, 1910, c. 309, 36 Stat. 539; Act of October 22, 1913, c. 32, 38 Stat. 208, 219); and it is settled that this does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it, or to annul orders of the Commission not amounting to an affirmative exercise of its powers. Procter & Gamble v. United States, 225 U. S. 282, 292, et seq., 32 Sup. Ct. 761, 56 L. Ed. 1091.

Complaint is made because reparation was not awarded. But we are unable to see that proper foundation was laid for this in the evidence submitted to the Commission.

Nothing more need be said concerning No. 25.

[9] The first question raised in No. 24 is based upon the language of the second paragraph of section 15 of the Commerce Act, inserted by the amendment of June 18, 1910, c. 309, 36 Stat. 539, 552.[2] It is said that the tariff published by the Cotton Belt December 7, 1913, was a new tariff within the meaning of this provision, and while the Commission was authorized, either upon complaint or on its own initative, to suspend its operation pending a hearing, this suspension must not be for a longer perod than 120 days beyond the time when the tariff would otherwise go into effect unless the hearing could not be concluded within that period, in which case alone the Commission might extend the time of suspension for a further period not exceeding six months. It is contended that no hearing on the matters involved in the suspended tariff was begun within the 120 days, and therefore the second order of suspension, and also the order canceling this tariff, were arbitrary and unlawful: the argument being that the issues involved in I. C. C. Docket No. 3151 were not the same as those presented in the matter of the suspended tariff, I. & S. Docket No. 355, and hence there was no hearing whatever on the latter. *484 *485

The form of the orders made by the Commission in I. & S. Docket No. 355 lends color to this argument. The order of December 19, 1913, makes no reference to the proceedings then pending in I. C. C. Docket No. 3151, treats the tariff recently filed as "stating new individual regulations and practices affecting rates and charges," declares that the Commis-

[2] "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: Provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months."

sion will enter upon a hearing concerning their propriety, and directs that their operation be postponed until the seventh of May; while the order of April 20 refers to the former one, recites that "such hearing cannot be concluded within the period of suspension above stated," and orders a further suspension until the 7th of November.

But it is not suggested, and there is no ground for supposing that the parties were misled by the form of these orders. They were parties to I. C. C. Docket No. 3151, then pending. The Cotton Belt was one of the carriers which had canceled the former tariffs authorizing allowances averaging $4.50 per car to the Railway, and the Railway having complained to the Commission of its action, it answered declaring among other things that it canceled the tariff for the reason that it was advised that the allowances theretofore made to the Railway were illegal because the Railway was merely an industrial or tap line and under the law not entitled to any part of the through rate, and further that if the Railway was entitled to compensation as a carrier it was not entitled to receive from the Cotton Belt any allowance out of the through rate, that if entitled to any it was not entitled to the allowance theretofore paid to it under the canceled tariff, and that the allowance given to the Railway was unreasonable, excessive, and unjust.

The issues raised by this answer and by the answers of the other defendant trunk lines, which are briefly recited in the first report (21 I. C. C. 307) but need not be here repeated necessarily involved, and were *486 treated by the*Commission as involving, the question how much could be allowed by the trunk lines to the Railway out of the through rate without amounting to an undue preference or indirect rebate to the Brewery because of the common control of the Brewery and the Railway. Special attention was called to this in the first report, as appears from what has been recited in the statement prefacing this opinion. And it is obvious that the same consideration was inherent in the case, whether the payments by the trunk lines to the Railway were considered as divisions of joint rates for services rendered for the shippers served by the Railway, or absorptions in compensation for services rendered by the Railway for the trunk lines. In either case, if the allowances to the Railway were made unduly large, the Brewery's share of the profit accruing from them would amount to an indirect preference to the Brewery. Tap Line Cases, 234 U. S. 1, 28, 34 Sup. Ct. 741, 58 L. Ed. 1185; O'Keefe v. United States, 240 U. S. 294, 301-302, 36 Sup. Ct. 313, 60 L. Ed. 651. Accordingly, in the second report (28 I. C. C. 107), the Commission said:

"Complainant railway itself concedes that this question of the amount of the allowance to the Railway, but not the question of whether a reasonable allowance should be made, is a matter for closer investigation owing to the common ownership of the stock of the Railway and of the Brewery, its statement in this respect, however, being based of course upon the understanding that the allowance was to come from the trunk lines."

And in the concluding part of its report, the Commission stated (page 111):

"Should one or more of the trunk lines attempt to pay to the Railway [more than] the $2 per car which we suggest herein as being in our opinion reasonable for the latter's shippers to pay for its service, another question would be presented in which would figure the fact, much discussed in the record, of the common ownership of the stock of the Railway and of the Brewery. That question would not arise primarily under section 15 of the act, but under those sections*which seek to prohibit the giving *487 of unlawful concessions by any device whatsoever. It follows from what we have said herein that we regard the present allowances which, as stated, average slightly above $4.50 per car, as effecting unlawful results."

This was on June 21, 1913; pursuant to the report the criticized allowances were canceled; and on November 13 in the same year the case was submitted to the Commission upon a rehearing at the instance of the Railway. The Cotton Belt remained a party to the proceeding. The issues raised by its answer had not been finally disposed of, nor its answer withdrawn. Since it involved the public interests, and not merely those of the Cotton Belt, this particular issue hardly could be withdrawn.

The question of the validity of the previous allowances, approximately $4.50 per car, or of any allowance greater than $2 per car, being thus bound up in the pending controversy under I. C. C. Docket No. 3151, the Cotton Belt tariff published December 7, 1913, while the Commission had that controversy under advisement, manifestly was an attempt to forestall the decision. There was no error in suspending it pending the decision. And, there being nothing further to be submitted to the Commission in the way of evidence or argument, it was natural, and not inconsistent with the substantial rights of the parties, for the Commission to treat the suspension of the Cotton Belt tariff as a proceeding ancillary to the other, involving no different question on the merits.

The final order setting this tariff aside necessarily rested upon a finding that the proposed absorption was so unduly large as to amount to a preference or indirect rebate to the Brewery. In orders of this kind, not including an award of damages, formal and precise findings no longer are necessary; section 14 having been amended in this respect by Act of June 29, 1906, c. 3591, 34 Stat. 584, 589. See House Report No. 591, 59th Congress, 1st Sess. p. 4, explaining this provision of the bill. *488

*What we have said disposes at the same tim of the only objection raised against the order of April 20, 1914.

[10] The Railway makes the additional contention that the order of July 10, 1914 (I.

& S. Docket No. 355), prohibited the Cotton Belt from paying to the Railway as much as $4.50 per car for its services, and that it amounted to a taking of the Railway's property without due process of law in violation of the Fifth Amendment, because any rate less than that named would be confiscatory. That the order has the effect of prohibiting the Cotton Belt from paying to the Railway as much as $4.50 per car is alleged in the petition of the appellants and admitted in the answer of the United States, and we take it for granted that this is so. It is argued that it was operative upon all the trunk lines, and it is contended that payments by all of these lines upon all interstate car interchanges of any rate less than $4.50 per car would not yield in the aggregate a reasonable return upon the fair value of the Railway's property devoted to the use of interstate commerce.

As a part of the argument, it is urged that the decision of the Commission actually limits the earnings of the Railway to $2.50 per car, alleged to be wholly inadequate. But the order under attack in this suit has no such effect; and the contemporaneous order under I. C. C. Docket No. 3151 merely limits the joint rates to not exceeding $2.50 in advance of the St. Louis rates, and does not deal with the divisions; the opinion expressed upon this point being only tentative.

Appellees contend that the finding of the Commission upon the subject of confiscation is conclusive; or at least that it is not subject to be attacked upon the evidence not presented to the Commission, as is attempted here. We cannot sustain this objection in its entirety. It is true that so long as the Commission proceeds in accordance with the requirements of the Commerce Act and its amendments, and with proper regard for constitutional restrictions, its*administrative orders, not calling for the payment of money, if made after due hearing and supported by evidence, are not subject to attack in the courts. This, as we have seen, results from the provisions of sections 15 and 16 of the act as amended. Interstate Comm. Comm. v. Illinois Central R. R., 215 U. S. 452, 469–470, 30 Sup. Ct. 155, 54 L. Ed. 280; Interstate Comm. Comm. v. Union Pacific R. R., 222 U. S. 541, 547, 32 Sup. Ct. 108, 56 L. Ed. 308; Procter & Gamble v. United States, 225 U. S. 282, 297–298, 32 Sup. Ct. 761, 56 L. Ed. 1091; Interstate Comm. Comm. v. Louisville & Nash. R. R., 227 U. S. 88, 91, 33 Sup. Ct. 185, 57 L. Ed. 431. But these cases recognize that matters of constitutional right are not to be conclusively determined by the Commission; and we are not prepared to say that a party is debarred from attacking an order of the Commission upon constitutional grounds even though they were not taken in the hearing before that body.

Nevertheless, correct practice requires that, in ordinary cases, and where the opportunity is open, all the pertinent evidence shall be submitted in the first instance to the Commission, and that a suit to set aside or annul its order shall be resorted to only where the Commission acts in disregard of the rights of the parties. This was recognized before the amendment of 1906, and when by sections 14, 15, and 16 of the original Act of February 4, 1887, c. 104, 24 Stat. 379, 384, as amended by Act of March 2, 1889, c. 382, 25 Stat. 855, the findings made by the Commission upon questions of fact were limited in their effect to that of prima facie evidence in all cases and not only, as now, in reparation cases. Cincinnati, N. O. & Texas Pac. Ry. v. Interstate Comm. Comm., 162 U. S. 184, 196, 16 Sup. Ct. 700, 40 L. Ed. 935; Texas & Pacific Ry. Co. v. Interstate Comm. Comm., 162 U. S. 197, 235, 238, 16 Sup. Ct. 666, 40 L. Ed. 940; Louisville, etc., R. R. Co. v. Behlmer, 175 U. S. 648, 675, 20 Sup. Ct. 209, 44 L. Ed. 309; East Tennessee, etc., Ry. Co. v. Interstate Comm. Comm., 181 U. S. 1, 27, 21 Sup. Ct. 516, 45 L. Ed. 719; Illinois Central R. R. v. Interstate Comm. Comm., 206 U. S. 441, 454, 27 Sup. Ct. 700, 51 L. Ed. 1128. The 1906*amendment, in modifying section 14 so as to dispense with the necessity of formal findings of fact except in cases where damages (or reparation) are awarded, and sections 15 and 16 so as to give a greater effect than before to the orders of the Commission other than those requiring the payment of money, renders it not less but more appropriate that, so far as practicable, all pertinent objections to action proposed by the Commission and the evidence to sustain them shall first be submitted to that body. Hence, we cannot approve of the course that was pursued in this case, of withholding from the Commission essential portions of the evidence that is alleged to show the rate in question to be confiscatory. Certainly, where the Commission, after full hearing, has set aside a given rate on the ground that it is unreasonably, high it should require a clear case to justify a court, upon evidence newly adduced but not in a proper sense newly discovered, in annulling the action of the Commission upon the ground that the same rate is so unreasonably low as to deprive the carrier of its constitutional right of compensation.

[11, 12] However, the issue is in the case and must be dealt with. In order to show that any rate less than $4.50 would be noncompensatory, the Railway undertook to demonstrate that the full $4.50 would not pay the cost of transportation and yield a just return upon the value of its property. Yet the rates voluntarily established by the Railway prior to the commencement of the present controversy averaged about $4.50 per car, a $4.50 rate was provided for in a tariff issued by the Railway in February, 1913, a uniform allowance of this amount was asked for by it upon the second hearing before the

Commission, and the Railway concurred in, and now seeks to maintain, the Cotton Belt tariff which contemplated payment of that rate for its services. Besides, the rate may be compared with $3 per car charged by the *491 Terminal for similar services, $2 per car fixed by city ordinance as the Railway's maximum charge for local shipments between any points on its line, the charge of $1 per car voluntarily established by the Railway for intra-plant movements, 25 cents per car for weighing movements, and the special charge of $1 per car on limited liability, obtaining between the Railway and the Cotton Belt and offered to other carriers. The evidential effect of the Railway's voluntary action is obvious. Interstate Comm. Comm. v. Chicago, B. & Q. R. R. Co., 186 U. S. 320, 336, 22 Sup. Ct. 824, 46 L. Ed. 1182.

Moreover, upon the second hearing before the Commission (January, 1912), Mr. Moore, the President of the Railway, testifying in its behalf upon the very point and from a full knowledge of the operations of the company and its property and expense accounts, stated:

"The revenue which we are now receiving for all kinds of service performed by the Manufacturers' Railway Company is sufficient to pay operating expenses, taxes, rentals, and other fixed charges and 7 per cent. on the investment."

The evidence produced by the Railway before the District Court, while quite inconsistent with these concessions, is adduced as a mathematical demonstration that the $4.50 rate is confiscatory. The principal witnesses were an expert in the valuation of railways, two real estate experts, and Mr. Moore, the President of the Railway. Opinion evidence was relied upon, basing values on estimated cost of reproduction less depreciation, it being stated that the records of the Railway had been kept in such a way as not to show the actual cost. A table was presented ("Summary D") stating the entire value of the property of the Railway on January 1, 1915, at $2,215,353.78, and deductions were made of capital expenditures during the previous eighteen months, in order to show the value as of June 30, 1913, and June 30, 1914. It was attempted to assign to the in- *492 terstate business a proportion of the total value corresponding to the extent of its employment in that business. Minnesota Rate Cases, 230 U. S. 352, 461, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. The value of the property as of June 30, 1913, according to the estimates, was $2,086,474.98; and it being found that the interstate car movements during the preceding fiscal year were 79.58 per cent. of the total traffic, an application of this percentage to the total value gave $1,659,227.08 as the proportion of the value of the property, based on use, assigned to interstate traffic for the fiscal year 1913. Operating expenses, taxes, and rentals for the same year were said to amount to $195,628.80, of which 79.58 per cent., or $155,681.39, was apportioned to interstate business. The gross revenue from interstate business for the same year, on the assumed basis of $4.50 per car from all trunk lines on all car interchanges, was calculated to be $217,309.25. Deducting from this the apportioned expenses ($155,681.39) would leave a net revenue of $61,627.86, or only 3.7 per cent. of $1,659,227.08, the value of the property assigned on the basis of use to interstate traffic as of June 30, 1913.

Similar processes showed apparent net earnings of only 1.86 per cent. for the fiscal year ending June 30, 1914, and .77 per cent. for the six months ending December 31, 1914.

The calculations are complex, and we need not reproduce them in detail. We have indicated the outlines, and will analyze the figures only far enough to show that they do not amount to a demonstration.

By way of contrast to the results deduced from opinion evidence concerning values, it should be remarked that Mr. Moore testified in the District Court that at the commencement of his connection with the company in February, 1909, he could only find an apparent book value amounting to $300,899.65, which he believed, however, did not reflect the value of the railway property at that time; and that down to January 31, 1915, there had been improvements and additions *493 to the equipment amounting to $560,008.75, and additions to real estate amounting to $525,349, making a total book value of $1,386,257.40. By deducting $128,878.80 for capital expenditures subsequent to June 30, 1913, we get $1,257,378.60 as the total value on that date, of which 79.58 per cent., or $1,000,621.89, would represent the value assigned to the interstate business according to the formula; and upon this amount the calculated net revenue of $61,627.86 would yield over 6 per cent.

Returning to the calculation relied upon by the Railway, Summary D includes an item "Present Value of Leases, $757,102."

This is the sum of two items, explained as follows: The Railway holds under lease from the Brewery all the lands occupied by its tracks and certain tracks owned by the Brewery within what is described as the "Brewery Zone," bounded by Lynch Street on the north, First street on the east, Utah Street on the south, and Thirteenth Street on the west, the rental being $24,000 per annum, and the lease having seventeen years to run from January 1, 1915. The real estate experts valued this according to its area in square feet, and by this process arrived at $1,377,853 as its market value. The rental value on a 5 per cent. basis would be $68,892.65. Since by the terms of the lease the lessor was required to pay the taxes, estimated at about $6,000, reducing the net income to about $18,000, this sum was deducted from $68,892.65, leaving $50,892.65 as the annual value of the lease to the Railway for

the unexpired term of seventeen years; and the cash value of an annuity of that amount for that term, said to be $573,767, was taken as the capital value of the lease.[3] Again, the Railway *holds certain property in its River Yard under lease from the City of St. Louis at an annual rental of $4,000, expiring October 7, 1934. This property was estimated by the witnesses to be worth $376,309, 5 per cent. of which is $18,815.45, and this amount less $4,000 was taken to be the annual value of the lease, which, capitalized for 19 years 9 months and 7 days, the unexpired term from January 1, 1915 (date of valuation), gave $183,335 as the value of this lease to the lessee.

We are not convinced that these somewhat speculative valuations of the leaseholds, even if the calculations were otherwise correct, ought to be included in the value of the Railway's property for the present purpose.

The lease from the Brewery includes sidings, tracks, and yards some of which are of special value to the Brewery, but either are inaccessible to the general public served by the tracks of the Railway or are practically monopolized for plant use by the Brewery. The Commission, in its Second Report, 28 I. C. C. 96, described the conditions.[4] The original lease from the Brewery to the Railway, dated December 31, 1908, drew a distinction between tracks and sidings, leasing the former and excluding the latter, as to which, however, it contained this clause:

"Said Association further gives and grants to said Railway the right and privilege to use and operate the aforesaid sidings, for railway purposes, upon condition, however, that such use will never interfere with the reasonable use thereof by said Association, of which said Association shall be the sole and only judge."

This was made the subject of criticism at the first hearing before the Commission, and in consequence the lease was amended before the second hearing so as to omit this limitation (28 I. C. C. 97). But the evidence tends to show, if it does not render it clear, that certain yards and tracks representing more than one-third of the aggregate value of the leased lands are used almost if not quite exclusively by the Brewery; and raises a question whether some of the other yards, or portions of them, are not, like those mentioned, actually used rather as parts of the Brewery plant than as parts of the transportation system of the Railway.

*The finding of the Commission that the Railway is for the purposes of its decision a common carrier (a finding not now in question), does not have the necessary effect of impressing all of its property with the character of property employed in the service of the public. The Commission recognized that there was a question whether a part of the service performed by the Railway was not a plant-facility service rather than that of a common carrier. 21 I. C. C. 316. And under the peculiar circumstances of the case we prefer to accept the reserved rental of $24,000, voluntarily fixed by the parties most concerned at a time antedating the present controversy, as more reliable evidence of the annual value of the rights conferred upon the Railway as a carrier than the opinions of the experts based upon the theory that by the lease the entire value of the property was devoted to the public use.

The lease from the city to the Railway is not in the printed transcript, but the substance of the ordinance authorizing it is stated. It granted authority to construct, maintain, and operate tracks upon land of which a considerable part constituted a public wharf. If the stipulated rental is less than the fair annual value of the property it is to be presumed that the grant of the excess was to the public, not to the private interest of the Railway. We are at a loss to see upon what principle a presumed annual value of the leasehold in excess of the stipulated rent can be capitalized as assets of the Railway

[3] The process is clearly erroneous. Payment of taxes by lessor is for its own account, not for lessee's. Annual cost of leasehold to lessee is measured by gross rental paid, irrespective of what lessor does with the money.

[4] The squares bounded by the streets Ninth, Thirteenth, Lynch, and Dorcas; Ninth, Eleventh, Pestalozzi, and Arsenal; and Second, Broadway (Broadway being just south of Seventh) Pestalozzi, and Arsenal are devoted to buildings and yards of the Brewery exclusively. Although within these bounded areas there are also others in addition to the three follow-named departments, they will, for the sake of convenience, be referred to as the bottling department, Budweiser department, and keg department, respectively. The tracks serving all three of these departments are in and between buildings and sheds of the Brewery or in the yards adjoining, and are practically inclosed—on some sides by buildings with passageways between and on the other sides by fences or walls surrounding the yards contiguous to the buildings. All of the tracks within these yards are essential to the operation of the Brewery except four team tracks in the yards contiguous to the bottling department at Ninth and Dorcas. As bearing upon the accessibility by the public to these various departments, it may be explained that the tracks in the open yard of the bottling department—that is, on the Ninth and Dorcas street sides—are inclosed by an iron fence, on which are displayed "No Thoroughfare" signs, and that the four public team tracks in this yard, referred to, end on the edge of an embankment supported by a concrete wall built up from Ninth Street, which is some 10 or 12 feet below, and topped with an iron fence; that the tracks at the Thirteenth street side of his department are ended some 10 or 15 feet below the street level by a stone wall and must therefore be reached by entries from other sides; that the team tracks in the Budweiser yard at Ninth and Pestalozzi are inclosed by a high iron fence with swinging gates; and, likewise, that the 25 or more ladder tracks in the yards of the keg department, beginning at Second and Pestalozzi and running west to Broadway, are ended some 25 feet below the level of Broadway by an embankment which is re-enforced by a concrete or stone wall topped with an iron fence. As access to the latter department from the Broadway side is thus absolutely impracticable, entrance must be effected from Pestalozzi street or between buildings of the Brewery on the Arsenal street side between Second and Broadway.

for the use of which in commerce the public is required to pay tolls. This would give to the lease the effect of converting public property, pro tanto, into private property.

Deducting the value of leases, $757,102, from $2,086,474.98, the estimated value of the Railway's property as of June 30, 1913, would leave $1,329,372.98, of which 79.58 per cent., or $1,057,915.02, would represent the value assigned to the interstate business according to the formula; and upon this amount the calculated net revenue of $61,627.86 would yield over 5.8 per cent.

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The calculations of revenue and expenses also require revision. The gross revenue from interstate business as stated includes not merely that derived from car interchanges at $4.50 per car, of which in the fiscal year ending June 30, 1913, there were 45,602 cars, producing $205,209; but in addition there was short-haul interchanges, 4,975 cars at the city rate of $2 per car, producing $9,950; interplant and intra-plant movements, 1,206 cars at $1 per car, producing $1,206; and weighing movements, 3,777 cars at 25 cents, producing $944.25, making a total of $217,309.25. The evidence renders it clear that the cost of these different movements is not and cannot be segregated; and Mr. Moore himself testified in effect that it costs the same to the Railway to weigh a car upon which 25 cents revenue is received, as to make an intra-plant switch of a car for which $1 is received, or a city movement limited by ordinance to $2, or an interchange delivery for which $4.50 is the rate assumed for the purposes of the test. The plant movements are for the benefit of the Brewery alone, that being the only industry having need for such service; weighing movements likewise appear to be independent of transportation in commerce. The limit of $2 fixed by the ordinance for the city movements seems to have been a part of the consideration for the grant to the Railway of rights in the streets; and on this theory any deficiency of revenue is properly apportionable to the traffic participating in these movements. But as to the other movements, the method of calculation adopted apportions the cost between the different classes according to the revenue derived from each, rather than according to the cost or value of the service.

If the plant and weighing movements—all of the former and three-fourths of the latter being performed for the Brewery—were charged at (say) $2.50 per car instead of the rates voluntarily adopted, the gain of revenue would be more than $10,000—approximately 1 per cent. upon the entire $1,057,915.02.

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The evidence submitted upon the issue of confiscation suggests other questions that need not be discussed or even mentioned; but we must not be understood as accepting what we have not particularly criticized. It is sufficient to say there is a failure to prove that the rate is unremunerative.

Decrees affirmed.

Mr. Justice HOLMES took no part in the consideration or decision of these cases.

(246 U. S. 606)

WAITE et al. v. MACY et al.

(Argued March 28, 1918. Decided April 22, 1918.)

No. 255.

1. INJUNCTION ⟸75—JURISDICTION—DISCRETION OF ADMINISTRATIVE OFFICERS.

While the courts cannot displace the judgment of an administrative board as to any matter within its jurisdiction, the board cannot enlarge the powers given it by statute; so the Board of Tea Appeals, appointed under Act March 2, 1897, c. 358, 29 Stat. 604 (Comp. St. 1916, §§ 8786–8796), as amended by Act May 16, 1908, c. 170, 35 Stat. 163 (Comp. St. 1916, § 8786), may be enjoined from applying illegal tests to tea imported by complainants.

2. INJUNCTION ⟸75—JURISDICTION—ADMINISTRATIVE OFFICERS.

While courts will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty, or will not follow the law, an injunction may be issued restraining the Board of Tea Appeals from following an illegal test prescribed in the regulations of the Secretary of the Treasury, who designated the board, for there is a presumption that the board will obey the orders of its superior.

3. CUSTOMS DUTIES ⟸22 — IMPORTATION OF TEA—REGULATIONS.

Under Act March 2, 1897, as amended by Act May 16, 1908, regulating the importation of tea, providing for the establishment of standards of purity, quality, and fitness for consumption, making unlawful the importation of inferior teas, authorizing appeals by those dissatisfied to the Board of Tea Appeals, and giving the Secretary of the Treasury power to enforce by appropriate regulations the provisions of the act, a regulation adopting a test for the discovery of artificial coloring matter in tea, and providing for the rejection of tea containing any such coloring matter, is in excess of the Secretary's powers, and tea worth nearly four times the standard should not be rejected, because it contained a minute quantity of Prussian blue, which was innocuous.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Bill by George H. Macy, Oliver C. Macy, George S. Clapp, T. Ridgway Macy, and Irving K. Hall, doing business as copartners under the name of Carter, Macy & Co., against Byron S. Waite and others, as general appraisers designated by the Secretary of the Treasury as the Board of Tea Appeals. A decree dismissing the bill (215 Fed. 456) was reversed, with directions, by the Circuit Court of Appeals for the Second Circuit (224 Fed. 359, 140 C. C. A. 45), and defendants appeal. Affirmed.

Mr. Assistant Attorney General Warren, for appellants.

Mr. Joseph H. Choate, Jr., of New York City, for appellees.

*Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill brought by importers of tea to prevent the appellants, a board of general appraisers known as the Tea Board, from applying to tea imported by the plaintiffs tests which, it is alleged, are illegal and if applied will lead to the exclusion of the tea. The bill was dismissed by the District Court, 215 Fed. 456, but the decree was reversed and an injunction ordered by the Circuit Court of Appeals, 224 Fed. 359, 140 C. C. A. 45.

The case is within a narrow compass. The Act of March 2, 1897, c. 358, 29 Stat. 604, amended by the Act of May 16, 1908, c. 170, 35 Stat. 163, provides for the establishment of standards "of purity, quality, and fitness for consumption, of all kinds of teas imported," etc., § 3 (Comp. St. 1916, § 8788), and makes it "unlawful * * * to import any merchandise as tea which is inferior in purity, quality and fitness for consumption to the standards" referred to. Section 1 (section 8786). When the tea is entered at the custom house it is compared with the standards by an examiner and if found equal to them in the above particulars it may be released by the custom house; if found inferior it is to be retained. Section 5 (section 8790). But either side may protest and have the matter referred to a board of three general appraisers such as the appellants are. If upon a final re-examination by the board "the tea shall be found inferior in purity, quality and fitness for consumption to the said standards" the tea must be removed from the country within six months. Section 6 (section 8791). The tea is to be tested in the particulars mentioned "according to the usages and customs of the tea trade; including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis." Section 7 (section 8792). The Secretary of the Treasury is given power to enforce the provisions of the act by appropriate regulations. Section 10 (section 8795). A regulation has adopted a test for the discovery of artificial coloring matter which in brief consists in rubbing tea leaves reduced to dust upon semi-glazed paper with a spatula and examining the smear with a lens. If particles of coloring matter are found a test sheet is submitted to chemical analysis for identification of the coloring matter and as soon as it is identified the tea is to be rejected. It was said below to be undisputed that if the tea in question contains any coloring matter, whether present through design or accident, the appellants pursuing the regulation will keep it out. The standard samples of this tea contain no coloring matter but contain a far greater amount of other foreign substances than does this. This tea is worth nearly four times as much a pound as the standard and the sole cause for rejecting it is the presence of from nine to nineteen parts of Prussian blue in a million of elements otherwise not objected to. It is not contended that the Prussian blue is deleterious. These facts are found by both Courts below. Upon them the plaintiffs (the appellees) say that the Government is attempting to apply criteria not allowed by the law. The Government says that the bill is an attempt to control a board in the performance of its statutory duty and to substitute the judgment of a court for that of the board.

[1, 2] No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption. Morrill v. Jones, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267. United States v. United Verde Copper Co., 196 U. S. 207, 215, 25 Sup. Ct. 222, 49 L. Ed. 449. United States v. George, 228 U. S. 14, 21, 33 Sup. Ct. 412, 57 L. Ed. 712. Again, it is true that Courts will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty or will not follow the law. First National Bank of Albuquerque v. Albright, 208 U. S. 548, 28 Sup. Ct. 349, 52 L. Ed. 614. But in this case the superior of the appellants had promulgated a rule for them to follow which is alleged to be beyond the power of the Secretary to make. It is said that the appellants are independent of the Secretary and that it is to be presumed that they will decide according to law, as they say in their answer. But if the avoidance of a direct statement as to their intent did not of itself warrant a presumption that they would obey orders, the admissions of their counsel were enough to make their intent to do so plain.

[3] We are brought then to the merits, and we are of opinion that the rule cannot be sustained, notwithstanding that since a former board refused to follow it as it then stood, there have been added clauses intended to save it as a chemical analysis. The regulation makes the presence of any coloring matter an absolute ground for exclusion. But the only grounds recognized by the statute are inferiority to the standard in purity, quality and fitness for consumption, words repeated over and over again in the act. It cannot be made a rule of law that any tea that has an infinitesimal amount of innocuous coloring matter is inferior in those respects to a standard that has a much greater amount of other impurities and is worth only a quarter as much. All extraneous substances are impurities, and the presence of any may be detected in any way found efficient. But one such substance cannot be picked out and accorded supremacy in evil by an absolute rule irrespective of any harm that it may do. We go one step further and add that in view of the facts as to the standard and

this tea, the presence of the Prussian blue affords no adequate ground for keeping the tea out.

The Secretary and the board must keep within the statute, Merritt v. Welsh, 104 U. S. 694, 26 L. Ed. 896, which goes to their jurisdiction, see Interstate Commerce Commission v. Northern Pacific Ry. Co., 216 U. S. 538, 544, 30 Sup. Ct. 417, 54 L. Ed. 608, and we see no reason why the restrictions should not be enforced by injunction, as it was, for instance, in Bacon v. Rutland R. R. Co., 232 U. S. 134, 34 Sup. Ct. 283, 58 L. Ed. 538. Philadelphia Co. v. Stimson, 223 U. S. 605, 620, 32 Sup. Ct. 340, 56 L. Ed. 570. Santa Fé Pacific R. R. Co. v. Lane, 244 U. S. 492, 37 Sup. Ct. 714, 61 L. Ed. 1275. We are satisfied that no other remedy, if there is any other, will secure the plaintiff's rights.

Decree affirmed.

(246 U. S. 610)

SAALFIELD v. UNITED STATES

(Argued March 27, 1918. Decided April 22, 1918.)

No. 101.

1. UNITED STATES ⊂=70(1)—CONSTRUCTION OF CONTRACT — CONCLUSIVENESS OF AGENT'S JUDGMENT.

Where a contract for 5 and 6 inch rapid fire guns contemplated the making and testing of a type gun of each caliber, and made acceptance of additional guns dependent on passage of tests by the type guns, the Chief of Ordnance and the Secretary of War, while authorized to determine disputes, were bound to decide candidly and reasonably whether the tests were passed satisfactorily.

2. COURTS ⊂=389 — REVIEW — FINDINGS OF COURT OF CLAIMS.

Findings of fact by the Court of Claims on a claim against the United States arising out of a contract for the manufacture of rapid fire guns are conclusive on the Supreme Court.

3. UNITED STATES ⊂=95 — ANNULMENT OF CONTRACT—PROPRIETY.

Under a contract for furnishing the United States with wire-wound rapid fire guns of 5 and 6 inch caliber, contemplating the making and testing of a type gun of each caliber, and that the acceptance of additional guns should be dependent on the satisfactory passage of the tests by the type guns, *held*, that there was nothing to show that the Secretary of War or Chief of Ordnance acted in bad faith or under a gross mistake in the determination of the result of the tests.

4. UNITED STATES ⊂=72 — ANNULMENT OF CONTRACT—WAIVER OF RIGHT.

In such case, the government by its delay did not waive its right to annul the contract, nor was that right suspended until a report should be made by experts on the technical problems involved in the construction of the gun.

Appeal from the Court of Claims.

Claim by John H. Brown and Harvey M. Munsell, trustees, against the United States. The claim was denied by the Court of Claims (51 Ct. Cl. 22), and Oliver B. Saalfield, administrator of John Hamilton Brown, surviving claimant, appeals. Affirmed.

Messrs. George A. King and George H. Lamar, both of Washington, D. C., for appellant. Mr. Assistant Attorney General Thompson, for the United States.

*611 *Mr. Justice CLARKE delivered the opinion of the Court.

This is an appeal to review a judgment by the Court of Claims in favor of the government, on a claim for damages growing out of a written contract dated May 18, 1898, for the manufacture of 50 wire-wound rapid fire guns, 25 of 5-inch caliber and 25 of 6-inch caliber. No guns having been delivered under the contract, it was annulled by the Chief of Ordnance, with the approval of the Secretary of War in an order, notice of which was given to the claimants on January 17, 1901. The appellant is the administrator of the survivor of one of two claimants, to whom we shall refer in this opinion as "the claimants."

[1] The essential parts of the contract to be considered are as follows:

"The muzzle velocity shall not be less than 2,600 f. s. with a good smokeless powder that shall not give a pressure of over 40,000 pounds per square inch, using a projectile of 55 pounds weight for the 5-inch gun and 100 pounds weight for the 6-inch gun. * * * The system of rapid-fire breech mechanism employed will be either the Brown or Dashiell, and must meet with the approval of the Ordnance Department. * * * It must permit of being easily and conveniently operated, and permit the same man to traverse, elevate, sight and fire, without moving the eye from the sight. * * * The first gun manufactured will be fired with full service charges of powder, such as that used in testing other rapid fire guns of similar caliber, and with not more than the regular service pressure for ordnance, and the gun must be fired for endurance 300 rounds or less as rapidly as practicable at the proving grounds of the manufacturers, commencing as soon as the gun is completed and continue firing as the Department may require, 5 rounds to be fired with pressure of about 45,000 pounds, and shall not exceed 50,000 pounds, these to be included in but at the close of the test, and the acceptance of the remainder of the same caliber will depend upon the type gun passing its test satisfactorily. * * *

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"Both gun and carriage must endure these tests in all respects satisfactorily, both as to the strength of material and facility of operation. * * *

"It is stipulated and agreed that the party of the first part shall deliver for test the first complete gun with mount, etc., within three months from the date of execution of this contract. * * *

"If any doubts or disputes arise as to the meaning of anything in this or any of the papers hereunto attached, and forming this contract, the matter shall be at once referred to the Chief of Ordnance, U. S. Army, for determination. If, however, the party of the first part shall feel aggrieved at any decision of the Chief of Ordnance, it shall have the right to submit the same to the Secretary of War, and his decision shall be final."

"(5) If any default shall be made by the parties of the first part in delivering all or any of the guns, etc., mentioned in this contract, of the quality and at the times and places herein specified, then, in that case, the said party of the second part may supply the deficiency

by purchase in open market or otherwise (the articles so procured to be of the kind herein specified as near as practicable), and the said parties of the first part shall be charged with the expense resulting from such failure. Nothing contained in this stipulation shall be construed to prevent the Chief of Ordnance, at his option, upon the happening of any such default, from declaring this contract to be thereafter null and void, without affecting the right of the United States to recover for defaults which may have occurred."

It is apparent from these excerpts that the contract contemplates the making and testing of a "type gun" of each caliber; that the acceptance of additional guns was dependent on this one "passing its test satisfactorily," and that the Chief of Ordnance and his superior officer, the Secretary of War, were to decide, not arbitrarily, but candidly and reasonably, whether the gun had satisfied the required test. Ripley v. United States, 223 U. S. 695, 701, 702, 32 Sup. Ct. 352, 56 L. Ed. 614.

The 5-inch test gun was to have been completed within three months from the date of the contract, but there were delays, assented to by the government, such that it was not completed for ten months, so that the first test began on March 8th of the following year (1899).

The finding by the Court of Claims as to what occurred during this firing test, to which the type gun of 5-inch caliber was subjected, is as follows:

"The test firing began with a pressure of 18,000 pounds per square inch, which was raised on the second round to 21,050 pounds, and on the third round to 32,800 pounds, with a muzzle velocity of 2,705 feet per second, and on the fourth round to 35,750 pounds pressure, with a muzzle velocity of 2,821 feet per second, *on which round the carriage was injured*, it not being strong enough to stand such high muzzle velocities.

"The claimants then protested against the increases made in the powder charge and insisted that any charge that was sufficient to produce a muzzle velocity of 2,600 feet per second was all that was required by the contract, except for the five high-pressure rounds required at the close of the test. This question was submitted to the Chief of Ordnance before firing was continued and by him decided in favor of the claimants. Thereafter the powder charge was so adapted as to give this muzzle velocity of 2,600 feet per second as a general rule, except in the said five high-pressure rounds at the close of the test, which were fired with pressures of between 45,000 and 50,000 pounds per square inch. *On one of these high-pressure rounds, the 293d round, the breach bushing and jacket of the gun were cracked and the breech could not be opened by hand.*

"These breaks were repaired, but *the mechanism repaired did not operate satisfactorily thereafter.*

"During the course of the test the gun was star-gauged by the government inspector about every 50 rounds, and these gaugings, at different times throughout the tests and at different points in the bore, *indicated varying and shifting changes*, both increases and decreases, in the diameters of different cross-sections of the bore, the gauging at several times and places *indicating a reduction of the normal diameter* of 5 inches down to 4.99 inches; and as a precaution against the danger of rupture or explosion of the gun by a reduction of the bore sufficient to cause the projectile to stick in the bore when the gun was fired an iron plug of the diameter of the projectile was passed through the bore about every 10 or 12 rounds, *on one of which occasions, about the 100th round, it stuck in the bore so tight at one point as to require the efforts of three men to force it through with a pole.*

"At all times, with this exception, the plug passed through freely.

"These reductions and variations in the diameter of the bore of the gun were to some extent due to deposits of metal on the walls of the bore by abrasion from the projectile in its passage from the gun, *but were principally due to changes in the cross section of the bore from a round to an elliptical form, resulting from a shifting of the segments enveloping the liner tube by the explosion of the charge*, and also to an actual contraction of the bore by the compression of the liner tube forming the walls of the bore by the elastic tension of the wire with which the tube and its enveloping segments were wound and bound together, which tension, with the further increase therein resulting from the explosion of the charge upon reaction after the explosion, exercised a compressing effect upon the liner tube.

"In large guns of ordinary types of construction there is *usually a slight contraction of bore* during the first few rounds of firing, after which the gun settles down to a new condition, and thereafter *the changes of bore diameter in a normal gun are almost entirely in the way of increase of diameter from erosion and abrasion.*

"While the variations and reductions in the diameter of the bore of the type gun indicated by the star gauging during the firing test *did not quite reach a point of actual danger to the gun from rupture or explosion* by sticking of the projectile in the bore in the process of firing *they did reach the limit of safety in this respect, and created a reasonable apprehension of danger in the minds of the Chief of Ordnance and other officials of the War Department connected with the execution of the contract for the guns, and caused the Chief of Ordnance and the Secretary of War to refuse to pass and accept the type gun unless it should satisfactorily pass a further test of 100 additional rounds* as proposed and recommended by the Chief of Ordnance in his indorsement of November 3, 1899, hereinafter set forth. This apprehension was heightened by the fact of the new and comparatively untried type of construction of the gun, and by its reversal of the usual behavior of guns of the ordinary types of construction in the way of its continued contractions and changes of bore in the course of extended use."

[2] These findings of fact, which under the circumstances of this case, must be accepted as final (United States v. New York Indians, 173 U. S. 464, 470, 19 Sup. Ct. 464, 43 L. Ed. 769; Cramp v. United States, 239 U. S. 221, 36 Sup. Ct. 70, 60 L. Ed. 238), if considered independently of the report of the Chief of Ordnance, yet to be discussed, obviously justify the conclusion that the test gun did not meet the contract requirements.

The carriage of this new and experimental type gun failed on the fourth round of firing, with a pressure well within the contract maximum; the gun itself developed such cracks in the breach bushing and jacket that the breech could not be opened by hand and did not work satisfactorily after repairs were made; and it showed unusual and abnormal changes in the bore which, while not

resulting in an explosion, created, in the mind of the Chief of Ordnance, a reasonable apprehension of danger in the use of the gun, and in his judgment required that it be modified and that it be subjected to an additional firing test, before it could be accepted as having satisfactorily passed the test prescribed by the contract.

[3] The report of the Chief of Ordnance to the Secretary of War on the result of this contract test is dated November 3, 1899, and is as follows:

"In the opinion of this office, while the type 5-inch gun is not deemed as satisfactory a gun as is desirable for service, *yet its test has apparently met the contract requirements*, and if certain modifications in the gun and its carriage shall be made in their further manufacture to remedy defects developed in the test, and in other respects be made to meet more fully the requirements of the department, *to which propositions the company willingly agrees*, it is recommended that the 5-inch type gun and its mount be accepted, *subject, however*, to the condition that, in view of the moderate pressure to which this gun has been subjected, the department fire it 100 additional rounds, or less, as it may deem expedient, with charges giving higher pressures and assimilating more nearly *the pressures that would be experienced in actual service*, and that in the
617 further manufacture of the guns they shall be modified, at the expense of the company, so as to remedy any further defects that may be developed in these additional firings."

The claimant's contention is rested largely upon this clause in the above paragraph, viz.: "Yet its test has apparently met the contract requirements." And their argument is that the test which the gun must meet was prescribed by the contract; that the facts found, and especially this clause, show that it proved equal to the required test; that the subsequent annulling of the contract by the Chief of Ordnance, with the approval of the Secretary of War "was not made and taken in good faith, but under a mistake so gross as to justify an inference of bad faith," and that, therefore, the claimants are entitled to recover the damages prayed for.

If this expression, so much relied upon, stood as the unqualified conclusion of the Chief of Ordnance and had been approved by the Secretary of War, the interpretation claimed for it might be justified, but the contextual setting of the clause shows clearly that in the opinion of the Chief of Ordnance "defects [had] developed in the test," which could be remedied only if certain modifications were made in the manufacture of both the gun and carriage, and that his understanding when making the report was that the claimants concurred in this conclusion and willingly agreed to conform to it.

The clause of the report so emphasized is the expression of a soldier, not of a technical lawyer, and the paragraph of the report in which it is found, taken altogether, conveys to us the conviction that the Chief of Ordnance, while concluding that the gun was defective in design and construction, nevertheless believed that it contained elements of invention which, modified and improved, would make of it a weapon of value to his country and that he was eager to lend official assistance to its further development, which he believed the claimants were equally eager to receive and profit by. In the interpretation most favorable to the claimants the report is an acceptance conditioned upon development and improvement of the gun which the Chief of Ordnance thought possible, but which conditions, as we shall see, the claimants, perhaps because of less confidence in their invention, never attempted to satisfy.

On January 31, 1900, this report of the Chief of Ordnance was approved by the Secretary of War and a week later the decision and recommendation thus approved were communicated to the claimants.

But, instead of the co-operation which the Chief of Ordnance thought assured, the government next heard from the claimants through lawyers and then through a letter from the claimants themselves, asking the Secretary of War to suspend further action until argument could be heard, and stating that "they had not as yet assented to any modification of the gun or carriage."

The Secretary of War replied to the lawyers that there was no question before him open to argument, but what, if any, reply was made to the letter of the claimants does not appear.

However, long prior to this, on May 18, 1899, after the test firing had been suspended and three months before it was completed, it was suggested by the government to the claimants that they should furnish "the mathematical computations and engineering considerations upon which their claim of strength of construction and other qualities of their gun were based." No notice was taken of this suggestion for almost a year, and not until after claimants were officially notified of the approval by the Secretary of War of the report of the Chief of Ordnance of November 3, 1899. Thereafter, on February 17, 1900, the claimants notified the Chief of Ordnance that they had employed two expert mathematicians to work out the various problems connected with the construction of their gun, and suggesting that
*619 they would like to have "an army officer of practical experience with artillery" assigned to co-operate with their selected experts and that they would compensate him for the service. Two days later the government acceded to this and authorized a major in the army to join in making the computations as suggested by the claimants.

The finding of the Court of Claims does not show that anything further was done until, on January 17, 1901, almost three years after this three months' contract was to have been completed, when, after the claimants had permitted almost a year to pass without accepting the suggestion of the government that modifications should be made in the

gun and carriage to cure the defects which the firing test had disclosed, the Chief of Ordnance, with the approval of the Secretary of War notified the claimants that, for failure to deliver an acceptable gun, their contract had been declared null and void. Against this conclusion the claimants protested and appealed to the Secretary of War for a revocation of the annullment order, but after hearing the claimants and their lawyers several times, the Secretary of War refused to revoke this order.

A month after the revocation order, the experts, employed almost a year before by the claimants, rendered to their employers a report on the technical problems connected with the construction of the gun, which the government had called for almost two years before. This report the Court of Claims finds was "upon the whole, favorable to the style of construction of the gun; but defects of construction were pointed out and remedies therefor suggested in the way of modifications in the construction."

This discussion of the findings of fact by the Court of Claims leads us unhesitatingly to the conclusion that the claim that the Secretary of War and the Chief of Ordnance acted in bad faith or under a gross mistake is wholly* unfounded and gratuitous; that, on the contrary, they dealt candidly, generously, even helpfully, with the claimants, and that the annullment of the contract under the circumstances was abundantly justified. The cause of the misfortune, which the claimants undoubtedly suffered, is not to be found in their treatment by the officials of the War Department but in their own refusal, from whatever cause, to accept the encouraging suggestion of the Chief of Ordnance that the Department was willing, by generous dealing and co-operation, to assist them in carrying forward their experimental gun to a successful development.

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[4] The claims made in argument that by various delays on its part the government, in some indefinite way, waived its right to annul the contract, and that this right to annul was suspended until report should be made on the technical problems involved, by the experts selected by the claimants, it is true with the co-operation of the government, but almost a year before, cannot be seriously considered. In the matter of delays the claimants were as much at fault and more, than the government, and the delay of the technical report for almost a year was reasonable ground for assuming that no report was likely to be made, or that if made it would not be favorable to the acceptance of the gun, which last, as we have seen, is shown by the finding of facts by the Court of Claims, to have been proved to be the case.

The judgment of the Court of Claims must be

Affirmed.

(246 U. S. 565)

COMMONWEALTH OF VIRGINIA v. STATE OF WEST VIRGINIA et al.

(Submitted March 6, 1917. Decided April 22, 1918.)

No. 2.

1. COURTS ⊂=379 — SUPREME COURT — JURISDICTION.

The elementary rule that judicial power essentially involves the right to enforce the results of its exertion applies to the judgments rendered in suits between states of which the Supreme Court has original jurisdiction.

2. JUDGMENT ⊂=519 — CONCLUSIVENESS — MATTERS CONCLUDED.

On proceedings by the commonwealth of Virginia for enforcement against the state of West Virginia of a judgment requiring payment of money rendered by the Supreme Court, the authority of the court to render the judgment is concluded, and cannot be reopened.

3. STATES ⊂=15—ACTIONS BETWEEN—JUDGMENT—VALIDITY.

A judgment in favor of the commonwealth of Virginia against the state of West Virginia, requiring payment of money, is not open to attack on the ground that the original jurisdiction conferred on the Supreme Court by the Constitution did not embrace the right of one state to recover a judgment in a mere action for debt against another, as the controversy arose out of the carving of West Virginia from Virginia, and the expressly assumed obligation of the newly created state to pay the just portion of the pre-existing debts of Virginia.

4. STATES ⊂=213—JUDGMENT AGAINST—ENFORCEMENT.

In view of the powers of the Privy Council, exercised prior to the Revolution of the American colonies, and the intent apparent in the adoption of the Constitution to remedy the condition under the Articles of Confederation under which Congress had no power to enforce the federal jurisdiction over controversies between the states, a judgment rendered against a state by the Supreme Court, in the exercise of the original jurisdiction given that tribunal in cases in which a state shall be a party, may be enforced against the state as such, and, to the extent necessary for so doing, authority may be exerted over the governmental powers and agencies possessed by the state.

5. STATES ⊂=15—AGREEMENTS BETWEEN AUTHORITY OF CONGRESS.

In view of the vesting in Congress of complete power to control agreements between states, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, Congress has legislative authority to enforce an agreement by the state of West Virginia to assume its just proportion of the debts of Virginia, out of which the state of West Virginia was carved; the duty of exacting the carrying out of a contract being implied from the grant of power to determine whether the contract should be made.

6. COURTS ⊂=304 — SUPREME COURT — JURISDICTION.

Though Congress has authority to legislate to enforce an agreement between states, the right of the Supreme Court to entertain a suit between such states based on the agreement is not affected; the two grants of power co-ordinating to a single end.

7. COURTS ⊂=379—JUDGMENT AGAINST STATE —ENFORCEMENT.

Where the commonwealth of Virginia, having recovered judgment requiring payment of money against the state of West Virginia, which was unsatisfied, sought its enforcement, the Supreme Court, in view of the character of the

parties, having announced its authority to enforce the judgment, and, to extent necessary for so doing, of exerting authority over the governmental powers and agencies possessed by the state of West Virginia, will not determine the appropriate remedy, but will reserve that question; the case being restored to the docket for further argument, so as to give the state of West Virginia an opportunity of satisfying the judgment.

On Petition for a Writ of Mandamus.

Bill by the Commonwealth of Virginia against the State of West Virginia. On petition for writ of mandamus. Authority of Supreme Court to enforce a previously rendered judgment in favor of the Commonwealth of Virginia announced, and the case restored to the docket for further argument embracing questions not decided.

Messrs. John Garland Pollard, of Richmond, Va., Wm. A. Anderson, of Lexington, Va., Randolph Harrison, of Lynchburg, Va., John G. Johnson, of Oneonta, N. Y., Sanford Robinson, of New York City, Holmes Conrad, of Washington, D. C., and Samuel W. Williams, of Bluefield, W. Va., for Commonwealth of Virginia.

Messrs. E. T. England, Atty. Gen., of Charleston, W. Va., John H. Holt, of Huntington, W. Va., W. Mollohan, G. W. McClintic, and C. W. May, all of Charleston, W. Va., Chas. E. Hogg, of Point Pleasant, W. Va., J. G. Carlisle, of Washington, D. C., and John C. Spooner, of New York City, for State of West Virginia.

*589 *Mr. Chief Justice WHITE delivered the opinion of the Court.

A rule allowed at the instance of Virginia against West Virginia to show cause why in default of payment of the judgment of this court in favor of the former state against the latter, an order should not be entered directing the levy of a tax by the Legislature of West Virginia to pay such judgment, and a motion by West Virginia to dismiss the rule is the matter before us.

In the suit in which the judgment was rendered Virginia, invoking the original jurisdiction of this court, sought the enforcement of a contract by which it was averred West Virginia was bound. The judgment which resulted was for $12,393,929.50 with interest and it was based upon three propositions specifically found to be established: First, that when territory was carved out of the dominion of the state of Virginia for the purpose of constituting the area of the state of West Virginia, the new state, coincident with its existence, became bound for and assumed to pay its just proportion of the previous public debt of Virginia. Second, that this obligation of West Virginia was the subject of a contract between the two states made with the consent of Congress and was incorporated into the Constitution by which West Virginia was admitted by Congress into the Union and therefore became a condition of such admission and a part of the very governmental fiber of that state. Third, that the sum of the judgment rendered constituted the equitable proportion of this debt due by West Virginia in accordance with the obligations of the contract.

The suit was commenced in 1906 and the judgment rendered in 1915. The various opinions expressed during the progress of the cause will be found in the reported *590 cases cited in the margin,[1] in the opinion in one of which (234 U. S. 117, 34 Sup. Ct. 889, 58 L. Ed. 1243) a chronological statement of the incidents of the controversy was made.

The opinions referred to will make it clear that both states were afforded the amplest opportunity to be heard and that all the propositions of law and fact urged were given the most solicitous consideration. Indeed, it is also true that in the course of the controversy, as demonstrated by the opinions cited, controlled by great consideration for the character of the parties, no technical rules were permitted to frustrate the right of both of the states to urge the very merits of every subject deemed by them to be material.

And controlled by a like purpose before coming to discharge our duty in the matter now before us we have searched the record in vain for any indication that the assumed existence of any error committed has operated to prevent the discharge by West Virginia of the obligations resulting from the judgment and hence has led to the proceeding to enforce the judgment which is now before us. In saying this however we are not unmindful that the record contains a suggestion of an alleged claim of West Virginia against the United States, which was not remotely referred to while the suit between the two states was undetermined, the claim referred to being based on an assumed violation of trust by the United States in the administration of what was left of the great domain of the Northwest Territory—a domain as to which, before the adoption of the Constitution of the United States, Virginia at the request of Congress transferred to the government of the Confederation all her right, title and interest in order to allay discord between the states, as New York had previously done and as Massachusetts, Connecticut, South Carolina, North Carolina and Georgia *subsequently did.[2] It is obvious *591 that the subject was referred to in connection with the duty of West Virginia to comply with the requirements of the judgment upon the hypothesis that if the United States

[1] Virginia v. West Virginia, 206 U. S. 290, 27 Sup. Ct. 732, 51 L. Ed. 1068; Id., 209 U. S. 514, 28 Sup. Ct. 614, 52 L. Ed. 914; Id., 220 U. S. 1, 31 Sup. Ct. 330, 55 L. Ed. 353; Id., 222 U. S. 17, 32 Sup. Ct. 4, 56 L. Ed. 71; Id., 231 U. S. 89, 34 Sup. Ct. 29, 58 L. Ed. 135; Id., 234 U. S. 117, 34 Sup. Ct. 889, 58 L. Ed. 1243; Id., 238 U. S. 202, 35 Sup. Ct. 795, 59 L. Ed. 1272; Id., 241 U. S. 531, 36 Sup. Ct. 719, 60 L. Ed. 1147.

[2] Gannett, Boundaries of the United States, pp. 24-29.

owed the claim and if in a suit against the United States recovery could be had, and if West Virginia received its share, it might be used, if sufficient, for discharging the judgment and thus save West Virginia from resorting to other means for so doing.

[1-3] That judicial power essentially involves the right to enforce the results of its exertion is elementary. Wayman v. Southard, 10 Wheat. 1, 23, 6 L. Ed. 253; Bank of the United States v. Halstead, 10 Wheat. 57, 6 L. Ed. 264; Gordon v. United States, 117 U. S. 697, 702. And that this applies to the exertion of such power in controversies between states as the result of the exercise of original jurisdiction conferred upon this court by the Constitution is therefore certain. The many cases in which such controversies between states have been decided in the exercise of original jurisdiction make this truth manifest.[3] Nor is there room for contending to the contrary because in all the cases cited the states against which judgments were rendered conformably to their duty under the Constitution voluntarily respected and gave effect to the same. This must be unless it can be said that because a doctrine has been universally recognized as being beyond dispute and has hence hitherto in every case from the foundation of the government been accepted and applied, it has by that fact alone now become a fit subject for dispute.

It is true that in one of the cited cases (South Dakota v. North Carolina, 192 U. S. 286, 24 Sup. Ct. 269, 48 L. Ed. 448) it was remarked that doubt had been expressed in some instances by individual judges as to whether the original jurisdiction conferred on the court by the Constitution embraced the right of one state to recover a judgment in a mere action for debt against another. In that case, however, it is apparent that the court did not solve such suggested doubt, as that question was not involved in the case then before it and that subject was hence left open to be passed on in the future when the occasion required. But the question thus left open has no bearing upon and does not require to be considered in the case before us, first, because the power to render the judgment as between the two states whose enforcement is now under consideration is as to them foreclosed by the fact of its rendition. And second, because while the controversy between the states culminated in a decree for money and that subject was within the issues, nevertheless the generating cause of the controversy was the carving out of the dominion of one of the states the area composing the other and the resulting and expressly assumed obligation of the newly created state to pay the just proportion of the pre-existing debt, an obligation which as we have seen rested in contract between the two states, consented to by Congress and expressed in substance as a condition in the Constitution by which the new state was admitted into the Union. In making this latter statement we do not overlook the truism that the Union under the Constitution is essentially one of states equal in local governmental power which therefore excludes the conception of an inequality of such power resulting from a condition of admission into the Union. Ward v. Race Horse, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244. But this principle has no application to the question of power to enforce against a state when admitted into the Union a contract entered into by it with another state with the consent of Congress since such question but concerns the equal operation upon all the states of a limitation upon them all imposed by the Constitution and the equal application of the authority conferred upon Congress to vivify and give effect by its consent to contracts entered into between states.

Both parties admit that West Virginia is the owner of no property not used for gov-

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[3] New York v. Connecticut, 4 Dall. 1, 3, 6, 1 L. Ed. 715; New Jersey v. New York, 3 Pet. 461, 7 L. Ed. 741; Id., 5 Pet. 284, 8 L. Ed. 127; Id., 6 Pet. 323, 8 L. Ed. 414; Rhode Island v. Massachusetts, 7 Pet. 651, 8 L. Ed. 816; Id., 11 Pet. 226, 9 L. Ed. 697; Id., 12 Pet. 657, 9 L. Ed 1233; Id., 13 Pet. 23, 10 L. Ed. 41; Id., 14 Pet. 210, 10 L. Ed. 423; Id., 15 Pet. 233, 10 L. Ed. 721; Id., 4 How. 591, 11 L. Ed. 1116; Massachusetts v. Rhode Island, 12 Pet. 755, 9 L. Ed. 1272; Missouri v. Iowa, 7 How. 659, 12 L. Ed. 861; Id., 10 How. 1, 13 L. Ed. 303; Florida v. Georgia, 11 How. 293, 13 L. Ed. 702; Id., 17 How. 478, 15 L. Ed. 181; Alabama v. Georgia, 23 How. 505, 16 L. Ed. 556; Virginia v. West Virginia, 11 Wall. 39, 20 L. Ed. 67; Missouri v. Kentucky, 11 Wall. 395, 20 L. Ed. 116; South Carolina v. Georgia, 93 U. S. 4, 23 L. Ed. 782; Indiana v. Kentucky, 136 U. S. 479, 10 Sup. Ct. 1051, 34 L. Ed. 329; Id., 159 U. S. 275, 16 Sup. Ct. 320, 40 L. Ed. 149; Id., 163 U. S. 520, 16 Sup. Ct. 1162, 41 L. Ed. 250; Id., 167 U. S. 270, 17 Sup. Ct. 999, 42 L. Ed. 164; Nebraska v. Iowa, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186; Id., 145 U. S. 519, 12 Sup. Ct. 976, 36 L. Ed. 798; Iowa v. Illinois, 147 U. S. 1, 13 Sup. Ct. 239, 37 L. Ed. 55; Id., 151 U. S. 238, 14 Sup. Ct. 333, 38 L. Ed. 145; Id., 202 U. S. 59, 26 Sup. Ct. 571, 50 L. Ed. 934; Virginia v. Tennessee, 148 U. S. 503, 13 Sup. Ct. 728, 37 L. Ed. 537; Id., 158 U. S. 267, 15 Sup. Ct. 818, 39 L. Ed. 976; Missouri v. Iowa, 160 U. S. 688, 16 Sup. Ct. 433, 40 L. Ed. 583; Id., 165 U. S. 118, 17 Sup. Ct. 290, 41 L. Ed. 655; Tennessee v. Virginia, 177 U. S. 501, 20 Sup. Ct. 715, 44 L. Ed. 863; Id., 190 U. S. 64, 23 Sup. Ct. 827, 47 L. Ed. 956; Missouri v. Illinois, 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497; Id., 200 U. S. 496, 26 Sup. Ct. 268, 50 L. Ed. 572; Id., 202 U. S. 598, 26 Sup. Ct. 713, 50 L. Ed. 1160; Kansas v. Colorado, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838; Id., 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956; South Dakota v. North Carolina, 192 U. S. 286, 24 Sup. Ct. 269, 48 L. Ed. 448; Missouri v. Nebraska, 196 U. S. 23, 25 Sup. Ct. 155, 49 L. Ed. 372; Id., 197 U. S. 577, 25 Sup. Ct. 580, 49 L. Ed. 881; Louisiana v. Mississippi, 202 U. S. 1, 26 Sup. Ct. 408, 571, 50 L. Ed. 913; Washington v. Oregon, 211 U. S. 127, 29 Sup. Ct. 47, 53 L. Ed. 118; Id., 214 U. S. 205, 29 Sup. Ct. 631, 53 L. Ed. 969; Missouri v. Kansas, 213 U. S. 78, 29 Sup. Ct. 417, 53 L. Ed. 706; Maryland v. West Virginia, 217 U. S. 1, 30 Sup. Ct. 268, 54 L. Ed. 645; Id., 217 U. S. 577, 30 Sup. Ct. 630, 54 L. Ed. 888; Id., 225 U. S. 1, 32 Sup. Ct. 672, 56 L. Ed. 955; North Carolina v. Tennessee, 235 U. S. 1, 35 Sup. Ct. 8, 59 L. Ed. 97; Id., 240 U. S. 652, 36 Sup. Ct. 604, 60 L. Ed. 847; Arkansas v. Tennessee, 246 U. S. 158, 38 Sup. Ct. 301, 62 L. Ed. —.

ernmental purposes and that therefore from the mere issue of an execution the judgment is not susceptible of being enforced if under such execution property actually devoted to immediate governmental uses of the state may not be taken. Passing a decision as to the latter question, all the contentions on either side will be disposed of by considering two subjects: first, the limitations on the right to enforce inhering in the fact that the judgment is against a state and its enforcement against such governmental being; and second, the appropriateness of the form of procedure applicable for such enforcement. The solution of these subjects may be disposed of by answering two questions which we propose to separately state and consider.

*594 [4] 1. May a judgment rendered against a state as a state be enforced against it as such, including the right to the extent necessary for so doing of exerting authority over the governmental powers and agencies possessed by the state?

On this subject Virginia contends that as the Constitution subjected the state of West Virginia to judicial authority at the suit of the state of Virginia, the judgment which was rendered in such a suit binds and operates upon the state of West Virginia, that is, upon that state in a governmental capacity, including all instrumentalities and agencies of state power, and indirectly binding the whole body of the citizenship of that state and the property which by the exertion of powers possessed by the state are subject to be reached for the purpose of meeting and discharging the state obligation. As then, the contention proceeds, the Legislature of West Virginia possesses the power to tax and that body and its powers are all operated upon by the judgment, the inability to enforce by means of ordinary process of execution gives the right and sanctions the exertion of the authority to enforce the judgment by compelling the Legislature to exercise its power of taxation. The significance of the contention and its scope are aptly illustrated by the reference in argument to the many decided cases holding that where a municipality is empowered to levy specified taxation to pay a particular debt, the judicial power may enforce the levy of the tax to meet a judgment rendered in consequence of a default in paying the indebtedness.[4]

On the other hand, West Virginia insists that the defendant as a state may not as to its powers of government reserved to it by the Constitution be controlled or limited by process for the purpose of enforcing the *595 payment of the judgment. Because the right for that end is recognized to obtain an execution against a state and levy it upon its property, if any, not used for governmental purposes, it is argued, affords no ground for upholding the power by compelled exercise of the taxing authority of the state to create a fund which may be used when collected for paying the judgment. The rights reserved to the states by the Constitution, it is further insisted, may not be interfered with by the judicial power merely because that power has been given authority to adjudicate at the instance of one state a right asserted against another, since although the authority to enforce the adjudication may not be denied, execution to give effect to that authority is restrained by the provisions of the Constitution which recognize state governmental power.

Mark, in words a common premise—a judgment against a state and the authority to enforce it—is the predicate upon which is rested on the one hand the contention as to the existence of complete and effective, and the assertion on the other of limited and inefficacious power. But it is obvious that the latter can only rest upon either treating the word "state" as used in the premise as embracing only a misshapen or dead entity, that is, a state stripped for the purpose of judicial power of all its governmental authority, or if not, by destroying or dwarfing the significance of the word "state" as describing the entity subject to enforcement, or both. It needs no argument to demonstrate that both of these theories are incompatible with and destructive of the very numerous cases decided by this court to which we have referred. As it is certain that governmental powers reserved to the states by the Constitution—their sovereignty—were the efficient cause of the general rule by which they were not subject to judicial power, that is, to be impleaded, it must follow that when the Constitution gave original jurisdiction to this court *596 to entertain at the instance of one state a suit against another it must have been intended to modify the general rule, that is, to bring the states and their governmental authority within the exceptional judicial power which was created. No other rational explanation can be given for the provision. And the context of the Constitution, that is, the express prohibition which it contains as to the power of the states to contract with each other except with the consent of Congress, the limitations as to war and armies, obviously intended to prevent any of the states from resorting to force for the redress of any grievance real or imaginary, all harmonize with and give force to this conception of the operation and effect of the right to exert, at the prayer of one state, judicial authority over another.

[4] Supervisors v. United States, 4 Wall. 435, 18 L. Ed. 419; Von Hoffman v. City of Quincy, 4 Wall. 535, 18 L. Ed. 403; City of Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560; Riggs v. Johnson County, 6 Wall. 166, 18 L. Ed. 768; Walkley v. City of Muscatine, 6 Wall. 481, 18 L. Ed. 930; Labette County Commissioners v. Moulton, 112 U. S. 217, 5 Sup. Ct. 108, 28 L. Ed. 698; County Commissioners of Cherokee County v. Wilson, 109 U. S. 621, 3 Sup. Ct. 352, 27 L. Ed. 1053.

But it is in substance said this view must be wrong for two reasons: (a) Because it virtually overrides the provision of the Constitution reserving to the states the powers not delegated, by the provision making a grant of judicial power for the purpose of disposing of controversies between states; and (b) because it gives to the Constitution a construction incompatible with its plain purpose, which was while creating the nation, yet at the same time to preserve the states with their governmental authority in order that state and nation might endure. Ultimately the argument at its best but urges that the text of the Constitution be disregarded for fear of supposed consequences to arise from enforcing it. And it is difficult to understand upon what ground of reason the preservation of the rights of all the states can be predicated upon the assumption that any one state may destroy the rights of any other without any power to redress or cure the resulting grievance. Nor further can it be readily understood why it is assumed that the preservation and perpetuation of the Constitution depend upon the *absence of all power to preserve and give effect to the great guaranties which safeguard the authority and preserve the rights of all the states. *597

Besides, however, the manifest error of the propositions which these considerations expose, their want of merit will be additionally demonstrated by the history of the institutions from which the provisions of the Constitution under review were derived and by bringing into view the evils which they were intended to remedy and the rights which it was contemplated their adoption would secure.

Bound by a common allegiance and absolutely controlled in their exterior relations by the mother country, the colonies before the Revolution were yet as regards each other practically independent, that is, distinct one from the other. Their common intercourse more or less frequent, the contiguity of their boundaries, their conflicting claims in many instances of authority over undefined and outlying territory, of necessity brought about conflicting contentions between them. As these contentions became more and more irritating, if not seriously acute, the necessity for the creation of some means of settling them became more and more urgent if physical conflict was to be avoided. And for this reason, it is to be assumed, it early came to pass that differences between the colonies were taken to the Privy Council for settlement and were there considered and passed upon during a long period of years, the sanction afforded to the conclusions of that body being the entire power of the realm, whether exerted through the medium of a royal decree or legislation by Parliament. This power, it is undoubtedly true, was principally called into play in cases of disputed boundary, but that it was applied also to the complaint of an individual against a colony concerning the wrongful possession of property by the colony alleged to belong to him is not disputed. This general situation as to the disputes between the colonies and the power to dispose of them by the Privy Council was stated in Rhode Island v. Massachusetts, 12 Pet. 657, 739, 9 L. Ed. 1233, et seq., and will be found reviewed in the authorities referred to in the margin.[5]

When the Revolution came and the relations with the mother country were severed, indisputably controversies between some of the colonies of the greatest moment to them had been submitted to the Privy Council and were undetermined. The necessity for their consideration and solution was obviously not obscured by the struggle for independence which ensued, for, by the ninth of the Articles of Confederation an attempt to provide for them as well as for future controversies was made. Without going into detail it suffices to say that that article in express terms declared the Congress to be the final arbiter of controversies between the states and provided machinery for bringing into play a tribunal which had power to decide the same. That these powers were exerted concerning controversies between the states of the most serious character again cannot be disputed. But the mechanism devised for their solution proved unavailing because of a want of power in Congress to enforce the findings of the body charged with their solution, a deficiency of power which was generic because resulting from the limited authority over the states conferred by the Articles of Confederation on Congress as to every subject. That this absence of power to control the governmental attributes of the states for the purpose of enforcing findings concerning disputes between them gave rise to the most serious consequences and brought the states to the very verge of physical struggle and resulted in the shedding of blood and would, if it had not been for the adoption of the Constitution of the United States, it may be reasonably assumed, have rendered nugatory the great results of the Revolution, is known to all and will be found stated in the authoritative works on the history of the time.[6] *598

Throwing this light upon the constitutional provisions, the conferring on this court of original jurisdiction over controversies be-

[5] Acts of the Privy Council, Colonial Series, Vols. I to V, passim; Snow, The Administration of Dependencies, Chap. V and passim; Gannett, Boundaries of the United States, pp. 35, 41, 44, 49-52, 73, 88; Story on the Constitution (5th Ed.) §§ 80, 83, 1681.

[6] Fiske, The Critical Period of American History, p. 147 et seq.; McMaster, History of the People of the United States, Vol. I, p. 210 et seq.; Miner, History of Wyoming.

See also Story on the Constitution (5th Ed.) §§ 1679, 1680; 131 U. S. Appendix L.

tween states, the taking away of all authority as to war and armies from the states and granting it to Congress, the prohibiting the states also from making agreements or compacts with each other without the consent of Congress, at once makes clear how completely the past infirmities of power were in mind and were provided against. This result stands out in the boldest possible relief when it is borne in mind that not a want of authority in Congress to decide controversies between states, but the absence of power in Congress to enforce as against the governments of the states its decisions on such subjects, was the evil that cried aloud for cure, since it must be patent that the provisions written into the Constitution, the power which was conferred upon Congress and the judicial power as to states created, joined with the prohibitions placed upon the states, all combined to unite the authority to decide with the power to enforce—a unison which could only have arisen from contemplating the dangers of the past and the unalterable purpose to prevent their recurrence in the future. And, while it may not materially add to the demonstration of the result stated, it may serve a useful purpose to direct attention to the probable operation of tradition upon the mind of the framers, shown by the fact that, harmonizing with
*600 the practice which prevailed during the colonial period in the Privy Council, the original jurisdiction as conferred by the Constitution on this court embraced not only controversies between states but between private individuals and a state—a power which following its recognition in Chisholm v. Georgia, 2 Dall. 419, 1 L. Ed. 440, was withdrawn by the adoption of the Eleventh Amendment. The fact that in the Convention, so far as the published debates disclose, the provisions which we are considering were adopted without debate, it may be inferred, resulted from the necessity of their enactment as shown by the experience of the colonies and by the specter of turmoil if not war which, as we have seen, had so recently arisen from the disputes between the states, a danger against the recurrence of which there was a common purpose efficiently to provide. And it may well be that a like mental condition accounts for the limited expressions concerning the provisions in question in the proceedings for the ratification of the Constitution which followed, although there are not wanting one or two instances where they were referred to which when rightly interpreted make manifest the purposes which we have stated.[7]

The state, then, as a governmental entity having been subjected by the Constitution to the judicial power under the conditions stated, and the duty to enforce the judgment by resort to appropriate remedies being certain even although their exertion may operate upon the governmental powers of the State, we are brought to consider the second question, which is:

[5] 2. What are the appropriate remedies for such enforcement?

Back of the consideration of what remedies are appropriate, whether looked at from the point of view of the exertion of equitable power or the application of legal remedies extraordinary in character (mandamus, etc.) lies the question what ordinary remedies are *601 available, and that subject must necessarily be disposed of. As the powers to render the judgment and to enforce it arise from the grant in the Constitution on that subject, looked at from a generic point of view, both are federal powers, and comprehensively considered are sustained by every authority of the federal government, judicial, legislative or executive, which may be appropriately exercised. And confining ourselves to a determination of what is appropriate in view of the particular judgment in this cause, two questions naturally present themselves: (a) The power of Congress to legislate to secure the enforcement of the contract between the states; and (b) the appropriate remedies which may by the judicial power be exerted to enforce the judgment. We again consider them separately.

(a) The power of Congress to legislate for the enforcement of the obligation of West Virginia.

The vesting in Congress of complete power to control agreements between states, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that Congress as the repository, not only of legislative power, but of primary authority to maintain armies and declare war, speaking for all the states and for their protection, was concerned with such agreements, and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power. It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between states carried with it the right, if the contract was assented to and hence became operative by the will of Congress, to see to its enforcement. This must be the case unless it can be said that the duty of exacting the carrying out of a contract is not, within the principle of McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, relevant to *602 the power to determine whether the contract should be made. But the one is so relevant to the other as to leave no room for dispute to the contrary.

Having thus the power to provide for the execution of the contract, it must follow that the power is plenary and complete, limited of course as we have just said by the general rule that the acts done for its exertion must

[7] Vol. 2, Elliot's Debates, pp. 462, 490, 527, 571, 573; The Federalist, No. 81.

be relevant and appropriate to the power. This being true it further follows, as we have already seen, that by the very fact that the national power is paramount in the area over which it extends, the lawful exertion of its authority by Congress to compel compliance with the obligation resulting from the contract between the two states which it approved is not circumscribed by the powers reserved to the states. Indeed the argument that the recognition of such a power in Congress is subversive of our constitutional institutions from its mere statements proves to the contrary, since at last it comes to insisting that any one state may by violating its obligations under the Constitution take away the rights of another and thus destroy constitutional government. Obviously if it be conceded that no power obtains to enforce as against a state its duty under the Constitution in one respect and to prevent it from doing wrong to another state, it would follow that the same principle would have to be applied to wrongs done by other states, and thus the government under the Constitution would be not an indissoluble union of indestructible states but a government composed of states each having the potency with impunity to wrong or degrade another—a result which would inevitably lead to a destruction of the union between them. Besides it must be apparent that to treat the power of Congress to legislate to secure the performance by a state of its duty under the Constitution, that is, its continued respect for and obedience to that instrument, as coercion, comes back at last to the theory that any one state may throw off and disregard without sanction its obligation and subjection to the Constitution. A conclusion which brings at once to the mind the thought that to maintain the proposition now urged by West Virginia would compel a disregard of the very principles which led to the carving out of that state from the territory of Virginia; in other words, to disregard and overthrow the doctrines irrevocably settled by the great controversy of the Civil War, which in their ultimate aspect find their consecration in the amendments to the Constitution which followed.

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[6] Nor is there any force in the suggestion that the existence of the power in Congress to legislate for the enforcement of a contract made by a state under the circumstances here under consideration is incompatible with the grant of original jurisdiction to this court to entertain a suit between the states on the same subject. The two grants in no way conflict but co-operate and co-ordinate to a common end; that is, the obedience of a state to the Constitution by performing the duty which that instrument exacts. And this is unaffected by the fact that the power of Congress to exert its legislative authority as we have just stated it also extends to the creation of new remedies in addition to those provided for by section 14 of the Judiciary Act Sept. 24, 1789 (1 Stat. 81, c. 20, now section 262, Judicial Code [Act March 3, 1911, c. 231, 36 Stat. 1162; Comp. St. 1916, § 1239]) to meet the exigency occasioned by the judicial duty of enforcing a judgment against a state under the circumstances as here disclosed. We say this because we think it is apparent that to provide by legislative action additional process relevant to the enforcement of judicial authority is the exertion of a legislative and not the exercise of a judicial power.

This leaves only the second aspect of the question now under consideration.

[7] (b) The appropriate remedies under existing legislation.

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The remedy sought, as we have at the outset seen, is an order in the nature of mandamus commanding the levy by the Legislature of West Virginia of a tax to pay the judgment. In so far as the duty to award that remedy is disputed merely because authority to enforce a judgment against a state may not affect state power, the contention is adversely disposed of by what we have said. But this does not dispose of all the contentions between the parties on the subject, since on the one hand it is insisted that the existence of a discretion in the Legislature of West Virginia as to taxation precludes the possibility of issuing the order, and on the other hand it is contended that the duty to give effect to the judgment against the state, operating upon all state powers, excludes the legislative discretion asserted and gives the resulting right to compel. But we are of opinion that we should not now dispose of such question and should also now leave undetermined the further question, which as the result of the inherent duty resting on us to give effect to the judicial power exercised we have been led to consider on our own motion; that is, whether there is power to direct the levy of a tax adequate to pay the judgment and provide for its enforcement irrespective of state agencies. We say this because, impelled now by the consideration of the character of the parties which has controlled us during the whole course of the litigation, the right judicially to enforce by appropriate proceedings as against a state and its governmental agencies having been determined, and the constitutional power of Congress to legislate in a twofold way having been also pointed out, we are fain to believe that if we refrain now from passing upon the questions stated, we may be spared in the future the necessity of exerting compulsory power against one of the states of the Union to compel it to discharge a plain duty resting upon it under the Constitution. Indeed, irrespective of these considerations, upon the assumption that both the requirements of duty and the suggestions of self-interest may fail to bring about the result stated, we are nevertheless of the opinion that we should not now finally dispose of the

*605

case, but because of the character of the parties and the nature of the controversy, a contract approved by Congress and subject to be by it enforced, we should reserve further action in order that full opportunity may be afforded to Congress to exercise the power which it undoubtedly possesses.

Giving effect to this view, accepting the things which are irrevocably foreclosed—briefly stated, the judgment against the state operating upon it in all its governmental powers and the duty to enforce it viewed in that aspect—our conclusion is that the case should be restored to the docket for further argument at the next term after the February recess. Such argument will embrace the three questions left open: 1. The right under the conditions previously stated to award the mandamus prayed for. 2. If not, the power and duty to direct the levy of a tax as stated. 3. If means for doing so be found to exist, the right, if necessary, to apply such other and appropriate equitable remedy by dealing with the funds or taxable property of West Virginia or the rights of that state as may secure an execution of the judgment. In saying this, however, to the end that if on such future hearing provided for the conclusion should be that any of the processes stated are susceptible of being lawfully applied (repeating that we do not now decide such questions) occasion for a further delay may not exist, we reserve the right, if deemed advisable, at a day hereafter before the end of the term or at the next term before the period fixed for the hearing, to appoint a master for the purpose of examining and reporting concerning the amount and method of taxation essential to be put into effect, whether by way of order to the state Legislature or direct action, to secure the full execution of the *judgment, as well as concerning the means *606 otherwise existing in the state of West Virginia, if any, which by the exercise of the equitable powers in the discharge of the duty to enforce payment may be available for that purpose.

And it is so ordered.

(246 U. S. 638)

UNITED STATES ex rel. LOUISVILLE CEMENT CO. v. INTERSTATE COMMERCE COMMISSION.

(Argued March 14, 1918. Decided April 29, 1918.)

No. 70.

1. CARRIERS ⟸34 — INTERSTATE COMMERCE COMMISSION—HOLDINGS.

Where the Interstate Commerce Commission held that a claim for overcharges could not be considered, because complaint for recovery was not made within two years from the time the cause of action accrued, the holding of the Commission must be interpreted, not as one that it had jurisdiction over the claim and that it was barred by limitations, but that the claim was without its jurisdiction.

2. CARRIERS ⟸34 — INTERSTATE COMMERCE COMMISSION—TIME FOR FILING COMPLAINT.

The provision of Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384, as amended by Act June 29, 1906, c. 3591, § 5, 34 Stat. 590 (Comp. St. 1916, § 8584), that all complaints for the recovery of damages shall be filed with the Commission within two years after the cause of action accrues, and not after, is not a mere statute of limitation, but is jurisdictional, limiting the power of the Commission.

3. MANDAMUS ⟸73(1) — INTERSTATE COMMERCE COMMISSION.

The Supreme Court of the District of Columbia in a proper case has power to direct the Interstate Commerce Commission by mandamus to entertain and proceed to adjudicate a cause, which it has erroneously declared not to be within its jurisdiction.

4. CARRIERS ⟸34 — INTERSTATE COMMERCE COMMISSION—CLAIMS—ACCRUAL.

Under Interstate Commerce Act, § 16, as amended by Act June 29, 1906, c. 3591, § 5, declaring that all complaints for the recovery of damages shall be filed with the Commission within two years after the cause of action accrues and not after, the cause of action to recover overcharges must be deemed to have accrued when the overcharges were paid, and not when the shipments were made, particularly as, when the amendment was adopted, it had repeatedly declared in decisions of the Supreme Court that a cause of action does not accrue until suit may be legally instituted upon it.

In Error to the Court of Appeals of the District of Columbia.

Petition by the United States, on the relation of the Louisville Cement Company, for a writ of mandate against the Interstate Commerce Commission. The petition was denied, and, the judgment being affirmed (42 App. D. C. 514), relator brings error to the Court of Appeals of the District of Columbia. Reversed.

Messrs. J. Van Dyke Norman, of Louisville, Ky., and Frank Lyon and George H. Lamar, both of Washington, D. C., for plaintiff in error.

Messrs. Charles W. Needham, of Washington, D. C., and Joseph W. Folk, of St. Louis, Mo., for defendant in error.

*639 *Mr. Justice CLARKE delivered the opinion of the Court.

The facts of this case are not disputed and are as follows:

By mistake in printing its tariff, the published rate of the Louisville & Nashville Railroad Company on coal from mines in Kentucky to Speeds, Ind., was increased on July 29, 1906, to $1.10 per ton from $1, which had been the rate before.

The mistake was not noticed and the old rate was charged and paid by relator (plaintiff in error) on shipments until the following February, when, the increased published rate being discovered, it was charged and collected until the next April, when the former rate was restored.

Promptly on April 19, 1907, the relator wrote the Interstate Commerce Commission, explaining the circumstances, and requesting that the railroad company be authorized to refund the overcharges paid, February 11 to April 10, 1907, amounting to $595.65.

The Commission replied to this letter, that if the railroad company would file with the Commission an admission that the rate had been increased through error and would ask for authority to make the refund, the subject would receive consideration.

This statement of the Commission was immediately communicated to the railroad company, but it refused to make the required admission of mistake and to request authority to make the refund until the full published rate was paid on shipments made before the mistake was discovered. This led to dispute and delay, with the result that these excess charges ($1,335.25) were not paid until February 1, 1911.

In the following November the relator filed its petition with the Commission asking for an order permitting the railroad company to refund the entire amount, in excess of the former rate, paid under the mistakenly published tariff.

*640 *The railroad company admitted that it never intended to increase the rate and consented that the reparation order prayed for should be issued.

The Commission found, as a matter of fact, that the mistakenly published rate of $1.10 was unreasonable to the extent that it exceeded $1 per ton, and then, holding that all complaints for the recovery of damages must be filed with the Commission within two years from the date of the delivery of the shipment, it ruled that the letter of the relator to the Commission of April 19, 1907, making claim for the overcharges which had been paid between February 11 and April 10, 1907, was sufficient to satisfy the law, and ultimately issued to the railroad company authority to pay this amount to the relator; but the Commission further held that the complaint for the recovery of the overcharges for the period prior to February 11th, although filed within nine months of the date of their payment, was not in time to meet

the requirement of section 16 of the act that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after," and that "they (the overcharges) are, therefore, barred from our consideration."

The relator filed its petition for a writ of mandamus in the Supreme Court of the District of Columbia, which petition was denied, and the judgment of the Court of Appeals for the District affirming this holding is here for review.

The lower courts arrived at their conclusion by holding that the Commission entertained jurisdiction over the portion of the relator's claim which was rejected; that in the exercise of that jurisdiction it held the claim to be barred and that this was an exercise of discretion committed by law to the Commission which is not subject to control by the writ of mandamus.

[1] We think the courts fell into error in thus interpreting the language used by the Commission in its report.

*641 * * As to the portion of the claim which we are considering, the report of the Commission is as follows:

"The only question left for determination is whether the claim is barred, in whole or in part, by the following limitation of the act: 'All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after.'

"The Commission holds that the date when the cause of action accrues is the date of the delivery of the shipment. Blinn Lumber Co. v. Southern Pacific Co., 18 Interst. Com. Com'n R. 430. * * * No complaint was filed by complainant [relator] with reference to shipments made before February 1st, 1907, until the petition here in question was filed on November 15th, 1911, and these shipments had all been delivered more than four years before the filing of that petition. They [the overcharges] are therefore barred from our consideration."

The concluding sentence thus used by the Commission, that "They [the overcharges] are therefore barred from our consideration," implies that in the opinion of the Commission the two-year provision of the sixteenth section of the act is a limitation upon its power, and that the construction which it gave to this limitation placed the claim we are considering so beyond its jurisdiction that it could not consider it, and reference to the case cited as authority for its conclusion, Blinn Lumber Co. v. Southern Pacific Co., 18 Interst. Com. Com'n R. 430, makes it clear that such was the intended holding. In that case the Commission expresses its conclusion in this form:

"After careful consideration of the contentions of all parties * * * as to the right of the complainant" (after two years) "to maintain this proceeding for reparation before the Commission, it is our conclusion that we are without power to grant the relief prayed for."

*642 And in Anaconda Copper Mining Co. v. C. & E. R. R. Co., 19 Interst. Com. Com'n R. 592, decided seven months later, the Commission makes a yet more emphatic announcement of its views upon the subject, saying:

"In this report only such shipments will be considered as moved within two years from the time the complaint embracing them was filed, and with respect to shipments moving prior to such two-year period we think it proper to state that, following the spirit as well as the letter of the limitation clause contained in section 16 of the act, we believe we are without jurisdiction, and therefore we will not make any finding whatever concerning such shipments or the rates and charges assessed thereon."

It is thus made very clear that the holding of the Commission was, not that, having jurisdiction over the claim upon consideration thereof, is was found to be barred by a statute of limitation, but that the language of the two-year provision of the act was jurisdictional, and placed it so beyond its power that it could not be considered at all, and that, for this reason, the petition, to the extent it related to the overcharges paid on February 1, 1911, was dismissed.

[2] We agree with this conclusion of the Commission, that the two-year provision of the act is not a mere statute of limitation, but is jurisdictional—is a limit set to the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusion. Interstate Commerce Commission v. Northern Pacific Ry. Co., 216 U. S. 538, 544, 30 Sup. Ct. 417, 54 L. Ed. 608. That such was the opinion of this court was clearly intimated in Phillips v. Grand Trunk Western R. R. Co., 236 U. S. 662, 667, 35 Sup. Ct. 444, 59 L. Ed. 774, and it conforms in principle to the holdings of the court with respect to a similar limitation, but for six years, on the jurisdiction of the Court of Claims. Ford v. United States, 116 U. S. 213, 6 Sup. Ct. 360, 29 L. Ed. 608; Finn v. United States, 123 U. S. 227, 232, 8 Sup. Ct. 82, 31 L. Ed. 128; United States v. Wardwell, 172 U. S. 48, 52, 19 Sup. Ct. 86, 43 L. Ed. 360.

*643 [3] That the Supreme Court of the District of Columbia, in a proper case, has power to direct the Commission by mandamus to entertain and proceed to adjudicate a cause which it has erroneously declared to be not within its jurisdiction is decided in Interstate Commerce Commission v. Humboldt Steamship Co., 224 U. S. 474, 32 Sup. Ct. 556, 56 L. Ed. 849. If the Commission did so err, on the authority of many decisions, among them Ex parte Russell, 13 Wall. 664, 20 L. Ed. 632, Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853, Hollon Parker, Petitioner, 131 U. S. 221, 9 Sup. Ct. 708, 33 L. Ed. 123, In re Grossmayer, Petitioner, 177 U. S. 48, 20 Sup. Ct. 535, 44 L. Ed. 665, and Interstate Commerce Commission v. Humboldt Steamship Co., 224 U. S. 474, 485, 32 Sup. Ct. 556, 56 L. Ed. 849, the courts may correct such error on a petition for mandamus, where, as in this case, the erroneous decision cannot be reviewed on appeal or writ of error.

[4] There remains the question, Did the Commission place an erroneous interpretation upon the scope of its jurisdiction under this two-year provision in section 16 of the act, in excluding the claim which we have before us from its consideration?

This provision first appears in an amendment to the act, approved June 29, 1906 (34 Stat. vol. 1, c. 3591, § 5, p. 590), and in January, 1908 the Commission published as its construction of the limitation the following, viz.:

"A cause of action accrues, as that phrase is used in the act, on the date the freight charges are actually paid."

The decisions of the Commission show (15 Interst. Com. Com'n R. 201, 235, 533; Marshall & Michel Grain Co. v. St. L. & S. F. R. R. Co., 16 Interst. Com. Com'n R. 385) that it adhered to this construction until May, 1910, when in Blinn Lumber Co. v. Southern Pacific Co., 18 Interst. Com. Com'n R. 430, it changed its ruling and adopted the holding that the cause of action accrues when the shipment was delivered.

This change, as the report of the Commission shows, resulted, not from any modification of opinion as to the meaning of the language used, but from the conclusion of a majority of its members that such interpretation was necessary to give effect to other provisions of the act, especially those relating to rebates and undue preferences.

*641 *But this two-year provision, obviously enough, relates only to the recovery of money damages, and if Congress had intended that the cause of action of the shipper to recover damages for unreasonable charges should accrue when the shipment was received, or when it was delivered by the carrier, we cannot doubt that a simple and obvious form for expressing that intention would have been used, instead of the expression "from the time the cause of action accrues." And in this connection we cannot fail to recognize that when the statute was enacted the time when a cause of action accrues had been settled by repeated decisions of this court to be when a suit may first be legally instituted upon it (Amy v. Dubuque, 98 U. S. 470, 474, 25 L. Ed. 228; United States v. Taylor, 104 U. S. 216, 222, 26 L. Ed. 721; Rice v. United States, 122 U. S. 611, 617, 7 Sup. Ct. 1377, 30 L. Ed. 793), and, since no clearly controlling language to the contrary is used, it must be assumed that Congress intended that this familiar expression should be given the well-understood meaning which had been given to it by this court. We therefore conclude, as was held, without special discussion of the point, in Phillips v. Grand Trunk Western R. R. Co., 236 U. S. 662, 666, 668, 35 Sup. Ct. 444, 59 L. Ed. 774, which in this respect really rules the case before us, that the proper construction of this jurisdictional provision requires that the cause of action of the shipper in this case shall be held not to have accrued until payment had been made of the unreasonable charges, and that, therefore, the interpretation which the Commission placed upon its jurisdictional power is erroneous.

The unusual and purely fortuitous circumstance, that the character of this jurisdictional limitation on the power of the Commission chances to be such that the giving of a correct construction to it must result in determining the character of the decision which the Commission must render when the case is returned to it, cannot affect the power of this court or that of the *lower courts to define what that jurisdiction is under the act of Congress or the duty of the Commission to accept and act upon such definition when announced. *645

It results that the judgment of the Court of Appeals must be reversed and that the case must be remanded to the Supreme Court of the District of Columbia, with direction that a writ of mandamus issue to the Commission, directing that it proceed to dispose of the claim in controversy under the construction placed upon its jurisdiction by this opinion.

Reversed.

(246 U. S. 621)

IBANEZ et al. v. HONGKONG & SHANGHAI BANKING CORP. et al.

(Argued March 20, 21, 1918. Decided April 29, 1918.)

No. 230.

1. COURTS ⟸387(4) — PRECEDENTS — CONSTRUCTION OF LOCAL LAWS.

On appeal from the Supreme Court of the Philippine Islands, the judgment of that tribunal, based on a construction of the local laws, will be deferred to.

2. PARENT AND CHILD ⟸16—EMANCIPATION —AUTHORITY OF PARENTS.

Plaintiffs' father died before the United States acquired the Philippine Islands, and after the adoption of the Code of Civil Procedure, their mother, while they were yet minors, but over the age of 18, executed instruments emancipating them with their consent. Code Civ. Proc. § 581, provides that pending guardianships shall proceed in accordance with the Spanish law, while the Civil Code previously in force declared in article 159 that the father, or in his absence the mother, should be the legal administrator of the property of the children under their authority. *Held* that, though no guardian of the person or property of plaintiffs was ever applied for or appointed after the promulgation of the Code of Civil Procedure, yet as, under the Spanish law, filiation stood in lieu of those legal safeguards with which the latter Code envelops the property of a minor child, it must be deemed that plaintiffs, at the time they were emancipated by their mother, were under guardianship according to the Spanish law, and the validity of such emancipation is not open to attack.

Appeal from the Supreme Court of the Philippine Islands.

Suit by Joaquin Ibanez de Aldecoa y Palet and Zoilo Ibanez de Aldecoa y Palet against Hongkong & Shanghai Banking Corporation

and others. The Court of First Instance of Manila dismissed the suit as to the first-named plaintiff, but granted relief in favor of the second, and on appeal to the Supreme Court of the Philippine Islands the judgment was affirmed as to the first-named plaintiff, and reversed as to the latter, and plaintiffs appeal. Affirmed.

Mr. Antonio M. Opisso, of Manila, P. I., for appellants.

Messrs. Charles Cowles Tucker, of Washington, D. C., Frederic R. Coudert and Howard Thayer Kingsbury, both of New York City, and F. C. Fisher, of Manila, P. I., for appellees.

Mr. Justice McKENNA delivered the opinion of the Court.

*622 Suit by appellants, Joaquin Ibanez de Aldecoa and Zoilo Ibanez de Aldecoa, brought in the Court of First*Instance of Manila, to have declared null and void a mortgage executed by them in favor of appellees on the ground that when they executed the mortgage they were unemancipated minors.

After some preliminary procedure and upon answer filed and hearing had, the Court of First Instance dismissed the suit as to Joaquin Ibanez, but granted relief in favor of Zoilo Ibanez. Upon appeal the Supreme Court of the Philippine Islands affirmed the judgment so far as it sustained the validity of the mortgage as to Joaquin Ibanez, and reversed it, the judgment, so far as it declared the nullity of the mortgage as to Zoilo Ibanez, and declared the mortgage binding upon the latter; that is, declared the mortgage valid as to both. This appeal was then prosecuted.

The facts are not in dispute. The appellants were born in the Islands, their parents being natives of Spain. Their father's domicile was in Manila, where he died October 4, 1895. After his death the firm of Aldecoa & Co., of which he had been a regular member, was reorganized and his widow became one of the general or "capitalistic" partners of the firm, and she appeared as such in the articles of partnership.

On July 31, 1903, the mother of the appellants, they then being over the age of 18 years, went before a notary public and executed two instruments wherein and whereby she emancipated them with their consent.

No guardian of the person or property of appellants has ever been applied for or appointed under the Code of Civil Procedure of the Islands since its promulgation; instead appellants had continued from the death of their father under the custody of their mother until the execution of the instruments of emancipation.

February 23, 1906, the firm of Aldecoa & Co. was heavily indebted to the appellee *623 bank and the bank was pressing for payment or security. In consequence*the mortgage, which is the subject of this suit, was executed February 23, 1906. On December 31, 1906, the firm expired by limitation and went into liquidation.

The question presented is whether the mother of appellants could legally emancipate them and thus confer upon them capacity to execute a valid mortgage of their real property, they consenting. The solution of the question, the Supreme Court said, "involves an inquiry as to the effect of the provisions of the New Code of Civil Procedure relating to guardianship upon certain provisions of the Civil Code relating to the control by parents over the persons and property of their minor children."

In other words, the question in the case turns upon the accommodation or conflict between certain provisions of the Civil Code and certain provisions of the Code of Civil Procedure, the latter being later in enactment. If its provisions did not repeal or supersede the provisions of the other, the mother of appellants had power to emancipate them and their mortgage was a valid instrument. On this question the courts below are in dissonance. The Court of First Instance considered that the codes were irreconcilable and gave a repealing strength to the Code of Civil Procedure. The Supreme Court rejected this conclusion and gave accommodation to the provisions of the codes by excluding those of the Code of Civil Procedure from operation upon parents who had assumed charge of the property of their minor children and were enjoying its usufruct prior to the adoption of that code. In other words, the rights and duties of such parents with respect to their children, including the right of emancipation, continued to be regulated by the Civil Code.

[1, 2] The court deduced this conclusion from the explicit language of the Civil Code conferring parental authority, the absence of a repealing, or modifying or superseding, word in the Code of Civil Procedure, and the declaration of the latter that guardianships pending at the time of its*passage *624 should "proceed in accordance with Spanish law," with certain exceptions, which emphasized the declaration. It, the declaration, is important, and we therefore quote it. It is section 581 and is as follows:

"Pending guardianships to proceed in accordance with Spanish law, with certain exceptions. All proceedings in cases of guardianship pending in the Philippine Islands at the time of the passage of this act, shall proceed in accordance with the existing Spanish procedure under which the guardians were appointed: Provided, nevertheless, that any guardian appointed under existing Spanish law may be removed in accordance with the provisions of section 574 of this act, and his successor may be appointed as therein provided, and every successor to a guardian so removed shall, in the administration of the person or estate, or either, as the case may be, of his ward, be governed by the provisions of this act."

The construction by the Supreme Court is vigorously assailed by appellants. It was so assailed in the Supreme Court and the

court answered it and other contentions of appellants by a discussion at once minute and comprehensive. It is not possible to reproduce it or even epitomize it. Its basis is the customs and habits of a people with resulting rights which found expression and sanction in the Civil Code and of which there is no repeal, it was held, or displacement in the Code of Civil Procedure. And the abruptness of the change and disorder of rights which the contentions of appellants involve the court felt and declared.

The change, if change there was, was certainly abrupt and quite radical. Under the Civil Code parents had general control over the property of their children. "The father, or, in his absence, the mother, is the legal administrator of the property of the children who are under their authority" (article 159), *625 and by subsequent articles a usufruct in the property was given to the parents.* "Filiation", the court said, "stood in lieu of those legal safe-guards" with which the "Code of Civil Procedure envelops the property of a minor child." And the court pointed out that there were certain restrictions upon the parent but they "did not make the parent a guardian." It was further held that the Civil Code drew a sharp and clearly distinguishable line between guardianship properly so called, and the patria potestas, or parental authority, and confined the former to guardianship contained in article 199 of that Code which defined it as "the custody of the person and property or only of the property of those who, not being under the parental authority, are incapable of taking care of themselves."

It was upon these considerations that the court based its judgment, and if it be granted there are counter considerations of strength we are disposed to defer to the tribunal "on the spot." It has support in the principles of our jurisprudence which are repellant to retrospective operation of a law and the repeal by implication of one law by another. These principles have urgency in the present case. The change contended for is not only abrupt but fundamental. It is not change of procedure merely but of systems, disturbing rights, devesting or imposing obligations. Indeed, the present case is an example. The mother of appellants, in confidence of her right to do so, emancipated the appellants, and the appellees in equal confidence accepted it as legal, and that many are in like situation under like confidences may be conjectured.

It is in effect urged, however, that such disorder was foreseen and accepted as a consequence of existing laws which the legislators with ability and care made a study of, and "finding the law of guardianship and the law of parental authority, as they stood then, repugnant to the American idea of justice, 'ruthlessly brushed aside' the old order and inaugurated 'the new in the form which had withstood the test of time in the United States.'" In other words, displaced the parental authority and all that it meant of power of administration and enjoyment by the parents of the estates of their minor children. *626

We concede the care and ability of the legislators but deduce a conclusion different from that of counsel. We are convinced that neither would have been exercised to displace abruptly a system so fixed in the habits and sentiments of a people as parental authority was in the habits of the Islands, and certainly not without explicit declaration, and leave without warning so radical and important a change to be collected from disputable implications. We concur, therefore, with the Supreme Court that section 581, supra, was intended to save "from the operation of the new act all proceedings in cases of guardianship pending in the Philippine Islands at the time of its passage." And guardianship and the administration of an estate did not mean, as contended by appellants, something procedural in a court, but they meant what the laws recognized as such and, we have seen, article 159 of the Civil Code provides that "the father, or, in his absence, the mother, is the legal administrator of the property of the children who are under their authority." The right is a valuable one and it has as an incident a right as valuable, the usufruct of the estate administered.

The value and extent of both rights this court has had occasion to declare in Darlington v. Turner, 202 U. S. 195, 230, et seq., 26 Sup. Ct. 630, 50 L. Ed. 992, and in view of that case we are forced to think that, however our habits may induce us to approve the American system of the relation of parent and child and that there should be interposed between them when property interests are involved the order of a court and the security of bonds, there are other peoples—including a state of this Union—who have found that they could rely with confidence on other than material considerations for the performance of duty and that "filiation" could stand in *627 lieu of "those legal safeguards" with which the new Code of Procedure "envelops the property of a minor child."

There are other contentions of appellants which are either mixed with questions of fact or depend upon an appreciation of local matters and procedure the decision of the local court upon which we accept.

Judgment affirmed.

(246 U. S. 627)

IBANEZ et al. v. HONGKONG & SHANGHAI BANKING CORP.

(Argued March 20, 21, 1918. Decided April 29, 1918.)

No. 231.

1. APPEAL AND ERROR ⊂⊃1043(1)—REVIEW—HARMLESS ERROR.

Though a suit by defendants, attacking the validity of a mortgage which plaintiffs sought to foreclose, was pending, the refusal of the court to stay foreclosure proceedings until determination of the first suit was harmless as to defendants; the mortgage being upheld in the first suit.

2. COURTS ⊂⊃387(1) — PRECEDENTS — LOCAL LAW.

The Supreme Court will defer to a declaration of the local law by the courts of the Philippine Islands, particularly when their decision is in accordance with the rule obtaining in other jurisdictions.

Appeal from the Supreme Court of the Philippine Islands.

Suit by the Hongkong & Shanghai Banking Corporation against Joaquin Ibanez de Aldecoa y Palet and others, begun in the Court of First Instance of Manila. From a judgment of the Supreme Court of the Philippine Islands for plaintiff, defendants appeal. Modified and affirmed.

Mr. Antonio M. Opisso, of Manila, P. I., for appellants.

Messrs. Charles Cowles Tucker, of Washington, D. C., Frederic R. Coudert and Howard Thayer Kingsbury, both of New York City, and F. C. Fisher, of Manila, P. I., for appellee.

*628 *Mr. Justice McKENNA delivered the opinion of the Court.

This suit was submitted with No. 230, just decided. 246 U. S. 621, 38 Sup. Ct. 410, 62 L. Ed. ——. It was brought in the Court of First Instance of Manila to foreclose, among other purposes, the mortgage which that suit was brought to declare void. The defense in this case of Joaquin Ibanez and Zoilo Ibanez is based on the same ground that they alleged as a cause of action in the other case; that is, that the mortgage is a nullity because they were unemancipated minors when it was executed. This contention and the facts and legal propositions relevant to it are set out in No. 230 and need not be repeated. It was there decided that their emancipation was complete and legal, and the mortgage executed by them therefore valid, the Civil Code providing for such emancipation not having been repealed or superseded by the Code of Civil Precedure—this being the basic contention.

Other defenses are, however, set up which were more or less mingled with defenses of other parties to the suit who are not here. Those special to Joaquin and Zoilo Ibanez were, as separated by the Supreme Court: (1) The pendency of another suit; and (2) a former judgment.

[1] 1. Under this it was urged that the suit for the annulling of the mortgage (case No. 230) had been submitted for adjudication and had not been disposed of. Identity was hence asserted between the two actions, and it was insisted that the second should have awaited the disposition of the first. The Supreme *629 Court took a *different view, urged thereto by cases which it cited. But counsel say that if the mortgage had been declared null in the first action (No. 230) it could not have been foreclosed in the second (that at bar), as it would have encountered the plea of res judicata. If, however, the mortgage had been upheld in the first action the appellants would have been precluded from attacking it in the second. That the alternatives would have occurred may be conceded; one of them, indeed, has occurred and has demonstrated that appellants suffered no detriment from the ruling.

[2] The appellant Isabel Palet assigns as error that the Supreme Court failed to hold (1) that her liability as surety of Aldecoa & Co. had been extinguished in accordance with the provisions of article 1851 of the Civil Code, which provides that "the extension granted to a debtor by the creditor, without the consent of the surety, extinguishes the security"; (2) refused to order for her benefit that the property of the company should be exhausted before resort be had to her property for satisfaction of the bank's claim.

It will be observed at once that the defenses have some dependence upon questions of fact upon which the two courts below concurred. From article 1851 of the Civil Code, abstractly considered, nothing can be deduced. Both the trial and Supreme Courts held that "the mere failure to bring an action upon a credit, as soon as the same or any part of it matures, does not constitute an extension of the term of the obligation." And it was further held that the extension, to produce the extinction of the liability, "must be based on some new agreement by which the creditor deprives himself of the right to immediately enforce the claim." This interpretation of the local courts of the local law we defer to. The construction, moreover, expresses the rule that obtains in other jurisdictions.

*As to the other assignment of error the *630 court replied that Isabel Palet did not deny that as a member of the firm of Aldecoa & Co. she was liable with the company and that besides the trial court had directed that the mortgaged properties, including the properties mortgaged by her, should be sold under foreclosure in the event the company should not pay into court the amount of the judgment within the time designated for the purpose.

Counsel for appellee, however, admits that by clerical error, the judgment is made to run "against the company and Isabel Palet jointly and severally and does in terms express the subsidiary character" of her liability, and he therefore does not oppose a modification of the judgment to conform to the opinion of the trial court, that is, "that save as regards the foreclosure of the mortgage no execution shall issue against Isabel Palet until after the exhaustion of the assets of the principal debtor [the company]—which, by the way," counsel adds, "is a mere formality, as there are no such assets available, Aldecoa & Co. being notoriously insolvent, as stated by the Supreme Court in its decision." Opposing counsel may not be of this opinion, and we therefore modify the judgment as indicated, and, as modified, it is

Affirmed.

(246 U. S. 634)

E. H. EMERY & CO. v. AMERICAN REFRIGERATOR TRANSIT CO.

(Argued and Submitted April 19, 1918. Decided April 29, 1918.)

No. 739.

REMOVAL OF CAUSES ⟸19(5) — FEDERAL QUESTION.

Where plaintiff in a state court sought to recover a sum less than $3,000 from defendant refrigerator company for damages to peaches, on the theory that it failed to properly load and ice refrigerator cars pursuant to its contract with a railroad company, defendant's liability, if any, depends upon the contract, and defendant cannot remove the cause from the state court, on the theory that it was one governed by the acts of Congress, though the railroad company was subject to Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379, and defendant, not being a common carrier, was not subject to the inhibition of Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094, as amended by Act Jan. 20, 1914, c. 11, 38 Stat. 278 (Comp. St. 1916, § 1010), against removal by common carriers of suits under the act to regulate commerce, where the amount does not exceed $3,000.

Appeal from the District Court of the United States for the Southern District of Iowa.

Action by E. H. Emery & Co. against the American Refrigerator Transit Company, in which the Chicago, Burlington & Quincy Railroad Company was garnished. The Railroad Company defaulted, and plaintiff dismissed as to the personal action, but not as to the proceeding in rem. Thereupon, on petition of the Refrigerator Company, the cause was removed from the state court to the federal District Court, and, its motion to remand being denied, plaintiff declined to proceed further. From a judgment for defendant, plaintiff appeals. Reversed.

Mr. C. W. Whitmore, of Ottumwa, Iowa, for appellant.

Mr. Fred. W. Lehmann, Jr., of Des Moines, Iowa, for appellee.

*635 *Mr. Justice HOLMES delivered the opinion of the Court.

The plaintiff, the appellant, brought a suit in a State Court against the Chicago, Burlington & Quincy Railroad Company and the appellee. The original petition sought to charge both, as common carriers, under the Interstate Commerce Acts for damage to peaches caused by their being improperly stowed, handled and iced, amounting to less than $3,000. After a trial a judgment was entered for the railroad and it was held that under the Iowa Statutes the present appellee was entitled to be dismissed, as sued in the wrong county. Thereupon the plaintiff issued a garnishee process against the railroad as a debtor of the appellee, upon which the railroad made default. Then the appellee was dismissed "as to the personal action but not as to said proceeding in rem," and a time was allowed for the filing of a petition by the appellant. A petition calling itself "Substituted Petition" was filed on October 16, 1916, and a few days later in the same month a petition for removal to the District Court of the United States was presented, which was granted by the State Court. A motion to remand was made and denied. The plaintiff stood upon its motion and declined to proceed farther, denying the jurisdiction of the Court, whereupon the petition was dismissed, judgment was entered for the defendant, an appeal was taken and it was certified that the appeal was taken solely upon the jurisdiction of the Court.

We are content to assume without deciding that the case, whether a new action or not, had become removable if the difficulties to be mentioned can be overcome. On this assumption the jurisdiction is maintained on the argument that the plaintiff seeks to impose liability upon the defendant through the provisions of the Interstate Commerce Act, the governing tariffs and an interstate bill of *636 lading issued by the Missouri, Kansas & Texas Railway Company of Texas. The amendment to the Judicial Code, § 28, by the Act of January 20, 1914, c. 11, 38 Stat. 278, prohibiting the removal from state courts of suits, under section 20 of the Act to Regulate Commerce, against common carriers for injury to property, where the matter in controversy does not exceed $3,000, is met by the fact that the substituted petition does not charge the defendant as a common carrier, and both parties now agree that it was not one. Hence, it is said, the suit can be removed irrespective of the amount involved. It becomes necessary therefore to inquire in what way the defendant is supposed to be liable under the Acts of Congress. The substituted petition relies upon a contract between the defendant and the Missouri, Kansas & Texas road by which the former assumed liability for the damages of the kind alleged, or some of them, and the fact that

the railroad was a party to the bills of lading and the governing interstate tariffs, although the appellee was not. It also relies upon an alleged contract between it and the defendant for the cars involved and an implied undertaking for proper care and service. This last ground and other similar ones may be laid on one side as they clearly are outside the scope of the statutes concerned. So may a count alleging a partnership with the Missouri, Kansas & Texas in these transactions, as that would mean that the defendant became a common carrier pro hac vice and so within the above amendment to the Judicial Code.

The chief if not the only way in which the Acts of Congress are brought in so as to give color to the attempt to remove is through the subjection of the Missouri, Kansas & Texas to those acts. But that affects the defendant only by virtue of a contract between it and road. If in some way unexplained a stranger to the contract is entitled to profit by it, the foundation is the contract, not the laws which fixed the liability of the railroad that the*defendant assumed. The laws did not operate upon the defendant by their own force but merely as a measure of the damages agreed to be paid. To follow the language of a somewhat different case, the contract "is the sole determinant of the conditions supposed, and its reference elsewhere for their fulfillment is like the reference to a document that it adopts and makes part of itself." Louisville & Nashville R. R. Co. v. Western Union Telegraph Co., 237 U. S. 300, 303, 35 Sup. Ct. 598, 59 L. Ed. 965.

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One count alleges that the defendant caused the damage as agent for the Missouri, Kansas & Texas road by furnishing cars with insufficient tanks, employing inexperienced men and defectively stowing and failing to ice the peaches, and that these acts "constituted misfeasance on the part of defendant of the duties it owed to its principal the Missouri, Kansas & Texas Railway Company of Texas, and to the public at large." If this is not disposed of by what we have said, then it states no duty under the Act to Regulate Commerce, but only one at common law. In no aspect can it be maintained that any count attempts to allege a primary liability of the defendant under the Act to Regulate Commerce otherwise than as carrier and if sued as a carrier it cannot remove because the amount in controversy is too small.

Judgment reversed.

(246 U. S. 631)

DICKINSON v. STILES.

(Argued April 18 and 19, 1918. Decided April 29, 1918.)

No. 735.

1. Courts ⟸396(7)—Questions Presented—Constitutional Questions.

Where a Minnesota statute giving attorneys a lien on the cause of action of their clients was held applicable to an action in the courts of that state, based on the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, and Act April 5, 1910, c. 143, 36 Stat. 291 [Comp. St. 1916, §§ 8657–8665]), and the pleadings showed that the action was one for injuries received in interstate commerce, and the question of the applicability of the statute was discussed in the state court, a writ of error to review the judgment on the ground that the statute as construed was repugnant to the Constitution and laws of the United States cannot be dismissed on the theory that the question had not been raised below.

2. Attorney and Client ⟸172 — Attorneys' Liens — Enforcement—Action Under Federal Employers' Liability Act.

As the federal Employers' Liability Act authorizes actions in the state courts and makes the state practice applicable, Gen. St. Minn. 1913, § 4955, giving attorneys a lien on the cause of action of their clients, is properly applied to an action brought in the courts of that state under the federal act, where defendant settled the claim with the client.

In Error to the Supreme Court of the State of Minnesota.

Action by Louis W. Holloway against Jacob M. Dickinson, as receiver of the Chicago, Rock Island & Pacific Railway Company, in which, after dismissal and settlement of the action, George C. Stiles intervened to have his right to an attorney's lien determined. A judgment for the lienor was affirmed on defendant's appeal (137 Minn. 410, 163 N. W. 791), and defendant brings error to the Supreme Court of the State of Minnesota. Affirmed.

Mr. Edward S. Stringer, of St. Paul, Minn., for plaintiff in error.

Mr. George H. Lamar, of Washington, D. C., for defendant in error.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a writ of error to correct a judgment of the Supreme Court of Minnesota which sustained the validity of a statute of the State held applicable to this case and alleged by the plaintiff in error to be repugnant to the Constitution and laws of the United States when so applied. The facts that raise the question are simple. One Holloway sued the plaintiff in error under the Employers' Liability Act for personal injuries and engaged the*defendant in error, Stiles,* as his attorney, agreeing to pay him one-third of the amount recovered by suit or settlement. The statutes of Minnesota give the attorney a lien upon the cause of action. Gen. Stats. of 1913, § 4955. Before trial the plaintiff in error settled by paying $6,500. Stiles intervened in the cause and claimed his fee pursuant to his contract. There was a trial which ended in a judgment for Stiles—the trial court ruling that the Minnesota statute was effective to impose a lien upon a cause of action arising under the Act of Congress relating to the liability of carriers by railroad to their employés. April 22, 1908, c. 149, 35 Stat. 65. April 5, 1910, c. 143, 36 Stat. 291.

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The Supreme Court of the State sustained this ruling, 137 Minn. 410, 163 N. W. 791, and subsequently, without further discussion, affirmed the judgment for Stiles.

[1] It is argued for the defendant in error that it does not appear sufficiently in the record that the case turned upon the ruling supposed. But the original declaration was for an injury alleged to have been received in interstate commerce and, whatever the answer denied, that was the claim that was settled. The question was called to the attention of the trial court and was discussed at length by the Supreme Court. We perceive no ground for the motion to dismiss.

[2] Coming to the merits, cases that declare that the acts of Congress supersede all state legislation on the subject of the liability of railroad companies to their employés have nothing to do with the matter. The Minnesota statute does not meddle with that. It affects neither the amount recovered nor the persons by whom it is recovered, nor again the principles of distribution. It deals only with a necessary expense of recovery. Congress cannot have contemplated that the claims to which its action gave rise or power would be paid in all cases without litigation, or that suits would be tried by lawyers for nothing, yet it did not regulate attorney's fees. It contemplated suits in state courts and accepted state procedure in advance. Minneapolis & St. Louis R. R. Co. v. Bombolis, 241 U. S. 211, 36 Sup. Ct. 595, 60 L. Ed. 961, L. R. A. 1917A, 86, Ann. Cas. 1916E, 505; Louisville & Nashville R. R. Co. v. Stewart, 241 U. S. 261, 36 Sup. Ct. 586, 60 L. Ed. 989. We see no reason why it should be supposed to have excluded ordinary incidents of state procedure. Before the Carmack Amendment it was held not to invalidate state legislation requiring, under a penalty, prompt settlement of claims for loss of freight in the State, Atlantic Coast Line R. R. Co. v. Mazursky, 216 U. S. 122, 30 Sup. Ct. 378, 54 L. Ed. 411; see Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co., 237 U. S. 597, 35 Sup. Ct. 715, 59 L. Ed. 1137, Ann. Cas. 1916D, 333; or, since that amendment, allowing in the costs a moderate attorney's fee, for small claims unsuccessfully disputed, Missouri, Kansas & Texas Ry. Co. v. Harris, 234 U. S. 412, 34 Sup. Ct. 790, 58 L. Ed. 1377, L. R. A. 1915E, 942, although both laws affect commerce among the States.

The statutes referred to in the last cited cases imposed liability for an additional sum. The present one does not. We presume that it would not be contended that the Employers' Liability Act prevented the assignment of a judgment under it in such form as was allowed by the law of Minnesota, or that it allowed the defendant to disregard such an assignment after notice. Nor do we perceive any different rule for an assignment of judgment or cause of action by way of security, which under the Minnesota statute the contract with Holloway brought to pass. It is true that this security is made effectual by requiring payment to the attorney, Davis v. Great Northern Ry. Co., 128 Minn. 354, 358, 151 N. W. 128, and this may be said to result in requiring the judgment debtor to split up the payment. But surely there is nothing in that liability, seemingly common to all Minnesota judgments, Wheaton v. Spooner, 52 Minn. 417, 423, 54 N. W. 372, that introduces an interference with the Act of Congress that otherwise would not exist. In cases where a partial assignment is provided for irrespective of attorneys' fees we should not expect to hear the suggestion of such a point. The whole case is simply that the State allows the attorney employed to collect a claim to be subrogated to the rights of the claimant so far as to secure the attorney's fees. We see no reason why it should not.

Judgment affirmed.

(247 U. S. 16)

GASQUET v. FENNER et al.

(Argued April 24, 1918. Decided May 6, 1918.)

No. 261.

JUDGMENT ⟸823—FULL FAITH AND CREDIT—POWERS.

As Civ. Code La. arts. 420, 421, declare that a person interdicted cannot resume the exercise of his rights until after a definitive judgment repealing the interdiction, and that an interdiction can only be revoked by the solemnities observed in pronouncing it, one adjudged incompetent and interdicted by the Louisiana state court, having removed to Tennessee and there being adjudged competent, cannot, by bill in the federal court, compel a Louisiana executor of an estate in which he was interested to account, for the Tennessee judgment could have no extraterritorial effect, regardless of the full faith and credit clause of the federal Constitution, and the Louisiana executor, under the laws of that state, could not be compelled to make a settlement until the interdiction was removed or a curator appointed for the person interdicted.

Appeal from District Court of the United States for the Eastern District of Louisiana.

Bill by Fernand Vaughan Gasquet against Charles Payne Fenner, testamentary executor, and others. From a decree dismissing the bill without prejudice (235 Fed. 997), complainant appeals. Affirmed.

Messrs. Williams Winans Wall, of New Orleans, La., G. T. Fitzhugh, of Memphis, Tenn., and Thomas Gilmore, of New Orleans, La., for appellant.

Mr. George Denegre, of New Orleans, La., for appellees.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill brought by the appellant, alleging himself to be a citizen of Tennessee, to require the principal appellee, the executor under his mother's will, appointed and qualified in Louisiana, to pay over to him

one-third of his mother's estate—that being the proportion to which he is admitted to be ultimately entitled. The defendants allege that the appellant is a citizen of Louisiana and pronounced incapable of taking care of his person and administering his estate, by a judgment of interdiction of the Louisiana Courts. They say that the estate has not yet been fully administered as no final account has been filed and that until the interdiction is set aside an account can be rendered and possession of the appellant's share delivered only to a curator; but that appointment of a curator has been delayed by the appellant's having taken a writ of error from this Court to the Supreme Court of the State in respect of its interdiction decree. 136 La. 958, 68 South. 89. Dismissed, 242 U. S. 367, 37 Sup. Ct. 165, 61 L. Ed. 367.

Pending an application to the Supreme Court of the State for a rehearing, Gasquet, who was in custody, obtained his release on habeas corpus from a lower court, afterwards declared by the Supreme Court to have been without jurisdiction, and on July 28, 1914, established himself in Tennessee. On February 20, 1915, he filed a petition in the Probate Court of Shelby County, Tennessee, for an inquiry whether he was a lunatic, upon the same day obtained a verdict declaring him of sound mind and on February 23 a decree to this same effect, which also declared him entitled to settlement from all persons having control of any part of his estate "any disability by reason of the proceedings against him * * * hereinbefore mentioned [i. e. the Louisiana interdict] being hereby removed." Armed with this Gasquet brought the bill in the present case and contends that due faith and credit were denied to the Tennessee decree when the bill was dismissed, as it was. (D. C.) 235 Fed. 997.

Ordinarily, at least, a decree in rem is conclusive as to the facts that it establishes only as against parties entitled to be heard. The Mary, 9 Cranch, 126, 146, 3 L. Ed. 678; Tilt v. Kelsey, 207 U. S. 43, 52, 28 Sup. Ct. 1, 52 L. Ed. 95; Manson v. Williams, 213 U. S. 453, 29 Sup. Ct. 519, 53 L. Ed. 869. It may be argued that if the defendant was entitled to be heard he was entitled to notice of some kind, which of course he did not receive in a proceeding that was tried on the day when it was begun, and that if he was not entitled to be heard he is not bound outside the limits of Tennessee. But we are not called upon to consider whether this and other arguments are sound that would need consideration before the plaintiff could prevail in this case, because in our opinion the decree was right for the reason given by the district judge. It may be called a matter of form rather than of substance; upon that we are not curious to inquire. It is enough that the reason seems to us sufficient. Article 420 of the Civil Code of Louisiana provides that a "person interdicted cannot resume the exercise of his rights, until after the definitive judgment by which the repeal of the interdiction is pronounced"; and article 421, that "interdiction can only be revoked by the same solemnities which were observed in pronouncing it." Whatever may be the conclusiveness of the Tennessee decree it cannot operate upon the interdiction directly. At most it can only furnish ground for a conclusive right to have the interdiction removed. When the State laws, as a condition for the final settlement of a probate decree require either the revocation of the interdict or the appointment of a curator one or the other thing must be done. It is not enough for the party to show that he has a right to have one of them done.

It is said that the appellant may have his right determined by the Court of the United States, under the decision in Waterman v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80. But the short answer is that all that could be determined in the District Court is admitted and never has been in dispute. The only obstacle in the way of giving the plaintiff his share is the obstacle in the way of a final account and settlement, which must take place in the Probate Court. By the law of Louisiana they cannot be had until either a curator is appointed or the interdiction removed. Assuming that the plaintiff has every other right that he says, he cannot pursue his rights across country but must proceed along the road that Louisiana law provides.

Decree affirmed.

The CHIEF JUSTICE took no part in the decision of this case.

(247 U. S. 7)

PERLMAN v. UNITED STATES.

(Argued April 18, 1918. Decided May 6, 1918.)

No. 752.

1. APPEAL AND ERROR ⟸150(1)—INTEREST—DISMISSAL OF APPEAL.

Where the corporation of which petitioner was president sued for infringement of a patent, and the federal District Court granted a motion for dismissal without prejudice on the condition that the evidence should be perpetuated and the exhibits impounded in the custody of the clerk to be kept subject to the order of the court, petitioner had such an interest in the exhibits which were his personal property that he could appeal from an order denying his petition to restrain and enjoin the United States attorney from taking into his possession the exhibits for use in the investigation of a charge of perjury against petitioner, though the petition was entitled as though filed in the equity suit in which the exhibits were impounded, and petitioner was not nominally a party thereto.

2. CRIMINAL LAW ⟨⟩1023(2)—REVIEW—FINALITY OF PROCEEDING.

In such case, the order of the district court, denying the petition if considered as part of the criminal proceeding against petitioner, is as to petitioner final and not interlocutory, and so a writ of error to review the order cannot be dismissed on the ground of its interlocutory character.

3. CRIMINAL LAW ⟨⟩393(1) — SEARCHES AND SEIZURES ⟨⟩7 — UNREASONABLE SEARCHES AND SEIZURES—WHAT ARE—INCRIMINATING TESTIMONY.

Where the president of a corporation testifying in its behalf in an infringement suit produced exhibits which were impounded by order of the court, he cannot, on the theory that it would amount to an unlawful search and seizure and compel him to bear witness against himself, in violation of Const. U. S. Amends. 4, 5, prevent the United States attorney from obtaining possession of the exhibits for use in prosecution for alleged perjuries committed by the president as a witness in the infringement suit, for though the exhibits were his own property, the president, having published them and used them in testifying for the corporation in which he was interested, is not entitled to have them protected as if they had never left his possession.

*Appeal from and in Error to the District Court of the United States for the Southern District of New York.

Petition of Louis H. Perlman to restrain and enjoin the United States attorney for the Southern District of New York from taking into his possession or custody certain exhibits which had been impounded or deposited by order of the District Court for that district with the clerk of the court in a suit between the Perlman Rim Corporation and the Firestone Tire & Rubber Company. Relief was denied, and petitioner appeals and brings error. Affirmed.

Appeal and error to review an order denying petition of Perlman to restrain and enjoin the United States attorney for the Southern district of New York from taking into his possession or custody certain exhibits which had been impounded and deposited by order of the district court for that district with the clerk of the court.

In support of the relief prayed Perlman alleges the following facts, which we state narratively: He is the inventor of a device known in the market as a demountable rim, its purpose being to mount and carry an inflated pneumatic tire upon a metallic rim, which contains locking devices for attachment to the wheels of automobiles and other vehicles.

He brought suit for infringement against the Standard Welding Company, and, issue being joined, there was a judgment for him against the company, which was affirmed by the Court of Appeals. (D. C.) 231 Fed. 453, 231 Fed. 734, 146 C. C. A. 18. At the trial of the cause certain exhibits hereinafter referred to were offered by him which were and are his personal property and have been continuously in his possession or in the possession of those who represent him.

Subsequently he, with others, formed a corporation known as the Perlman Rim Corporation, which, among other things, undertook to market the patented device.

In March, 1916, he assigned the letters patent to the corporation, but not the exhibits above mentioned.

In February, 1917, the corporation, being advised that the Firestone Tire & Rubber Company was infringing the device, brought suit against the company for infringement, which came up for trial before Judge Hand. After final submission of the case the plaintiff, the Perlman Rim Corporation, through its counsel, asked leave to discontinue the action and for its dismissal without prejudice. The motion was granted, but the condition was imposed that the evidence be perpetuated and the exhibits impounded in the custody of the clerk, to be kept under seal subject to the order of the court.[1] The exhibits were part of those heretofore referred to and used on the trial before Judge Hunt.

July 17, 1917, Perlman ascertained from the attorney for the corporation that the attorney had been served with a copy of an order signed by Judge Hand, directing him, the attorney for the corporation, and the attorney for the Firestone Company to appear and show cause why the United States attorney should not have and be given possession of the exhibits as the United States attorney had instituted proceedings against Perlman which involved the question whether he had committed an offense against the United States. The attorney for the corporation also told Perlman that he had not opposed the motion and that the attorney for the Firestone Company had not appeared; that, therefore, the order would be entered as a matter of course.

The application of the United States attorney was based on an affidavit of one Harold Harper, an assistant to the United States attorney, which charged, among other things, that the exhibits were material and necessary in an investigation pending before

[1] "This cause having come on to be heard and testimony having been taken by both parties, now, on plaintiff's motion, and after hearing defendant's counsel in opposition thereto, it is

"Ordered, that the bill of complaint herein be and it hereby is dismissed without prejudice with costs to defendant to be taxed; and as a condition of such dismissal and in accordance with plaintiff's stipulation made in open court, it is

"Further ordered, that the minutes of the trial be filed and that all the exhibits offered by either party be impounded and deposited with the clerk of this court under seal to be opened only by order of court on notice to each of the parties hereto; and

"That, all testimony taken up to the present time in this cause (as well as the exhibits) shall stand as testimony which may be read and used in any cause between the parties hereto or between any other parties who would be privies if judgment were entered herein, including cases in which the vendees and users of the rims made or sold by the defendant or such other parties are sued."

the grand jury and for preparation for trial in case an indictment should be found.

The exhibits are his, Perlman's, personal property and the use of them by the grand jury and the United States attorney as contemplated would be in violation of his rights and unwarranted in law; they were impounded in a suit to which he was not a party, but a witness, and he had not consented thereto or been heard by counsel.

He prayed for an order upon all the parties concerned to show cause why an order should not be made directing the clerk to deliver to him, Perlman, the exhibits and that the United States attorney be restrained from using them, and that unless such stay be granted, his rights would be seriously invaded and he would be compelled to furnish evidence against himself in a criminal proceeding, all without due process of law.

A schedule of the exhibits is attached to the petition and shows them to be not only matters in writing, such as bills, letters and checks, but models of wheels, rim-carrying tires, and of other implements and tools, and the patent upon which the suit was brought.

Before the filing of the petition an order had been granted upon motion of the United States attorney directing the clerk to produce the exhibits before the grand jury. The order further directed that the United States attorney have access to the exhibits at all reasonable times and that if an indictment should be found against Perlman the United States attorney might have such temporary custody of the exhibits or any part thereof as might be necessary for the purpose, under such regulations as the clerk might make.

Upon the filing of Perlman's petition an order was granted restraining the use of the exhibits until the hearing of the petition. Subsequently, upon the hearing, and Perlman having withdrawn so much of his application as related to the return of the exhibits to him, the court, Judge Manton sitting, denied the relief prayed for against the use of the exhibits by the United States attorney or their presentation to the United States grand jury.

The order recited that it was made upon the order of Judge Hand, the petition of Perlman and the affidavit of Harper.

The affidavit gives some details that Perlman's petition does not. It states that Perlman testified that he had been president of the Perlman Rim Corporation since its formation and further that he gave testimony in respect to the alleged invention which was the subject of the patent, and that in the course of his testimony he produced and offered in evidence on the part of the corporation the exhibits. And the affidavit states that the impounding of the exhibits was part of the decree in the suit against the Firestone Company and that Perlman was present at the time and during practically all of the proceedings of the trial and that the minutes of the court show no protest by him.

It further states that certain of the alleged perjuries committed by Perlman referred directly to the exhibits, as to the time and manner of their production or alteration; and that certain other statements alleged to have been perjured were made by him and supported by the exhibits. And further that in the course of his cross-examination Perlman gave certain evidence with regard to events in England in the year 1895 which did not directly concern the matter of invention but went to the credibility of the witness as such, and in respect to those statements an indictment had been found against Perlman by the grand jury attending the court for the July, 1917, term.

The sources of information of Harper as to the above matters not within his own knowledge were stated to be the official stenographic report of the trial, the records of the clerk's office, and statements made to him by persons who had been present in the court room during the trial and cognizant of the proceedings.

Mr. Louis Marshall, of New York City, for appellant and plaintiff in error.

Mr. Assistant Attorney General Fitts for the United States.

Mr. Justice McKENNA, after stating the case as above, delivered the opinion of the Court.

The United States makes a motion to dismiss on the following grounds:

"1. Appellant has no interest in the subject matter of and is not a party to the equity suit out of which the appeal arises;

"2. The order of the District Court if considered as a part of the criminal proceeding is not final, but merely interlocutory, and therefore not reviewable by this court."

[1] We think the motion should be overruled. Referring to the impounding order it will be seen that the government was not one of those for whom the use of the exhibits was reserved. It, therefore, had no rights under the order. Its rights—or, it is more accurate to say, its powers—were of different origin, were governmental, and would affect Perlman by their exercise. We think, therefore, that he could intervene to oppose and urge in opposition property and constitutional rights and their sanctions. His petition was in effect independent and did not lose its character by being entitled in the equity suit.

[2] The second contention of the government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur.

[3] On the merits the case is rather unique. Perlman contends that the proposed use by the United States before the grand jury of the exhibits as a basis for an indictment against him constitutes an unreasonable seizure and makes of him a compulsory witness against himself, in violation of the Fourth and Fifth Amendments. In other words, he claims the same sanctuary for the exhibits in the hands of the court as though they were in his hands and had never been published or delivered to the world. For this he invokes certain principles and cases. The principles are well established. They are paraphrases of the Constitution, giving it in cases a more precise specialization. They preclude, of course, compulsion, either upon the individual or, under some circumstances, his property; nor is it a condition or part of compulsion that there be an actual entry upon premises, an actual search and seizure. The principles preclude as well the extortion of testimony or detrimental inferences from silence or refusals to testify.

The incidences of the cases in which the principles were declared do not help Perlman. In all of them there was force or threats or trespass upon property, some invasion of privacy or governmental extortion. In Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, there was an order of the court requiring the production of private books, invoices and papers, the alternative of refusal being that their character as asserted by counsel should be taken as confessed. In Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, there was an effort to compel a witness to disclose circumstances which might be evidence against him of the commission of an offense or might connect him with it. Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, is of like illustration. In United States v. Wong Quong Wong (D. C.) 94 Fed. 832, private letters were opened. In United States v. Mills (C. C.) 185 Fed. 318, there was a general seizure of all of the defendant's business records by the United States marshal when executing a warrant of arrest. In United States v. Abrams (D. C.) 230 Fed. 313, business papers were delivered to an officer under threats or promises of benefit. In Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, there was an invasion of premises without a search warrant and the carrying away of certain letters and envelopes. The latter case is especially relied on by counsel, and it is definite as to principles and as to seizures the Constitution forbids and those it permits. The distinctions are made clear and the discussion leaves nothing to be added of either principles or their illustration. But it is not like the case at bar. In it there was an invasion of the defendant's privacy, a taking from his immediate and personal possession. In the case at bar there was a voluntary exposition of the articles, for use as evidence in the Circuit Court and in the Circuit Court of Appeals (D. C.) 231 Fed. 453, 231 Fed. 734, 146 C. C. A. 18, that judicial action should be based upon them, action prayed for by him against another. And they served his purpose; they prevailed as proof and secured a judgment for him.

There was again exposition of them and use as evidence in Perlman Rim Co. v. Firestone Co. (D. C.) 244 Fed. 304. In that case, it is true, Perlman was not nominally a party, but he was interested in the suit and its success. His patent depended upon it. They were part of his evidence, necessary supports and illustrations of it, as much, therefore, a part of his testimony as his spoken word, as much a part of the records of the court as the stenographer's notes. Their tangibility did not change their character as evidence. Indeed, it gave emphasis to the notes and a more pertinent strength, and was deemed necessary to their completeness and understanding. As is usual in a patent case, there was exposition and illustration by exhibits. And their production was voluntary, no form of constraint or compulsion or extortion was put upon him, and that some one of them must exist is the test of immunity. Holt v. United States, 218 U. S. 245, 252, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138. Therefore, as said by counsel for the government:

> "Having let go the exhibits, so that they have become a part of the judicial records, he is not now in position to suppress the story they tell."

But Perlman insists that he owned the exhibits and appears to contend that his ownership exempted them from any use by the government without his consent. The extent of the insistence is rather elusive of measurement. It seems to be that the owner of property must be considered as having a constructive possession of it wherever it be and in whosesoever hands it be, and is always, therefore, in a kind of asylum of constitutional privilege. And to be of avail the contention must be pushed to this extreme. It is opposed, however, by all the cited cases. They, as we have said, make the criterion of immunity not the ownership of property but the "physical or moral compulsion" exerted.

As we have seen, Perlman delivered the exhibits to publicity, made them the means of advantage. They, for the purposes of justice, were taken from his possession and volition into the control and custody of the court. Upon formal motion they were released for the use of the government, a use as meritorious in consideration as that which determined the ruling in Ex parte Uppercu, 239 U. S. 435, 36 Sup. Ct. 140, 60 L. Ed. 368.

Order affirmed.

(247 U. S. 3)

COX v. WOOD, Major General.

(Argued April 17 and 18, 1918. Decided May 6, 1918.)

No. 833.

COURTS ⟸90(3) — PRECEDENTS — STARE DECISIS.

Relator's claim that he was entitled to his discharge from military service under Selective Draft Act May 18, 1917 (40 Stat. 76, c. 15) on the ground that the call to service for which the draft had been made under the act was for duty in a foreign country, need not be considered as an original proposition; the Supreme Court in a recent decision having announced that the power of Congress was not restricted to Const. art. 1, § 8, declaring that Congress shall have the power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, but that Congress had authority under the war-making power to compel military service in foreign countries.

Appeal from the District Court of the United States for the District of Kansas.

Petition by Robert Cox for a writ of habeas corpus directed to Major General Leonard Wood, Commandant of Camp Funston in the State of Kansas. Motion to dismiss being sustained, relator appeals. Affirmed.

Mr. Hannis Taylor, of Washington, D. C., for appellant.

Mr. Solicitor General Davis, for appellee.

Mr. Chief Justice WHITE delivered the opinion of the Court.

The appellant, conformably to the Selective Draft Law of May 18, 1917 (40 Stat. 76, c. 15), was called to compulsory military duty * and in December, 1917, was*engaged in performing it at Camp Funston, Kansas. On the 3d of that month he petitioned for a writ of habeas corpus to be directed to the general commanding the camp to discharge him from further service. The ground of the petition was that although Congress had the power to call the citizens of the United States, the national militia, to compulsory service in virtue of the militia clause of the Constitution (article 1, § 8), that power was limited to the character of services specified in the militia clause, viz.: "To execute the laws of the Union, suppress insurrections and repel invasions." Further alleging that it had been officially declared that the call to service for which the draft had been made under the act was avowedly for the purpose of military duty in a foreign country, it was charged that the call was illegal and the right to the writ existed. Before the allowance of a rule on the petition, through the United States district attorney the general who was named as respondent in the petition moved to dismiss because the facts alleged constituted no ground for the relief which was prayed and hence as a return stating such facts would require a discharge of the rule for habeas corpus if issued, none should be ordered. On the 20th of December the matter was submitted by consent of the United States district attorney and the petitioner to the court for its action upon the petition and the motion to dismiss. On the 4th of January, 1918, the court sustained the motion of the district attorney and dismissed the petition. In the opinion by which this conclusion was sustained it was pointed out, conformably to the statement which we have made concerning the petition that the—

"petitioner, after affirming the validity of said Conscription Act of May 18, 1917, pleads what he calls his constitutional immunity from military service beyond the territorial limits of the United States. Such claim of constitutional immunity rests upon the contention that no conscription act can be*passed except* under that part of section 8, art. 1, of the Constitution which provides that 'the Congress shall have power * * * to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.' * * *"

On the day the judgment was rendered, January 4th, an appeal to this court was prayed and allowed, the assignments of error then made for that purpose reasserting the want of power in Congress to require a citizen to render compulsory military service beyond the territorial limits of the United States.

When on December 3d the petition was filed in the lower court, various cases calling in question the constitutionality of the Selective Draft Law of May 18, 1917, were on the docket of this court and approaching hearing and were argued here on December 13th and 14th before the decision below was rendered, January 4th, sustaining the motion to dismiss. Before that argument, however, at the request of counsel for the present appellant permission was given to file a brief in those cases as a friend of the court and such brief was filed and considered in passing upon the cases which were decided on January 7, 1918. Selective Draft Cases, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. —.

Coming to consider the elaborate contentions and arguments supporting them made in the present case, it is indisputable that they all rest upon the assumption as to the exclusive character of the delegation made to Congress by the militia clause (article 1, § 8) and the restriction as to the use of the military force raised under such delegation resulting from the provisions in the clause relied upon, that is, the prohibition of compulsory service beyond the territorial limits of the United States. But we are of opinion that we are not now called upon to consider these contentions as a matter of original inquiry because the fundamental mistake upon which all the*arguments rest and the er-

ror in the conclusion which they are advanced to sustain were pointed out and conclusively established by the decision sustaining the Selective Draft Law recently announced in the Selective Draft Cases, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. ——. This result is apparent since on the face of the opinion delivered in those cases the constitutional power of Congress to compel the military service which the assailed law commanded was based on the following propositions: (a) That the power of Congress to compel military service and the duty of the citizen to render it when called for were derived from the authority given to Congress by the Constitution to declare war and to raise armies. (b) That those powers were not qualified or restricted by the provisions of the militia clause and hence the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia clause. And (c) that from these principles it also follows that the power to call for military duty under the authority to declare war and raise armies and the duty of the citizen to serve when called were coterminous with the constitutional grant from which the authority was derived and knew no limit deduced from a separate and for the purpose of the war power wholly incidental if not irrelevant and subordinate provision concerning the militia found in the Constitution. Our duty to affirm is therefore made clear.

But before so ordering we must notice a suggestion made by the government that because of impertinent and scandalous passages contained in the brief of the appellant the brief should be stricken from the files. Considering the passages referred to and making every allowance for intensity of zeal and an extreme of earnestness on the part of counsel, we are nevertheless constrained to the conclusion that the passages justify the terms of censure by which they are characterized in the suggestion made by the government. But despite this conclusion which we regretfully reach, we see no useful purpose to be subserved by granting the motion to strike. On the contrary we think the passages on their face are so obviously intemperate and so patently unwarranted that if as a result of permitting the passages to remain on the files they should come under future observation, they would but serve to indicate to what intemperance of statement an absence of self-restraint or forgetfulness of decorum will lead and therefore admonish of the duty to be sedulous to obey and respect the limitations which an adhesion to them must exact.

Affirmed.

(247 U. S. 1)

SHEPARD et al. v. BARKLEY et al.

(Argued April 23, 1918. Decided May 6, 1918.)

No. 257.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suits by James M. Barkley, Moderator of the General Assembly and Chairman of the Executive Commission of the General Assembly of the Presbyterian Church in the United States of America, and others, against J. F. Shepard and others. From decrees for complainants, defendants appealed to the Circuit Court of Appeals, and, the decrees being affirmed (138 C. C. A. 217, 222 Fed. 669), they appeal. Affirmed.

Mr. Charles E. Morrow and Wm. R. Gentry, both of St. Louis, Mo., for appellants.

Mr. Frank Hagerman, of Kansas City, Mo., for appellees.

Memorandum opinion by Mr. Chief Justice WHITE, by direction of the Court.

The court is of the opinion that the following propositions are well founded, although some members of the court differ concerning them: (a) That the appeal in this case brings up for review both the causes which were decided by the court below at the same time and both therefore will be controlled by the decree here to be rendered. (b) That the order allowing an amendment as to the form of the appeal and the parties which was previously made without prejudice to the right of the appellees to object to the same at the hearing on the merits was rightfully granted and the objection which was at the hearing on the merits made by the appellees is without merit. (c) That under the case as made by the pleadings there is authority to review.

The approach to the merits being thus cleared, without any difference on the subject the court is of opinion that the doctrines by which the case is controlled have been so affirmatively and conclusively settled by a prior decision of this court as to cause it to be unnecessary as a matter of original consideration to restate them. Watson v. Jones, 13 Wall. 679, 20 L. Ed. 666. And the want of any possible reason for removing this case from the control of the doctrines of the Watson Case is, if needs be, conclusively shown by the many cases referred to by the court below in its opinion (222 Fed. 669, 138 C. C. A. 217), in which the Watson Case was made controlling and decisive as to controversies not in substance differing from the one here presented. Sherard v. Walton (D. C.) 206 Fed. 562; Helm v. Zarecor (D. C.) 213 Fed. 648; Bonham v. Sharp (D. C.) 213 Fed. 660; Harris v. Cosby, 173 Ala. 81, 55 South. 231; Sanders v. Baggerly, 96 Ark. 117, 131 S. W. 49; Permanent Commission of Missions v. Pacific Synod, 157 Cal. 105, 106 Pac. 395; Mack v. Kime, 129 Ga. 1, 58 S. E. 184, 24 L. R. A. (N. S.) 675; First Presbyterian Church of Lincoln v. First Cumberland Presbyterian Church of Lincoln, 245 Ill. 74, 91 N. E. 761, 19 Ann. Cas. 275; Fussell v. Hail, 233 Ill. 73, 84 N. E. 42; Fancy Prairie Church v. King, 245 Ill. 120, 91 N. E. 776; Pleasant Grove Congregation v. Riley, 248 Ill. 604, 94 N. E. 30; Ramsey v. Hicks, 174 Ind. 428, 91 N. E. 344, 92 N. E. 164, 30 L. R. A. (N. S.) 665; Bentle v. Ulay, 175 Ind. 494, 94 N. E. 759; Wallace v. Hughes, 131 Ky. 445, 115 S. W. 684; Carothers v. Moseley, 99 Miss. 671, 55 South. 881; Hayes v. Manning, 263 Mo. 1, 172 S. W. 897; Missouri Valley College v. Guthrie, 263 Mo. 52, 172 S. W. 909; First Presbyterian Church v. Cumberland Presbyterian Church, 34 Okl. 503, 126 Pac. 197; Brown v. Clark, 102 Tex. 323, 116 S. W. 360, 24 L. R. A. (N. S.) 670.

Affirmed.

MEMORANDUM DECISIONS

Disposed of at October Term, 1917

No. —, original. Ex parte in the matter of William H. BLYMYER, petitioner. March 18, 1918. Mr. William H. Blymer, of New York City, pro se. Motion for leave to file a petition for writ of mandamus denied.

No. 239. James F. TAYLOR et al., appellants, v. The UNITED STATES. April 15, 1918. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. Mr. R. E. Milling, of New Orleans, La., for appellants. The Attorney General, for the United States.

PER CURIAM. Judgment affirmed upon the authority of Washington Securities Co. v. United States, 234 U. S. 76, 78, 34 Sup. Ct. 725, 58 L. Ed. 1220; Wright-Blodgett Co. v. United States, 236 U. S. 397, 402–405, 35 Sup. Ct. 339, 59 L. Ed. 637; Linn & Lane Timber Co. v. United States, 236 U. S. 574, 575, 576, 35 Sup. Ct. 440, 59 L. Ed. 725.

No. 254. CENTRAL OF GEORGIA RAILWAY COMPANY, plaintiff in error, v. Birdie V. DE LOACH. April 15, 1918. In error to the Court of Appeals of the State of Georgia. For opinion below, see 18 Ga. App. 362, 89 S. E. 433. Mr. T. M. Cunningham, Jr., of Savannah, Ga., for plaintiff in error.

PER CURIAM. Judgment reversed with costs upon the authority of Pennsylvania Co. v. Donat, 239 U. S. 50, 36 Sup. Ct. 4, 60 L. Ed. 139; New York Central & Hudson River R. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298.

No. 296. MISSISSIPPI CENTRAL RAILROAD COMPANY, plaintiff in error, v. Wade LOTT. April 15, 1918. In error to the Supreme Court of the State of Mississippi. For opinion below, see 72 South. 202. Mr. S. E. Travis, of Hattiesburg, Miss., for plaintiff in error. Dismissed with costs on motion of counsel for the plaintiff in error.

No. 446. J. B. SHOWALTER et al., appellants, v. TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF THE STATE OF FLORIDA et al. April 15, 1918. Appeal from the District Court of the United States for the Southern District of Florida. Messrs. Clair D. Vallette and A. B. Quinton, both of Washington, D. C., for appellants. Dismissed with costs on motion of counsel for the appellants.

No. 598. James S. HOPKINS, as receiver, etc., plaintiff in error, v. The UNITED STATES of America, suing for the use and benefit of ELLINGTON & GUY (Inc.) et al. April 15, 1918. In error to the District Court of the United States for the Eastern District of North Carolina. Messrs. Mark W. Brown, of Asheville, N. C., and Albert J. Hopkins, of Chicago, Ill., for plaintiff in error.

PER CURIAM. Judgment affirmed with costs upon the authority of United States v. Congress Construction Co., 222 U. S. 199, 32 Sup. Ct. 44, 56 L. Ed. 163.

No. 894. WHITE GULCH MINING COMPANY, petitioner, v. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA et al. April 15, 1918. Mr. W. E. F. Deal, of San Francisco, Cal. (Messrs. W. G. Deal and Curtis Hillyer, both of San Francisco, Cal., of counsel), for petitioner. Mr. Christopher M. Bradley, of San Francisco, Cal., for respondents. Petition for a writ of certiorari to the Supreme Court of the State of California denied.

No. 899. Franklin SHAW et al., appellants, v. Franklin K. LANE, Secretary of the Interior. April 15, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

No. 912. Tom HOLLIS, petitioner, v. The UNITED STATES of America. April 15, 1918. For opinion below, see 246 Fed. 832. Messrs. John Stone Hoskins and Louis Silberman, both of Birmingham, Ala., for petitioner. Mr. John W. Davis, Sol. Gen., of Washington, D. C., and William C. Fitts, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 913. Simp PATTERSON, petitioner, v. The UNITED STATES of America. April 15, 1918. For opinion below, see 246 Fed. 833. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 914. WEST END STREET RAILWAY COMPANY, petitioner, v. John F. MALLEY, Collector of Internal Revenue. April 15, 1918. For opinion below, see 246 Fed. 625. Messrs. Alex. Britton and Evans Browne, both of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

No. 916. Thomas J. EVANS, sole surviving receiver, etc., petitioner, v. NATIONAL BANK OF SAVANNAH. April 15, 1918. For opinion below, see 94 S. E. 611. Mr. Frederick T. Saussy, of Savannah, Ga., for petitioner. Messrs. Wm. Garrard and Edward S. Elliott, both of Savannah, Ga., for respondent. Petition for a writ of certiorari to the Court of Appeals of the State of Georgia granted.

No. 918. The DENVER & RIO GRANDE RAILWAY COMPANY, petitioner, v. The EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee, etc. April 15, 1918. For opinion below, see 250 Fed. 327. Messrs. George Welwood Murray, of New York City, John F. Bowie, of San Francisco, Cal., and William R.

Begg and William Roberts, both of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit Court denied.

No. 919. SOUTH COAST STEAMSHIP COMPANY, petitioner, v. J. C. RUDBACH. April 15, 1918. For opinion below, see 247 Fed. 84. Messrs. Marcel E. Cerf and C. H. Sooy, both of San Francisco, Cal. (Mr. Oliver Dibble, of San Francisco, Cal., of counsel), for petitioner. Mr. Ira S. Lillick, of San Francisco, Cal., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

No. 923. J. C. HARKER, substituted by Charles O. Harker, Administrator, etc., et al., petitioners, v. BOARD OF SUPERVISORS OF GREENE COUNTY, IOWA, et al. April 15, 1918. For opinion below, see 163 N. W. 233, 236. Mr. O. M. Brockett, of Des Moines, Iowa, for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Iowa denied.

No. 941. RENSSELAER & SARATOGA RAILROAD COMPANY, petitioner, v. Roscoe IRWIN, Collector of Internal Revenue. April 15, 1918. For opinion below, see 249 Fed. 726. Mr. G. B. Wellington, of Troy, N. Y., for petitioner. Messrs. D. B. Lucey, of Ogdensburg, N. Y., and John W. Davis, Sol. Gen., of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 11. HITCHMAN COAL & COKE COMPANY, petitioner, v. John MITCHELL, individually, et al. April 22, 1918. See, also, 245 U. S. 229, 38 Sup. Ct. 190, 62 L. Ed. —. Messrs. George R. E. Gilchrist, of Wheeling, W. Va., and Hannis Taylor, of Washington, D. C., for petitioner. Messrs. Charles E. Hogg, of Point Pleasant, W. Va., and Charles J. Hogg, of Charleston, W. Va., for respondents. Leave granted to withdraw contempt proceedings herein on motion of Mr. Hannis Taylor for the petitioner.

No. 335. Donald A. CURRAN, plaintiff in error, v. The CHICAGO SHORT LINE RAILWAY COMPANY. April 22, 1918. In error to the Appellate Court, First District of the State of Illinois. For opinion below, see 198 Ill. App. 154. Mr. Morse Ives, of Chicago, Ill., for plaintiff in error. Mr. William Rothmann, of Chicago, Ill., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Miedreich v. Lauenstein, 232 U. S. 236, 243, 34 Sup. Ct. 309, 58 L. Ed. 584; Interstate Amusement Co. v. Albert, 239 U. S. 560, 566–567, 36 Sup. Ct. 168, 60 L. Ed. 439.

No. 495. Edward B. PRYOR and Edward F. Kearney, receivers of the Wabash Railroad Company, plaintiffs in error, v. Laura CHRISTY, administratrix of the estate of Edward F. Christy, deceased. April 22, 1918. In error to the Kansas City Court of Appeals of the State of Missouri. For opinion below, see 195 Mo. App. 232, 191 S. W. 241. Mr. James L. Minnis, of St. Louis, Mo., for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237, Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. 1916, § 1214).

No. 610. CITIZENS BANK OF MICHIGAN CITY, IND., plaintiff in error, v. Mary OPPERMAN. April 22, 1918. For opinion below, see 115 N. E. 55. Mr. Worth W. Pepple, of Michigan City, Ind., for plaintiff in error. Mr. Samuel Parker, of South Bend, Ind., for defendant in error. Petition for a writ of certiorari to the Supreme Court of the State of Indiana denied.

No. 610. CITIZENS BANK OF MICHIGAN CITY, IND., plaintiff in error, v. Mary OPPERMAN. April 22, 1918. For opinion below, see 115 N. E. 55. Mr. Worth W. Pepple, of Michigan City, Ind., for plaintiff in error. Mr. Samuel Parker, of South Bend, Ind., for defendant in error. Motion for a writ of certiorari herein under rule 14 (32 Sup. Ct. viii) denied.

No. 650. Clarence F. BIRDSEYE, appellant, v. Arthur WOODS, police commissioner of the city of New York; and

No. 651. Kellogg BIRDSEYE, appellant, v. Arthur WOODS, police commissioner of the city of New York. April 22, 1918. Appeals from the District Court of the United States for the Southern District of New York. For opinion below, see 244 Fed. 972. Mr. Charles L. Craig, of New York City, for appellants. Messrs. Francis Shunk Brown, Atty. Gen., of Philadelphia, Pa., Harry H. Rowand, Dist. Atty. of Allegheny County, of Pittsburgh, Pa., Edward Swann, Dist. Atty. of New York County, of New York City, Robert S. Johnstone, Asst. Dist. Atty., of New York City, Edmund K. Trent, Deputy Atty. Gen., of Pittsburgh, Pa., and Robert D. Petty, Deputy Asst. Dist. Atty., of New York City, for appellee.

PER CURIAM. Judgments affirmed with costs upon the authority of Munsey v. Clough, 196 U. S. 364, 373, 25 Sup. Ct. 282, 49 L. Ed. 515; Pierce v. Creecy, 210 U. S. 387, 401, 402, 404, 405, 28 Sup. Ct. 714, 52 L. Ed. 1113; Drew v. Thaw, 235 U. S. 432, 439–440, 35 Sup. Ct. 137, 59 L. Ed. 302.

No. 799. George F. MONTGOMERY, appellant, v. Arthur WOODS, police commissioner of the city of New York. April 22, 1918. Appeal from the District Court of the United States for the Southern District of New York. For opinion below, see 244 Fed. 967.

PER CURIAM. Judgment affirmed with costs upon the authority of: 1. Munsey v. Clough, 196 U. S. 364, 373–374, 25 Sup. Ct. 282, 49 L. Ed. 515; Appleyard v. Massachusetts, 203 U. S. 222, 27 Sup. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073; McNichols v. Pease, 207 U. S. 100, 28 Sup. Ct. 58, 52 L. Ed. 121; Biddinger v. Commissioner of Police, 245 U. S. 128, 38 Sup. Ct. 41, 62 L. Ed. —; 2. Munsey v. Clough, 196 U. S. 364, 373, 25 Sup. Ct. 282, 49 L. Ed. 515; Pierce v. Creecy, 210 U. S. 387, 401, 402, 404–405, 28 Sup. Ct. 714, 52 L. Ed. 1113; Drew v. Thaw, 235 U. S. 432, 439–440, 35 Sup. Ct. 137, 59 L. Ed. 302.

No. 921. NEW YORK CENTRAL RAILROAD COMPANY et al., petitioners, v. The CITY OF CHICAGO. April 22, 1918. Messrs. Robert J. Cary, F. Harold Schmitt, and M. L. Bell, all of Chicago, Ill., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied.

No. 922. FAIRBANKS, MORSE & COMPANY et al., petitioners, v. AMERICAN VALVE & METER COMPANY et al. April 22, 1918. For opinion below, see 249 Fed. 234. Mr. Fred L. Chappell, of Kalamazoo, Mich. (Messrs. Chappell & Earl, of Kalamazoo, Mich., of counsel), for petitioners. Messrs. Frank A. Whiteley, of Minneapolis, Minn., and Dwight S. Marfield and Charles M. Cist, both of Cincinnati, Ohio, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 927. Sam SANGER et al., surviving members, etc., et al., petitioners, v. Sarah Catharine WOODWARD. April 22, 1918. For opinion below, see 246 Fed. 777. Messrs. Wood B. Carrington, and Charles A. Boynton, both of Waco, Tex., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 933. Mariano LIM, petitioner, v. The UNITED STATES. April 22, 1918. Messrs. Alex. Britton and Evans Browne, both of Washington, D. C., for petitioner. Mr. John W. Davis, Sol. Gen., of Washington, D. C., and Charles Warren, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

No. 939. C. S. DASHIELL, trustee, et al. petitioners, v. Lewis T. FITZHUGH, trustee, etc. April 22, 1918. For opinion below, see 246 Fed. 366. Messrs. Marsilliott & Chandler, of Memphis, Tenn., Hunter Wilson, of Jackson, Miss., and Phil M. Canale, of Memphis, Tenn., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 949. REDERIAKTIEBOLAGET AMIE, petitioner, v. UNIVERSAL TRANSPORTATION COMPANY (Inc.). April 22, 1918. For opinion below, see 250 Fed. 400. Messrs. Engel Bros., of New York City, and Conlen, Brinton & Acker, of Philadelphia, Pa. (William J. Conlen, of Philadelphia, Pa., of counsel), for petitioner. Messrs. Kirlin Woolsey & Hickox, of New York City (Mr. J. Parker Kirlin, of New York City, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 962. COMMONWEALTH TRUST COMPANY OF PITTSBURGH, petitioner, v. The FIRST-SECOND NATIONAL BANK OF PITTSBURGH et al. April 22, 1918. For opinion below, see 103 Atl. 598. Messrs. H. F. Stambaugh and John M. Freeman, both of Pittsburgh, Pa., for petitioner. Messrs. Alexander J. Barron and George E. Alter, both of Pittsburgh, Pa., for respondents. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied.

No. 964. LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY, petitioner, v. BROOKLYN EASTERN DISTRICT TERMINAL. April 22, 1918. For opinion below, see 250 Fed. 1021. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

No. 963. James O. HARRIS, petitioner, v. The UNITED STATES OF AMERICA. April 22, 1918. For opinion below, see 249 Fed. 41. Messrs. Alva A. Andrews, of Bemidji, Minn., and Daniel W. Baker, of Washington, D. C., for petitioner. Mr. Alfred Jacques, of Duluth, Minn., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 256. Mrs. Laura L. BUNCH, petitioner, v. J. S. MALONEY, as Trustee in Bankruptcy for the T. H. Bunch Commission Company, bankrupt. April 29, 1918. On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. For opinion of Court of Appeals see 233 Fed. 967, 147 C. C. A. 641; opinion of District Court 225 Fed. 243. Messrs. W. E. Hemingway, G. B. Rose, J. F. Loughborough and V. M. Miles, all of Little Rock, Ark., for petitioner. Mr. J. M. Moore, of Little Rock, Ark., for respondent.

PER CURIAM. Judgment reversed with costs, and case remanded to the District Court of the United States for the Eastern District of Arkansas for further proceedings, upon the authority of Martin v. Commercial National Bank of Macon, Ga. (decided January 14, 1918) 245 U. S. 513, 38 Sup. Ct. 176, 62 L. Ed. —.

No. 259. D. E. FOOTE & COMPANY, Inc., et al., plaintiffs in error, v. Emerson C. HARRINGTON, Governor of the State of Maryland, et al. April 29, 1918. In error to the Court of Appeals of the State of Maryland. For opinion below, see 129 Md. 123, 98 Atl. 289. Mr. George Whitelock, of Baltimore, Md., for plaintiffs in error. Mr. Albert Ritchie, of New York City, for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Eustis v. Bolles, 150 U. S. 361, 14 Sup. Ct. 131, 37 L. Ed. 1111; Leathe v. Thomas, 207 U. S. 93, 28 Sup. Ct. 30, 52 L. Ed. 118; Holden Land Co. v. Inter-State Trading Co., 233 U. S. 536, 541, 34 Sup. Ct. 661, 58 L. Ed. 1083; Bilby v. Stewart (decided March 4, 1918) 246 U. S. 255, 38 Sup. Ct. 264, 62 L. Ed. —.

No. 263. The CHICAGO, KALAMAZOO & SAGINAW RAILWAY COMPANY, plaintiff in error, v. Gale KINDLESPARKER. April 29, 1918. In error to the United States Circuit Court of Appeals for the Sixth Circuit. For opinion below, see 234 Fed. 1, 148 C. C. A. 17. Mr. Frank E. Robson, of Detroit, Mich., for plaintiff in error.

PER CURIAM. Judgment reversed with costs, and case remanded to the District Court of the United States for the Western District of Michigan for further proceedings, upon the authority of Minneapolis & St. Louis R. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358.

No. 478. Mary A. PARMELEE, as administratrix of the estate of David Parmelee, deceased, plaintiff in error, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY. April 29, 1918. In error to the Supreme Court of the State of Washington. For opinion below, see 92 Wash. 185, 158 Pac. 977. Mr. Arthur E. Griffin, of Seattle, Wash., for plaintiff in error.

PER CURIAM. Judgment affirmed with costs upon the authority of Chicago Junction Ry. Co. v. King, 222 U. S. 222, 32 Sup. Ct. 79, 56 L. Ed. 173; Seaboard Air Line Ry. Co. v. Padgett, 236 U. S. 668, 673, 35 Sup. Ct. 481, 59

L. Ed. 777; Seaboard Air Line Ry. v. Koennecke, 239 U. S. 352, 355, 36 Sup. Ct. 126, 60 L. Ed. 324; Great Northern Ry. Co. v. Knapp, 240 U. S. 464, 466, 36 Sup. Ct. 399, 60 L. Ed. 745; B. & O. R. R. Co. v. Whitacre, 242 U. S. 169, 37 Sup. Ct. 33, 61 L. Ed. 228.

No. 932. The FILER & STOWELL COMPANY, petitioner, v. DIAMOND IRON WORKS. April 29, 1918. For opinion below, see 250 Fed. 454, which affirms 241 Fed. 498. Mr. Wm. G. Henderson, of Washington, D. C., for petitioner. Mr. Frank A. Whiteley, of Minneapolis, Minn., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 950. The BIRGE-FORBES COMPANY, petitioner, v. Carl R. HEYE. April 29, 1918. For opinion below, see 248 Fed. 636. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted.

No. 954. GENERAL ELECTRIC COMPANY, petitioner, v. COOPER HEWITT ELECTRIC COMPANY. April 29, 1918. For opinion below, see 249 Fed. 69. Mr. Jno. C. Pennie, of New York City (Messrs. Wm. H. Davis and W. B. Morton, both of New York City, of counsel), for petitioner. Messrs. Thomas B. Kerr and Parker W. Page, both of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 960. COMPAGNIA de COMMERCE et de NAVIGATION d'EXTREME ORIENT, petitioner, v. The HAMBURG-AMERIKA PACKETFAHRT ACTIENGESELLSCHAFT. April 29, 1918. Mr. W. A. Kincaid, of Manila, P. I. (Mr. Charles C. Cohn, of Manila, P. I., of counsel), for petitioner. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

No. 965. George STUART, as trustee, etc., petitioner, v. Estelle Manegold BEAVEN. April 29, 1918. For opinion below, see 250 Fed. 972. Messrs. Gustave F. Mertius and B. P. Crum, both of Montgomery, Ala., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 987. REDPATH LYCEUM BUREAU, petitioner, v. John L. PICKERING, collector of internal revenue. April 29, 1918. For opinion below, see 251 Fed. 49. Messrs. Albert M. Kales, of Chicago, Ill., and Fisher, Boyden, Kales & Bell, of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 245. E. B. HOWARD, as Auditor of the State of Oklahoma, et al., appellants, v. GIPSY OIL COMPANY;

No. 246. E. B. HOWARD, as Auditor of the State of Oklahoma, et al., appellants, v. INDIAN TERRITORY ILLUMINATING OIL COMPANY;

No. 247. E. B. HOWARD, as Auditor of the State of Oklahoma, et al., appellants, v. The OKLA OIL COMPANY; and

No. 248. E. B. HOWARD, as Auditor of the State of Oklahoma, et al., appellants, v. BARNSDALL OIL COMPANY. May 6, 1918. Appeals from the District Court of the United States for the Western District of Oklahoma. Mr. R. E. Wood, of Shawnee, Okl., for appellants. Messrs. John H. Burford, of Oklahoma City, Okl., and John Brennan, of Bartlesville, Okl., for respondent Indian Territory Illuminating Co. Messrs. John H. Burford and Frank B. Burford, both of Oklahoma City, Okl., for respondent Barnsdall Oil Co.

PER CURIAM. Judgments affirmed with costs upon the authority of Choctaw & Gulf R. R. Co. v. Harrison, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234; Indian Territory Illuminating Oil Company v. State of Oklahoma, 240 U. S. 522, 36 Sup. Ct. 453, 60 L. Ed. 779.

No. 833. Robert COX, appellant, v. Major General Leonard WOOD, Commandant, etc. May 6, 1918. See, also, 247 U. S. 3, 38 Sup. Ct. 421, 62 L. Ed. —. Messrs. Hannis Taylor, of Washington, D. C., and Joseph E. Black, of Richmond, Mo., for appellant. Mr. John W. Davis, Sol. Gen., of Washington, D. C., for respondent. Motion for leave to file petition for a rule to show cause denied.

No. 863. Luis HULLER et al., plaintiffs in error, v. The STATE OF NEW MEXICO on the relation of the NORTHWESTERN COLONIZATION & IMPROVEMENT COMPANY OF CHIHUAHUA. May 6, 1918. In error to the Supreme Court of the State of New Mexico. For opinion below, see 168 Pac. 528. Messrs. Walter D. Hawk and Samuel S. Holmes, both of Chicago, Ill., A. B. Renehan, of Santa Fé, N. M., and Charles A. Douglas, of Washington, D. C., for plaintiffs in error. Messrs. Harry L. Patton, Atty. Gen., H. B. Jamison, of Albuquerque, N. M., and Francis C. Wilson, of Santa Fé, N. M. (Messrs. James R. Garfield, of Cleveland, Ohio, and D. J. Cable, of Lima, Ohio, of counsel), for respondent.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of: 1. Equitable Assurance Society v. Brown, 187 U. S. 308, 311, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; Delmar Jockey Club v. Missouri, 210 U. S. 324, 28 Sup. Ct. 732, 52 L. Ed. 1080; Consolidated Turnpike v. Norfolk, etc., Ry. Co., 228 U. S. 596, 599-600, 33 Sup. Ct. 605, 57 L. Ed. 982. 2. Section 237, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156 [Comp. St. 1916, § 1214]) as amended by the act of Congress of September 6, 1916, c. 448, 39 Stat. 726; Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245 U. S. 162, 38 Sup. Ct. 58, 62 L. Ed. —.

No. 924. GREAT BEAR SPRING COMPANY, petitioner, v. BEAR LITHIA SPRINGS COMPANY. May 6, 1918. Mr. Edward S. Beach, of New York City, for petitioner. Mr. Fritz v. Briesen, of New York City, for respondent. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

No. 925. FULTON WATER WORKS COMPANY, petitioner, v. BEAR LITHIA SPRINGS COMPANY. May 6, 1918. Mr. Edward S. Beach, of New York City, for peti-

tioner. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

No. 938. James C. CHUPCO et al., petitioners, v. James A. CHAPMAN et al. May 6, 1918. For opinions below see, 160 Pac. 88; 170 Pac. 259. Messrs. Lewis C. Lawson, of Holdenville, Okl., and James C. Davis, of Muskogee, Okl., for petitioners. Mr. Harry H. Rogers, of Tulsa, Okl., for respondents. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

No. 942. Isabella GARWOOD, petitioner, v. Joseph SCHEIBER et al. May 6, 1918. For opinion below, see 246 Fed. 74. Messrs. Jeremiah F. Sullivan, of San Francisco, Cal., Frederick S. Tyler, of Washington, D. C., and Lloyd Macomber, of San Francisco, Cal., for petitioner. Messrs. William B. Bosley, of San Francisco., Cal., and A. H. Hewitt, of Yuba City, Cal., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 943. GOULD MINES COMPANY, petitioner, v. Bertha D. BAUR, administratrix, etc. May 6, 1918. For opinion below, see 250 Fed. 770. Messrs. John S. Miller, William C. Rigby, Benjamin F. Ninde, and Frank H. T. Potter, all of Chicago, Ill., for petitioner. Messrs. William C. Boyden, Horace Kent Tenney, and Roger Sherman, all of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 948. FIFTH NATIONAL BANK OF THE CITY OF NEW YORK, petitioner, v. John L. LYTTLE, as trustee, etc. May 6, 1918. For opinion below, see 250 Fed. 361. Messrs. Richard Kelly, William C. Beecher, and Irving L. Ernst, all of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 951. NATIONAL BANK OF BAKERSFIELD, petitioner, v. William H. MOORE, Jr., as trustee, etc. May 6, 1918. For opinion below, see 247 Fed. 913. Messrs. W. J. Hunsaker and E. W. Britt, both of Los Angeles, Cal., for petitioner. Messrs. Lynn Helm, Lucius K. Chase, and Ernest U. Schroeter, all of Los Angeles, Cal., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 956. R. A. GRAHAM, Petitioner, v. The J. D. SPRECKELS & BROTHERS' COMPANY. May 6, 1918. For opinion below, see 248 Fed. 66. Messrs. Lindley M. Garrison, of New York City, and Frederick D. McKenney, of Washington, D. C., for petitioner. Messrs. Morrison, Dunne & Brobeck, and P. F. Dunne, all of San Francisco, Cal., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 957. W. Gordon McCABE, Jr., and William F. Gray, petitioners, v. GUARANTY TRUST COMPANY OF NEW YORK, as substituted trustee, etc., et al. May 6, 1918. For opinion below, see 250 Fed. 699, — C. C. A. —. Messrs. David Hunter Miller and Gordon Auchincloss, both of New York City, for petitioners. Messrs. Myers & Goldsmith, of New York City (Messrs. Emanuel J. Myers and Gordon S. P. Kleeberg, both of New York City, of counsel), for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 966. VULCAN METALS COMPANY, Inc., and Albert Freeman, petitioners, v. SIMMONS MANUFACTURING COMPANY. May 6, 1918. For opinion below, see 248 Fed. 853. Mr. Wilson B. Brice, of New York City (Mr. Charles H. Hyde, of New York City, of counsel), for petitioners. Messrs. Sullivan & Cromwell, of New York City (Messrs. Clarke M. Rosecrantz and E. H. Sykes, both of New York City, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 972. CHEROKEE OIL & GAS COMPANY, petitioner, v. Charles L. MELTON et al. May 6, 1918. For opinion below, see 170 Pac. 691. Mr. C. B. Ames, of Oklahoma City, Okl. (Messrs. T. G. Chambers, Russell G. Lowe, and D. A. Richardson, all of Oklahoma City, Okl., W. P. Thompson, of Vinita, Okl., and W. C. Franklin, of Tulsa, Okl., of counsel), for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

No. 974. W. J. CARRELL, petitioner, v. The UNITED STATES of America. May 6, 1918. For opinion below, see 247 Fed. 1002. Mr. William Hawley Atwell, of Dallas, Tex., for petitioner. Messrs. John W. Davis, Sol. Gen., of Washington, D. C., and William C. Fitts, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 975. Jared FLAGG, petitioner, v. Ellsworth E. COOK. May 6, 1918. For opinion below, see 251 Fed. 5. Mr. John M. Coleman, of New York City, for petitioner. Mr. Gilbert E. Roe, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 1000. The DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, petitioner, v. Ignatz PETROWSKY, an infant, etc. May 6, 1918. For opinion below, see 250 Fed. 554. Messrs. William S. Jenney and Austin J. McMahon, both of New York City, for petitioner. Mr. Albert Massey, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 1002. Ex parte Cloyd H. DUNCAN, petitioner. May 6, 1918. For opinion below, see 249 Fed. 155. Mr. Cloyd H. Duncan, in proper. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

No. 1009. CHICAGO BONDING & SURETY COMPANY, petitioner, v. AUGUSTA-SAVANNAH NAVIGATION COMPANY. May 6, 1918. For opinion below, see 250 Fed. 616. Mr. Charles B. Stafford, of Chicago, Ill., for petitioner. Messrs. Harrison Musgrave and William S. Oppenheim, both of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 1022. Clinton H. PIERCE, Angelo Creo, Charles Z. Zeilman, and Charles Nelson, plaintiffs in error, v. The UNITED STATES of America. May 6, 1918. In error to the District Court of the United States for the Northern District of New York. See, also, 245 Fed. 878, 888. Mr. Solicitor General Davis, for the United States. Docketed and dismissed, on motion of Mr. Solicitor General Davis for the defendant in error.

No. 952. The UNITED STATES of America, petitioner, v. Henry VEEDER. April 22, 1918. For opinion below, see 252 Fed. 414. Mr. John W. Davis, Sol. Gen., of Washington, D. C., for the United States. Messrs. John J. Healy, Elwood G. Godman, Francis E. Baldwin, and George P. McCabe, all of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. —, Original. Ex parte in the matter of the UNITED STATES, petitioner. April 15, 1918. Motion for leave to file information for contempt discontinued, on motion of Mr. Solicitor General Davis for the petitioner.

(247 U. S. 201)

LOUISVILLE & N. R. CO. v. RICE.

(Submitted under Thirty-Second Rule April 1, 1918. Decided May 20, 1918.)

No. 574.

COURTS ⊜289—FEDERAL COURTS—JURISDICTION—COMMERCE.

Under Judicial Code (Act March 3, 1911, c. 231) § 24, 36 Stat. 1091 (Comp. St. 1916, § 991), providing that regardless of the amount in controversy the District Courts shall have original jurisdiction of all suits and proceedings arising under any law regulating commerce, and the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), requiring a carrier to collect, and the consignee to pay, all lawful charges duly prescribed by the tariffs in respect to shipment, the District Court has jurisdiction of an action by a railroad company on a claim based upon the provisions of a tariff duly filed, published, and approved as required, regardless of the consignee's defense that he was a mere commission merchant, and that the railroad company, having failed to present the charge at the time of the arrival of the shipment, was estopped thereafter to assert the claim; the property having been sold and the proceeds remitted to the owner.

In Error to the District Court of the United States for the Eastern District of Louisiana.

Action by the Louisville & Nashville Railroad Company against Clark H. Rice. There was a judgment dismissing the action for want of jurisdiction, and plaintiff brings error. Reversed and cause remanded.

Messrs. George Denegre, Victor Leovy, and Henry H. Chaffe, all of New Orleans, La., and Mr. Henry L. Stone, of Louisville, Ky., for plaintiff in error.

Mr. T. M. Miller, of Oklahoma City, Okl., for defendant in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Did the District Court rightly decide that it had no jurisdiction, is the only question presented.

Plaintiff in error sued to recover one hundred and forty-five dollars claimed to be due under tariffs approved and published as required by Interstate Commerce Act, for disinfecting fifty-eight cars containing live *202 stock shipped from *points outside the state and delivered to defendant, the consignee, at New Orleans, Louisiana. It alleged presentation of bills covering each shipment and payment by defendant of all charges except those for disinfecting—two dollars and fifty cents per car.

Answering, defendant admitted the shipments were interstate; that he paid all lawful charges, except those sued for; and that these had been properly prescribed under and pursuant to the Interstate Commerce Act. But he denied liability for these reasons: as the carrier well knew, or should have known, he had long been engaged in the business of factor or commission merchant; in due course while acting as representative for their owners and consignors he received the live stock, sold them immediately upon arrival, deducted expenses, etc., and remitted balance of proceeds to his principals; when the cars arrived he paid all charges actually demanded; he was not then advised and remained unaware that any others were contemplated until such balance had been remitted. Having led him to believe the amount asked and paid before he remitted entire net proceeds constituted full settlement, the carrier is now estopped from demanding more of him.

The trial court upon its own initiative dismissed the action for want of jurisdiction.

Section 24 of the Judicial Code provides that regardless of amount involved District Courts shall have original jurisdiction "of all suits and proceedings arising under any law regulating commerce." The Interstate Commerce Act requires carrier to collect and consignee to pay all lawful charges duly prescribed by the tariff in respect of every shipment. Their duty and obligation grow out of and depend upon that act.

In support of the trial court it is said: There is no jurisdiction unless the suit in part at least arises out of a controversy in regard to operation or effect of the act of Congress. Here there is no dispute as to legality of rate* or its application to the *203 shipments; and consignee's liability was fully discharged upon payment by him of amount demanded at time of delivery and surrender of the carrier's lien.

"Cases arising under the laws of the United States are such as grow out of the legislation of Congress." Tennessee v. Davis, 100 U. S. 257, 264, 25 L. Ed. 648. "Whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations." New Jersey Central R. R. Co. v. Mills, 113 U. S. 249, 257, 5 Sup. Ct. 456, 459 (28 L. Ed. 949). "If the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad." The Fair v. Kohler Die Co., 228 U. S. 22, 25, 33 Sup. Ct. 410, 412 (57 L. Ed. 716). A suit arises under an act of Congress when "it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." Shulthis v. McDougal, 225 U. S. 561, 569, 32 Sup. Ct. 704, 706 (56 L. Ed. 1205). As to interstate shipments "there can be no question that, since the decision in the Croninger Case [226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257], the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligation." St. Louis, Iron Mt. & So. Ry. Co. v. Starbird, 243 U. S. 592, 595, 37 Sup. Ct. 462, 464 (61 L. Ed. 917); Louisville & Nashville R. R. v. Maxwell, 237 U. S. 94, 97, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665.

The railroad company set up a claim based upon provisions of a tariff duly filed, published and approved as required by Inter-

state Commerce Act; result of the action necessarily depended upon construction and effect of that act.

We think the District Court had jurisdiction. Its judgment is accordingly reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

(247 U. S. 19)

Ex parte SOUTHWESTERN SURETY INS. CO.

(Submitted April 22, 1918. Decided May 20, 1918.)

Original No. 28.

1. UNITED STATES ⊂⊃67(2)—CONTRACTORS — SURETIES—ACTIONS.

Under Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1916, § 6923), relating to contracts for work to be done for the United States, and liability of contractor's sureties, where suit is brought by one subcontractor against the surety, and other subcontractors intervene therein, prohibition will not lie against the District Court assuming jurisdiction of such intervening petitions, though no process has been issued thereon, and notice of the filing thereof has not been given.

2. PROHIBITION ⊂⊃9—GROUND — STATUTE OF LIMITATION.

Prohibition will not issue by the Supreme Court against proceedings in an action in a District Court on the ground that claims asserted therein were barred by the statute of limitations.

On Petition for a Writ of Prohibition.

Petitioner became surety for the contractor for the construction of a post office building, and suit was brought by the subcontractors on the bond. Various subcontractors filed intervening petitions, and petitioner herein entered a special appearance and moved the court to strike out the several petitions on various grounds, the principal of which was that no process had been issued on the intervening petitions, nor notice of the filing thereof given to defendant. The motion was overruled, and petitioner applies for a writ of prohibition to prevent further proceedings in said action. Rule discharged.

Messrs. Hayden Johnson and Thomas M. Fields, both of Washington, D. C., for petitioner.

Mr. R. Randolph Hicks, of Norfolk, Va., for respondent.

*20 * Memorandum opinion by Mr. Chief Justice WHITE, by direction of the Court.

[1] The statute (Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 [Comp. St. 1916, § 6923]) makes the District Court of the district in which work contracted to be done for the United States is to be performed the forum for the assertion by supply creditors or materialmen of their claims against the contractor and the surety on the bond. It moreover authorizes one suit by all for the purpose of enforcing the liability of the surety. In the light of these provisions and their settled interpretation all the contentions of the petitioner but one which we shall hereafter separately notice are so completely foreclosed by previous authorities as to require only reference to them. United States v. Congress Construction Co., 222 U. S. 199, 32 Sup. Ct. 44, 56 L. Ed. 163; Illinois Surety Co. v. Peeler, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609; Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206. Indeed so certain is this the case that as to the principal one of the questions, the power of the court, when raised at this term it was treated as not open to controversy and was hence disposed of by a per curiam opinion. Hopkins v. Ellington & Guy, 246 U. S. 655, 38 Sup. Ct. 423, 62 L. Ed. —, decided April 15, 1918.

[2] The one subject which we postponed considering is the contention that rights of some of the claimants were asserted after the one-year period of limitation which the statute fixes. But this depends upon facts which fixes. But this depends upon facts which are not before us and besides involves a question within the competency of the court to decide concerning which therefore there is no basis for granting the writ of prohibition or sanctioning a resort to any other extraordinary legal remedy. See In re New York, etc., Steamship Co., 155 U. S. 523, 15 Sup. Ct. 183, 39 L. Ed. 246; Ex parte Oklahoma, 220 U. S. 191, 31 Sup. Ct. 426, 55 L. Ed. 431.

It follows therefore that the rule must be and it is discharged.

(247 U. S. 21)

YORK MFG. CO. v. COLLEY et al.

(Argued March 18, 1918. Decided May 20, 1918.)

No. 200.

COMMERCE ⊂⊃40(1)—FOREIGN CORPORATIONS —INSTALLATION OF ICE PLANT.

Where a contract for the sale of ice-manufacturing machinery between a Pennsylvania manufacturing company and residents of Texas provided that the machinery should be installed under the supervision of an engineer to be furnished by the Pennsylvania corporation, and tested by him before the purchasers should be bound to accept the same, the entire transaction must be deemed interstate commerce, the installation of the machinery being incidental to the contract of sale, so recovery by the Pennsylvania corporation cannot be denied on the ground that it was engaged in doing business in Texas without a permit.

Mr. Justice Pitney dissenting.

In Error to the Court of Civil Appeals of the Fourth Supreme Judicial District, State of Texas.

Action by the York Manufacturing Company against V. B. Cooley and another. A judgment dismissing the cause was affirmed (172 S. W. 266), and plaintiff brings error to the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas. Reversed and remanded, with directions.

Mr. N. C. Abbott, of Houston, Tex., for plaintiff in error.

Mr. Chief Justice WHITE delivered the opinion of the Court.

The York Manufacturing Company, a Pennsylvania corporation, sued for the amount due upon a contract for the purchase of ice-manufacturing machinery and to foreclose a lien upon the same. By answer the *22 defendants alleged that the plaintiff was a foreign corporation; that it maintained an office and transacted business in Texas without having obtained a permit therefor and was hence under Texas statutes not authorized to prosecute the suit in the courts of the state and a dismissal was prayed. In reply the plaintiff averred that the contract sued on was interstate commerce and that the state statute if held to apply was repugnant to the commerce clause of the Constitution of the United States. At the trial it was shown without dispute that the contract covered an ice plant guaranteed to produce three tons of ice a day, consisting of gas compression pumps, a compressor, ammonia condensers, freezing tank and cans, evaporating coils, a brine agitator and other machinery and accessories, including apparatus for utilizing exhaust steam for making distilled water for filling the ice cans. These parts of machinery, it was provided, were to be shipped from Pennsylvania to the point of delivery in Texas and were there to be erected and connected. This work, it was stipulated, was to be done under the supervision of an engineer to be sent by the York Manufacturing Company for whose services a fixed per diem charge of $6 was to be paid by the purchasers and who should have the assistance of mechanics furnished by the purchasers, the supervision to include not only the erection but the submitting of the machinery to a practical test in operation before the obligation to finally receive it would arise. It was moreover undisputed that these provisions were carried out; that about three weeks were consumed in erecting the machinery and about a week in practically testing it, when after a demonstration of its successful operation it was accepted by the purchasers.

The trial court, not doubting that the contract of sale was interstate commerce, nevertheless concluding that the stipulation as to supervision by an engineer to be sent by the seller was intrastate commerce and wholly separable from the interstate transaction, *23 held that the seller by carrying out that provision had engaged in local business in the state, and, as the permit required by the state statutes had not been secured, gave effect to the statutes and dismissed the suit. The case is here to review the action of the court below sustaining such conclusion, its judgment being that of the court of last resort of the state in consequence of the refusal of the Supreme Court of the state to allow a writ of error.

Referring to a previous ruling (Leschen & Sons Rope Co. v. Moser [Tex. Civ. App.] 159 S. W. 1018), in which it had held that the performance by a contractor of the duty of supervising the construction of a complex system of tramways did not constitute a doing of business within the state because it was relevant to and a part of the main contract for the material from which the road was to be constructed which was interstate commerce, the court below concluded that that case had been by it mistakenly decided, and therefore should be overruled and not applied in this. The conclusion as to previous error committed, the court said, was persuasively the result of the ruling in Browning v. Waycross, 233 U. S. 16, 34 Sup. Ct. 578, 58 L. Ed. 828, which it treated as here conclusively determining that the performance of the contract for the supervision by the engineer was purely intrastate commerce and subject to be treated as such although it formed a part of the stipulations of the principal contract of sale conceded to be interstate commerce.

But we are of opinion this decision was erroneous whether it be examined from the point of view of what was assumed to be the controlling effect of the ruling in the Waycross Case or whether it be tested by the elementary doctrines as to what constitutes interstate commerce. In the first place the Waycross Case concerned merely the right of the city of Waycross to collect a charge against a person who was carrying on a business of erecting lightning rods as the agent of one who had sold the rods in another state and shipped them to Waycross under an *24 agreement after their arrival to erect them. The case turned exclusively upon the nature and character of the business of erecting lightning rods and the relevant or appropriate relation to interstate commerce of a stipulation in an interstate contract of sale of such rods providing for their erection when delivery under the sale was made. As it was determined that the business of erecting lightning rods bore no relevant or appropriate relation to the contract made for the sale of such rods, it was decided that the contract for the erection of the rods did not lose its local character simply because it was made a part of an interstate commerce contract for the sale of the rods any more than would a contract for materials with which to build a house cause the building of the house to be a transaction of interstate commerce and not local business. But the broad distinction which is established by the statement just made between what was decided in the Waycross Case and the question here presented does not rest alone upon the implication resulting from what was under consideration in that case, but moreover expressly results from the fact that in the Waycross Case through abundance of precaution attention was directed to the fact that the ruling there made was not controlling as to a case where the service to be done in a state as the result of an interstate commerce sale was essentially connected with the subject-matter of the sale, that is, might be made to appropriately inhere in the duty of performance,

233 U. S. 23, 34 Sup. Ct. 578, 58 L. Ed. 828.

As, in the second place, since the ruling in McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, there has been no doubt that the interstate commerce power embraced that which is relevant or reasonably appropriate to the power granted, so also from such doctrine there can be no doubt that the right to make an interstate commerce contract includes in its very terms the right to incorporate into such contract provisions which
*25 are relevant and appropriate to the contract made. The only possible question open therefore is: Was the particular provision of the contract for the service of an engineer to assemble and erect the machinery in question at the point of destination and to practically test its efficiency before complete delivery relevant and appropriate to the interstate sale of the machinery? When the controversy is thus brought in last analysis to this issue there would seem to be no room for any but an affirmative answer. Generically this must be unless it can be said that an agreement to direct the assembling and supervision of machinery whose intrinsic value largely depends upon its being united and made operative as a whole is not appropriate to its sale. The consequence of such a ruling if made in this case would be particularly emphasized by a consideration of the functions of the machinery composing the plant which was sold, of its complexity, of the necessity of its aggregation and unison with mechanical skill and precision in order that the result of the contract of sale—the ice plant purchased—might come into existence. In its essential principle therefore the case is governed by Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336, Rearick v. Pennsylvania, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. Ed. 295, and Dozier v. Alabama, 218 U. S. 124, 30 Sup. Ct. 649, 54 L. Ed. 965, 28 L. R. A. (N. S.) 264. In fact those cases were relied upon in the Waycross Case as supporting the contention that a mere agreement for the erection of lightning rods in a contract made concerning the shipment of such rods in interstate commerce caused the act of erection to be itself interstate commerce. But the basis upon which the cases were held to be not apposite, that is, the local characteristic of the work of putting up lightning rods, not only demonstrates beyond doubt the mistake concerning the ruling as to the Waycross Case which was below committed, but serves unerringly to establish the soundness of the distinction by which the particular question before us is brought within the reach of interstate commerce.

*26 Of course we are concerned only with the case before us, that is, with a contract inherently relating to and intrinsically dealing with the thing sold, the machinery and all its parts constituting the ice plant. This view must be borne in mind in order to make it clear that what is here said does not concern the subject passed on in General Railway Signal Co. v. Virginia, 246 U. S. 500, 38 Sup. Ct. 360, 62 L. Ed. —, since in that case the work required to be done by the contract over and above its inherent and intrinsic relation to the subject-matter of the interstate commerce contract involved the performance of duties over which the state had a right to exercise control because of their inherent intrastate character. In fact the case last referred to when looked at from a broad point of view is but an illustration of the principle applied in the Waycross Case to the effect that that which was inherently intrastate did not lose its essential nature because it formed part of an interstate commerce contract to which it had no necessary relation. And this truth by a negative pregnant states the obverse view that that which is intrinsically interstate and immediately and inherently connected with interstate commerce is entitled to the protection of the Constitution of the United States resulting from that relation.

It follows therefore that the judgment must be and it is reversed, and the case remanded to the court below for further proceedings not inconsistent with this opinion.

And it is so ordered.

Mr Justice PITNEY dissents.

(247 U. S. 165)

WILLIAM E. PECK & CO., Inc., v. LOWE.

(Argued Dec. 10 & 11, 1917. Decided May 20, 1918.)

No. 234.

1. INTERNAL REVENUE ⇐1—TAXING POWERS —SIXTEENTH AMENDMENT.

The Sixteenth Amendment of the Constitution does not extend the taxing power of the United States to new or excepted subjects, but merely removes all occasion, which otherwise might exist for an apportionment among the states of taxes laid on income whether derived from one source or another.

2. COMMERCE ⇐77—INCOME TAXES—EXPORTATION.

Act Cong. Oct. 3, 1913, c. 16, § 2, 38 Stat. 166, subjecting every domestic corporation to an annual tax upon its entire income arising or accruing from all sources during the preceding calendar year, is not invalid under Const. art. 1, § 9, cl. 5, declaring that no tax or duty shall be laid on articles exported from any state, in so far as the act applies to income derived by a corporation from its export trade, for the constitutional inhibition merely prohibits export taxes or any tax directly burdening exportation, while the tax imposed by Act of 1913 is only upon the net income derived from export business after the transaction is complete.

In Error to the District Court of the United States for the Southern District of New York.

Action by William E. Peck & Company, Incorporated, against John Z. Lowe, Jr., Collector. There was a judgment for defendant (234 Fed. 125), and plaintiff brings error to the District Court of the United States for the Southern District of New York. Affirmed.

Messrs. Charles P. Spooner, of New York City, and Richard V. Lindabury, of Newark, N. J., for plaintiff in error.

Mr. Assistant Attorney General Fitts, for defendant in error.

*171 *Mr. Justice VAN DEVANTER delivered the opinion of the Court.

*172 This was an action to recover a tax paid under protest and alleged to have been imposed contrary to the *constitutional provision (article 1, § 9, cl. 5) that "no tax or duty shall be laid on articles exported from any state." The judgment below was for the defendant. 234 Fed. 125.

The plaintiff is a domestic corporation chiefly engaged in buying goods in the several states, shipping them to foreign countries and there selling them. In 1914 its net income from this business was $30,173.66, and from other sources $12,436.24. An income tax for that year, computed on the aggregate of these sums, was assessed against it and paid under compulsion. It is conceded that so much of the tax as was based on the income from other sources was valid, and the controversy is over so much of it as was attributable to the income from shipping goods to foreign countries and there selling them.

The tax was levied under the Act of October 3, 1913, c. 16, § 11, 38 Stat. 166, 172, which provided for annually subjecting every domestic corporation to the payment of a tax of a specified per centum of its "entire net income arising or accruing from all sources during the preceding calendar year." Certain fraternal and other corporations, as also income from certain enumerated sources, were specifically excepted, but none of the exceptions included the plaintiff or any part of its income. So, tested merely by the terms of the act, the tax collected from the plaintiff was rightly computed on its total net income. But as the act obviously could not impose a tax forbidden by the Constitution, we proceed to consider whether the tax, or rather the part in question, was forbidden by the constitutional provision on which the plaintiff relies.

[1] The Sixteenth Amendment, although referred to in argument, has no real bearing and may be put out of view. As pointed out in recent decisions, it does not extend the taxing power to new or excepted subjects, but merely removes all occasion, which otherwise might exist, for an apportionment among the *173 states of taxes *laid on income, whether it be derived from one source or another. Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 17–19, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414; Stanton v. Baltic Mining Co., 240 U. S. 103, 112–113, 36 Sup. Ct. 278, 60 L. Ed. 546.

[2] The Constitution broadly empowers Congress not only "to lay and collect taxes, duties, imposts, and excises," but also "to regulate commerce with foreign nations." So, if the prohibitory clause invoked by the plaintiff be not in the way, Congress undoubtedly has power to lay and collect such a tax as is here in question. That clause says "no tax or duty shall be laid on articles exported from any state." Of course it qualifies and restricts the power to tax as broadly conferred. But to what extent? The decisions of this court answer that it excepts from the range of that power articles in course of exportation, Turpin v. Burgess, 117 U. S. 504, 507, 6 Sup. Ct. 835, 29 L. Ed. 988; the act or occupation of exporting, Brown v. Maryland, 12 Wheat. 419, 445, 6 L. Ed. 678; bills of lading for articles being exported, Fairbank v. United States, 181 U. S. 283, 21 Sup. Ct. 648, 45 L. Ed. 862; charter parties for the carriage of cargoes from state to foreign ports, United States v. Hvoslef, 237 U. S. 1, 35 Sup. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286; and policies of marine insurance on articles being exported—such insurance being uniformly regarded as "an integral part of the exportation" and the policy as "one of the ordinary shipping documents," Thames & Mersey Ins. Co. v. United States, 237 U. S. 19, 35 Sup. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087. In short, the court has interpreted the clause as meaning that exportation must be free from taxation, and therefore as requiring "not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation." Fairbank v. United States, supra, 181 U. S. 292–293, 21 Sup. Ct. 648, 45 L. Ed. 862. And the court has indicated that where the tax is not laid on the articles themselves while in course of exportation the true test of its validity is whether it "so directly and closely" bears on the "process of exporting" as to be in substance a tax on the exportation. Thames & Mersey Ins. *Co. v. United *174 States, supra, 237 U. S. 25, 35 Sup. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087. In this view it has been held that the clause does not condemn or invalidate charges or taxes, not laid on property while being exported, merely because they affect exportation indirectly or remotely. Thus a charge for stamps which each package of manufactured tobacco intended for export was required to bear before removal from the factory was upheld in Pace v. Burgess, 92 U. S. 372, 23 L. Ed. 657, and Turpin v. Burgess, 117 U. S. 504, 6 Sup. Ct. 835, 29 L. Ed. 988; and the application of a manufacturing tax on all filled cheese to cheese manufactured under contract for export, and actually exported, was upheld in Cornell v. Coyne, 192 U. S. 418, 427, 24 Sup. Ct. 383, 384 (48 L. Ed. 504). In that case it was said:

> "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation."

While fully assenting and adhering to the interpretation which has been put on the clause in giving effect to its spirit as well as its letter, we are of opinion that to broaden

that interpretation would be to depart from both the spirit and letter.

The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax (see Stanton v. Baltic Mining Co., supra, 240 U. S. p. 113, 36 Sup. Ct. 278, 60 L. Ed. 546), it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. *175 The words of the act are "net income arising or accruing* from all sources." There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed —the net income—is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation.

For these reasons we hold that the objection urged against the tax is not well grounded.

Judgment affirmed.

(247 U. S. 175)

UNITED STATES v. FERGUSON et al.

(Submitted May 1, 1918. Decided May 20, 1918.)

No. 238.

INDIANS ⊂=15(1)—INDIAN LANDS—ALIENATION—ENROLLMENT—CONCLUSIVENESS.

Under Act April 26, 1906, c. 1876, § 22, 34 Stat. 145, providing that for all purposes the quantum of Indian blood possessed by any member of the Five Civilized Tribes shall be determined by the rolls of citizens thereof, approved by the Secretary of the Interior, and Act June 21, 1906, c. 3504, 34 Stat. 325, directing the deposit of a printed and bound copy of the approved rolls in the office of the recorder of each recording district, and in view of Act May 27, 1908, c. 199, 35 Stat. 312, also declaring that the approved rolls shall be conclusive as to the quantum of Indian blood of any enrolled citizen or freedman of such tribes, the final rolls of citizenship prepared under Act June 28, 1898, c. 517, § 21, 30 Stat. 495, Act June 2, 1900, c. 610, 31 Stat. 250, Act March 1, 1901, c. 676, §§ 28, 29, 31 Stat. 861, and Act June 30, 1902, c. 1323, §§ 7–9, 32 Stat. 500, are conclusive as to the quantum of Indian blood of any citizen for the purpose of determining whether he could alienate allotted lands under Act April 26, 1906, c. 1876, § 22, 34 Stat. 145.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States against Walter Ferguson and another. A decree for defendants was affirmed by the Circuit Court of Appeals (225 Fed. 974, 141 C. C. A. 96), and the United States appeals. Affirmed.

Mr. Assistant Attorney General Kearful, for the United States.

Mr. Harry H. Rogers, of Tulsa, Okl., and Messrs. Joseph L. Hull and Nathan A. Gibson, both of Muskogee, Okl., for appellees.

Mr. Justice VAN DEVANTER delivered 176 the opinion of the Court.

This is a suit to cancel certain conveyances of allotted Indian lands made by the heir of the deceased allottee. In the District Court there was a decree for the defendants, which was affirmed by the Circuit Court of Appeals. 225 Fed. 974, 141 C. C. A. 96.

The lands formerly belonged to the Creek Tribe and were allotted and patented to Kochokney, an enrolled member of that tribe, as his part or share of the tribal domain. He died, and Yekcha, as sole heir, succeeded to the title. A considerable time thereafter Yekcha made the conveyances sought to be canceled. Under Act April 26, 1906, c. 1876, § 22, 34 Stat. 137, 145, dealing with restrictions on the alienation of Creek and other allotments, he was free to make the conveyances if he was not a full-blood Indian. But, if he was a full-blood, the conveyances were void because made in violation of applicable restrictions. How the question whether he was or was not a full-blood should be determined—whether by reference to the rolls of citizenship or otherwise—is the matter in controversy.

The legislation providing for the allotment *177 of the lands of the Five Civilized Tribes, of which the Creek Tribe was one, required the commission in charge of that work to make rolls of the citizens or members of each tribe, such rolls to be "descriptive of the persons thereon," and declared that the rolls, when approved by the Secretary of the Interior, should be "the final rolls of citizenship." Act June 28, 1898, c. 517, § 21, 30 Stat. 495, 503; Act June 2, 1900, c. 610, 31 Stat. 250; Act March 1, 1901, c. 676, §§ 28, 29, 31 Stat. 861, 870; Act June 30, 1902, c. 1323, §§ 7–9, 32 Stat. 500, 501. The rolls were made and approved by the Secretary; a statement of the age, sex, and quantum of Indian blood of each member being included in the descriptive matter thereon. The act of April 26, 1906, supra, besides making the presence or absence of restrictions on the alienation of allotments de-

pendent on the quantum of Indian blood possessed by the allottee or heir, declared that "the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior." Act June 21, 1906, c. 3504, 34 Stat. 325, 340, directed that a printed and bound copy of the approved rolls be deposited "in the office of the recorder in each recording district for public inspection." Printed copies were so deposited.

While Kochokney, the father, was a member of the Creek tribe, Yekcha, the son, was a member of the Seminole Tribe. Yekcha's enrollment as shown on the approved roll was as follows:

"Seminole Roll. Indians by Blood.

"No. 1278: Name, Yekcha, Marche; age 30; sex M.; blood ½. Tribal enrollment: Year, 1897; band, Echo Emarthoge; No. 1; census card No. 380."

At the trial counsel for the plaintiff, after calling attention to the fact, which was admitted, that the father was enrolled as a full-blood Creek, sought to show by* oral testimony that the mother, whose name did not appear on any of the approved rolls, was a full-blood Seminole; but the court was of opinion that the quantum of Indian blood possessed by Yekcha must be determined by the approved roll, and so rejected the testimony. Then, interpreting the roll as meaning that he was an Indian of the half-blood, the court held that under the act of April 26, 1906, he was free to make the conveyances.

We think the court rightly excluded the oral testimony and gave controlling effect to the approved roll. When Congress came to make a difference between full-blood and mixed-blood Indians, by subjecting the former to restrictions not applied to the latter, it evidently deemed it better for the Indians and all concerned that there be some fixed, easily accessible and reasonably reliable evidential standard by which to determine, for the purpose of the matter then in hand, who were of the full-blood and who of the mixed-blood. Congress had power to deal with the subject, and from among the standards which might have been prescribed it selected the rolls made at its direction by the commission charged with making the allotments. Not improbably it was thought that the rolls, even if not altogether free from mistake and error, would be quite as reliable as oral testimony and would have the advantage of being both easily accessible and enduring. But, passing the reason for it, Congress directed that the quantum of Indian blood "be determined" by the approved rolls, and it did this in a connection which leaves no doubt of its purpose to give controlling effect to the rolls. Emphasis was given to this purpose in Act May 27, 1908, c. 199, 35 Stat. 312, where in again dealing with restrictions on the alienation of allotments, it was provided that the approved rolls "shall be conclusive as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this act." *Both the federal and state courts in Oklahoma have for several years applied the view here expressed. Bell v. Cook (C. C.) 192 Fed. 597, 604, 605; Yarbrough v. Spalding, 31 Okl. 806, 123 Pac. 843; Lawless v. Raddis, 36 Okl. 616, 129 Pac. 711.

It hardly requires statement that the court rightly interpreted the entry of Yekcha's enrollment, before quoted. It neither names nor says anything about either parent, but does state very plainly that he is an Indian of the half-blood.

Decree affirmed.

(247 U. S. 97)

ERIE R. CO. v. HILT et al.

(Argued May 3, 1918. Decided May 20, 1918.)

No. 846.

1. RAILROADS ⇐382(1) — CONTRIBUTORY NEGLIGENCE OF CHILD — LICENSEE — "PERSON."

General Railroad Law N. J. (3 Comp. St. 1910, p. 4245) § 55, declaring that if any person shall be injured by an engine or car while walking, standing, or playing on any railroad he shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating the railroad, with a proviso excepting lawful crossings, applies to a boy less than seven years old who had been playing marbles near a railroad siding and was injured when a car from under which he was trying to get his marble was moved, for the opening phrase "any person" as well as the word "playing" apparently includes infants of the tenderest age, and this construction is strengthened by a decision of the New Jersey Supreme Court to that effect, even though the Supreme Court is not the highest court in that state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Person.]

2. NEGLIGENCE ⇐39 — CHILDREN—INVITEES —TEMPTATION.

In determining whether a child injured by the moving of a car was an invitee on the railroad company's property, temptation cannot always be deemed invitation.

3. NEGLIGENCE ⇐33(1)— TRESPASSERS—DUTY OF LANDOWNER.

It is the common-law rule that, while a landowner cannot intentionally injure or lay traps to injure a person coming on his premises without license, he is not bound to provide for the trespasser's safety from other undisclosed dangers, or to interrupt his otherwise lawful occupations to provide for the chance that some one may be unlawfully there.

Mr. Justice Day and Mr. Justice Clarke, dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Action by Edwin J. Hilt, Jr., an infant, by his next friend and another against the Erie

Railroad Company. A judgment for plaintiffs was on writ of error affirmed by the Circuit Court of Appeals (246 Fed. 800), and defendant brings certiorari. Reversed.

Mr. George S. Hobart, of Jersey City, N. J., for petitioners.

Mr. Raymond Dawson, of New York City, for respondent.

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* Mr. Justice HOLMES delivered the opinion of the Court.

This is an action for personal injuries caused by the plaintiff being run over on a siding of the defendant's railroad at Garfield, New Jersey. The plaintiff was a boy less than seven years old and had been playing marbles near the siding when a marble rolled under a car. The boy tried to reach the marble with his foot and while he was doing so the car was backed and his left leg was so badly hurt that it had to be cut off. A statute of New Jersey provides that "if any person shall be injured by an engine or car while walking, standing or playing on any railroad, he shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad," with a proviso that the section shall not apply to the crossing of a railroad at a lawful crossing. General Railroad Law, § 55; Compiled Stat. 1910, p. 4245, citing P. L. 1903, p. 673. The trial court notwithstanding this statute, allowed the plaintiff to go to the jury and to obtain and keep a verdict, following such precedents in the circuit as Erie R. Co. v. Swiderski, 197 Fed. 521, 117 C. C. A. 17, and the judgment was affirmed by the Circuit Court of Appeals. 246 Fed. 800.

[1-3] The ground of the decision seemingly is that the statute does not appear beyond doubt to apply to very young infants, although the word "playing" sufficiently indicates that it had minors in view, even if the absoluteness of the opening phrase "any person" were not enough to exclude the reading in of exceptions by the Court. The words of the statute seem to us to require a different construction from that adopted and they have been given their full literal meaning by the Supreme Court of the State in the case of an infant younger than the plaintiff. Barcolini v. Atlantic City & Shore R. R. Co., 82 N. J. Law, 107, 81 Atl. 494. In view of the importance of that tribunal in New Jersey, although not the highest Court in the State, we see no reason why it should not be followed by the Courts of the United States, even if we thought its decision more doubtful than we do.

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There is no ground for the argument that the plaintiff was invited upon the tracks. Temptation is not always invitation. Delaware, Lackawanna & Western R. R. Co. v. Reich, 61 N. J. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727; Holbrook v. Aldrich, 168 Mass. 15, 16, 46 N. E. 115, 36 L. R. A. 493, 60 Am. St. Rep. 364; Romana v. Boston Elevated Ry. Co., 218 Mass. 76, 105 N. E. 598, L. R. A. 1915A, 510, Ann. Cas. 1917A, 893. In this case too the plaintiff was not moved by the temptation, if any, offered by the cars, but by the wish to recover his marble. Therefore it is unnecessary to consider whether an express invitation would have affected the case, or what conclusion properly could be drawn from the fact that children had played in that neighborhood before and sometimes had been ordered away. The statute seemingly adopts in an unqualified form the policy of the common law as understood we believe in New Jersey, Massachusetts, and some other States, that while a landowner cannot intentionally injure or lay traps for a person coming upon his premises without license, he is not bound to provide for the trespasser's safety from other undisclosed dangers, or to interrupt his own otherwise lawful occupations to provide for the chance that some one may be unlawfully there. Turess v. New York, Susquehanna & Western R. R. Co., 61 N. J. Law, 314, 40 Atl. 614; Delaware, Lackawanna & Western R. R. Co. v. Reich; Holbrook v. Aldrich; Romana v. Boston Elevated Ry. Co., supra.

Judgment reversed.

In the absence of a decision of the highest Court of New Jersey holding otherwise Mr. Justice DAY and Mr. Justice CLARKE are of opinion that the Circuit Court of Appeals was right in holding the statute inapplicable to a child of seven, and therefore dissent.

(247 U. S. 204)

UNION PAC. R. CO. v. LAUGHLIN.

(Argued and Submitted April 18, 1918. Decided May 20, 1918.)

No. 623.

COURTS ⊜394(1)—REVIEW—STATE COURT—FEDERAL QUESTION.

Where a railroad company which had been notified of a Missouri attorney's lien on his client's cause of action against the company, satisfied a judgment in favor of the client rendered in the federal court in an action brought by a second attorney, the enforcement of the lien of the first attorney given by Rev. St. Mo. 1909, §§ 964, 965, by an action in the state court against the railroad company, did not deprive it of any right guaranteed by the United States Constitution or Statutes, so as to warrant review by the national Supreme Court of the state court's judgment on writ of error under Jud. Code, § 237 (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by Act Sept. 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. 1916, § 1214).

In Error to the Kansas City Court of Appeals of the State of Missouri.

Action by L. A. Laughlin against the Union Pacific Railroad Company. Judgment for plaintiff was affirmed on defendant's ap-

peal (196 Mo. App. 541, 196 S. W. 398), and defendant brings error to the Kansas City Court of Appeals of the state of Missouri. Writ of error dismissed.

Messrs. N. H. Loomis, of Omaha, Neb., I. N. Watson, of Kansas City, Mo., and R. W. Blair, of Topeka, Kan., for plaintiff in error.

Mr. Edwin A. Krauthoff, of Kansas City, Mo., for defendant in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Xedes, a section hand on the Union Pacific Railroad, was injured, in Kansas, while in the performance of his duties. Laughlin, an attorney at law, was employed by him in Missouri to prosecute and settle his claim against the company; and Xedes agreed that *205 Laughlin should receive as compensation one-half of whatever amount he might obtain in settlement of the claim. The Revised Statutes of Missouri (1909), sections 964 and 965, authorizing such agreements, give to the attorney a lien on the cause of action and on the proceeds, if notice of the lien is duly given to the defendant or "proposed defendant"; and, as construed by the Supreme Court of Missouri,[1] they also provide that if, after such notice, the claim is settled in any manner without first procuring the written consent of such attorney, the defendant or "proposed defendant" shall be liable to the attorney in an independent suit to an amount equal to that for which he held the lien.

Laughlin gave to the company this statutory notice. Later and without his consent, Xedes brought, through other counsel, in a state court, suit against the company which was removed to the District Court of the United States for the Western Division of the Western District of Missouri, and judgment was entered therein for $550. The company paid this amount to the clerk of court in satisfaction of the judgment; and it was paid by him to Xedes and his new counsel. When Laughlin learned these facts, he brought suit against the company in Missouri before a justice of the peace, for $275, and recovered a judgment therefor which was affirmed in the state circuit court and again by the Kansas City Court of Appeals. A rehearing applied for in June, 1917, was denied by that court, which also refused to transfer the case to the Supreme Court. The company, contending that the federal Constitution has been violated, brings the case here under section 237 of the Judicial Code as amended.

It does not appear here, as it did in Dickinson v. Stiles, 246 U. S. 631, 38 Sup. Ct. 415, 62 L. Ed. —— (decided April 29, 1918), that the suit of the employé against the railroad was brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]); and no claim is made that the attorney's lien *206 statute of the state is inconsistent with that law or the constitutional provision concerning interstate commerce. The company's contention, as set forth in its assignment of error in this court, is that the decision below takes its property and denies to it equal protection of the law in violation of the Fourteenth Amendment, because the decision imposes a liability not imposed by the judgment recovered by Xedes in the federal court; deprives it of the protection afforded by the Acts of Congress to those who pay to the clerks of the United States District Courts money in satisfaction of judgments entered therein;[2] and gives to two attorneys liens for the same service. The defendant in error moves to dismiss on the ground that the case does not present a federal question reviewable under section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the Act of September 6, 1916, c. 448, § 2 (39 Stat. 726 [Comp. St. 1916, § 1214]), because there is not drawn in question the validity of a statute of or an authority exercised under any state on the ground of their being repugnant to the Constitution, treaties or laws of the United States; and that if such question is presented, the Kansas City Court of Appeals was not "the highest court of a state in which a decision in the suit could" have been had, since the Supreme Court of Missouri has appellate jurisdiction in cases where "the validity of a treaty or statute of or authority exercised under the United States is drawn in question," and no application was made to nor any action taken by it.

The Missouri statute simply gives a cause of action against one who, with knowledge of the existence of a lien, deforces it. To grant such a remedy against the wrongdoer clearly does not deprive him of any right guaranteed *207 by the federal Constitution, even if the instrument by means of which the wrong is accomplished happens to be the judgment of a federal court. No substantial federal question is involved. We have no occasion, therefore, to consider whether the validity of the Missouri statute was drawn in question (Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245 U. S. 162, 38 Sup. Ct. 58, 62 L. Ed. ——); nor whether "a decision in the suit" might not have been had in the Supreme Court of Missouri (Missouri, Kansas & Texas Railway Company v. Elliott, 184 U. S. 530, 22 Sup. Ct. 446, 46 L. Ed. 673).

Writ of error dismissed.

[1] O'Connor v. St. Louis Transit Co., 198 Mo. 622, 645, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; Taylor v. St. Louis Transit Co., 198 Mo. 715, 730, 97 S. W. 155; Wait v. Atchison, etc., R. R., 204 Mo. 491, 501, 103 S. W. 60.

[2] Revised Statutes, sections 966, 967, 995 (Comp. St. 1916, §§ 1605, 1608, 1644), and section 996 as amended by Act of February 19, 1897, c. 265, § 3, 29 Stat. 578, and Act of March 3, 1911, c. 224, 36 Stat. 1083 (Comp. St. 1916, § 1645); Act of August 1, 1888, c. 729, §§ 1 and 2, 25 Stat. 357 (Comp. St. 1916, §§ 1606, 1607).

(247 U. S. 105)

WESTERN UNION TELEGRAPH CO. et al. v. FOSTER et al. SAME v. MACLEOD et al., Public Service Commission of Commonwealth of Massachusetts. NOBLE v. WESTERN UNION TELEGRAPH CO. et al. SAME v. UNITED TELEGRAM CO. et al.

(Argued April 29 and 30, 1918. Decided May 20, 1918.)

Nos. 274, 275, 419, 420.

1. COMMERCE ⟸28—"INTERSTATE COMMERCE"—TELEGRAMS.

Where the New York Stock Exchange agreed to furnish quotations to telegraph companies and they were authorized to furnish the same to subscribers subject to discontinuance on objection by the exchange, the distribution of such quotations in Massachusetts constituted interstate commerce, even though the quotations were sent in the ordinary course of telegraphy in Morse code to a point in Massachusetts, where they were translated into English and transmitted by an operator to the tickers in the offices of the subscribers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. JUDGMENT ⟸707 — CONCLUSIVENESS — PARTIES BOUND—INTERVENTION.

Where a contract between telegraph companies and a stock exchange which furnished them with quotations authorized the exchange to intervene in suits against the companies, a decree of a state court, relating to the distribution of quotations within such state, is not conclusive on the stock exchange, where it did not intervene in the proceedings.

In Error to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Appeals from the District Court of the United States for the District of Massachusetts.

Petition by the Western Union Telegraph Company and the United Telegram Company against Calvin H. Foster and Frederick J. Macleod and others, members of the Public Service Commission, which was consolidated with a bill by Frederick J. Macleod and others constituting the Public Service Commission of the Commonwealth of Massachusetts. The cases were reserved on the pleadings for determination by the full court, which decreed that the petition of the telegraph companies should be dismissed and the order of the Commission obeyed (224 Mass. 365, 113 N. E. 192), and the Telegraph Companies bring error to the Supreme Judicial Court of the Commonwealth of Massachusetts. The cases were submitted in the Supreme Court, with appeals by Henry G. S. Noble, as president of the New York Stock Exchange. From decrees of the District Court of the United States for the District of Massachusetts, dismissing bills by the appellant against the Western Union Telegraph Company and others and against the United Telegram Company and others. Decrees of the Supreme Judicial Court of Massachusetts and those of the District Court reversed.

Messrs. Rush Taggart and John G. Milburn, both of New York City, and Arthur Lord, of Boston, Mass., for plaintiffs in error (in cases Nos. 274 and 275).

Mr. Henry S. Robbins, of Chicago, Ill., for appellant (in cases Nos. 419 and 420).

Messrs. Patrick Henry Kelley and William Harold Hitchcock, both of Boston, Mass., for Calvin H. Foster.

Messrs. Henry C. Attwill, Atty. Gen., and H. Ware Barnum, Asst. Atty. Gen., for Public Service Commission of Massachusetts.

*110 *Mr. Justice HOLMES delivered the opinion of the Court.

Four cases were argued together in this Court. The first two were suits in the Supreme Judicial Court of Massachusetts, one a statutory petition by the telegraph companies to have an order of the Public Service Commission annulled, the other a bill by the Commission to have the same order enforced. The cases were consolidated and reserved on the pleadings for determination by the full Court, which decreed that the petition of the plaintiffs in error should be dismissed and the order of *111 the Commission obeyed. 224 Mass. 365, 113 N. E. 192. The order recited that the Gold and Stock Telegraph Company by the Western Union Telegraph Company lessee and the United Telegram Company had without just cause refused to supply to Calvin H. Foster the continuous quotations of the New York Stock Exchange by means of ticker service then supplied to others, declared the refusal an unlawful discrimination and required the two companies to remove the discrimination forthwith.

The material facts may be abridged as follows: The New York Stock Exchange, having a monopoly of the information collected by it on the floor of the Exchange concerning the prices quoted in transactions there, made contracts with the plaintiffs in error of the same general character as those before the Court in Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 246, 25 Sup. Ct. 637, 49 L. Ed. 1031, and Hunt v. New York Cotton Exchange, 205 U. S. 322, 27 Sup. Ct. 529, 51 L. Ed. 821. By these contracts for specified lump sums the Exchange agreed to furnish to the Telegraph Companies simultaneously full and continuous quotations of prices made in transactions upon the Exchange. The Telegraph Companies "may" in their turn furnish quotations to their "patrons" at intervals of more than fifteen minutes subject to discontinuance upon objection of the Exchange, and may furnish continuous service by ticker to subscribers, provided the latter sign applications in duplicate, one of which is to go to the Exchange, the application not to be effectual until the subscriber is approved by the Exchange, agreeing that the Telegraph

Company may discontinue the service "whenever directed so to do by said New York Stock Exchange." The application recognizes that the quotations are furnished under contract with the Exchange and agrees not to furnish the quotations to branch offices or correspondents unless first approved by the Exchange and also signing agreements, one of which is to be delivered to the Exchange. The contract states *that the intent of the Exchange in reserving the right to disapprove, etc., is only to prevent improper and unlawful use of the facts.

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The Gold and Stock Telegraph Company's business is carried on by the Western Union Telegraph Company in the name of the former. The quotations are furnished to the latter in New York, telegraphed by it to the office of the Gold and Stock Company in Boston, translated from the Morse code into English, and thence transmitted by an operator to the tickers in the offices of the brokers who have subscribed and have been approved. The United Telegram Company, a New Jersey corporation, receives quotations for Boston alone, where is its principal office outside of New Jersey. They are furnished by the Exchange in New York, telegraphed to the Boston office over a wire of the Postal Telegraph Cable Company, and thence transmitted as in the other case. On these facts the plaintiffs in error say that the order is an unwarranted interference with commerce among the States and takes property without due process of law, setting up the Constitution of the United States.

[1] We shall not discuss the bearing of the Fourteenth Amendment nor yet how far an order simply to remove a discrimination could be effectual when if Mr. Foster were let in on the same terms as those now accepted as subscribers, he would agree that the Telegraph Company might discontinue its service without notice whenever directed so to do by the New York Stock Exchange. It is enough that in our opinion the transmission of the quotations did not lose its character of interstate commerce until it was completed in the brokers' offices and that the interference with it was of a kind not permitted to the States. The supposed analogy that has prevailed is that of a receiver of a package breaking bulk and selling at will in retail trade. But it appears to us misleading. We also think it unimportant that the contracts between the *Exchange and the Telegraph Companies emphasize the element of quasi-sale for a lump sum and leave it to the interest of the Telegraph Companies to find subscribers. Neither that nor the intervention of an operator, or of another company, are in the least degree conclusive. Unlike the case of breaking bulk for subsequently determined retail sales, in these the ultimate recipients are determined before the message starts and have been accepted as the contemplated recipients by the Exchange. It does not matter if they have no contract with the Exchange, directly. It does not matter that if the Telegraph Companies did not deliver to any given one the Exchange could not complain. If the normal, contemplated and followed course is a transmission as continuous and rapid as science can make it from Exchange to broker's office it does not matter what are the stages or how little they are secured by covenant or bond.

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Thus lumber purchased in Texas for the purpose of filling foreign orders was held to be carried in interstate commerce, although no contract prevented the purchaser from giving it a different destination. Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111, 126, 33 Sup. Ct. 229, 57 L. Ed. 442. Practice, intent and the typical course, not title or niceties of form, were recognized as determining the character, and other cases to the same effect were cited. The principle was reaffirmed in Railroad Commission of Louisiana v. Texas & Pacific Ry. Co., 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215; and is too well settled to need to be further sustained. Western Oil Refining Co. v. Lipscomb, 244 U. S. 346, 349, 37 Sup. Ct. 623, 61 L. Ed. 1181. See Swift & Co. v. United States, 196 U. S. 375, 398, 399, 25 Sup. Ct. 276, 49 L. Ed. 518. It is admitted that the transmission from New York to Massachusetts by the Telegraph Company was interstate commerce. If so it continued such until it reached "the point where the parties originally intended that the movement should finally end." Illinois Central R. R. Co. v. Louisiana R. R. Commission, 236 U. S. 157, 163, 35 Sup. Ct. 275, 59 L. Ed. 517.

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*If the transmission of the quotations is interstate commerce the order in question cannot be sustained. It is not like the requirement of some incidental convenience that can be afforded without seriously impeding the interstate work. It is an attempt to affect in its very vitals the character of a business generically withdrawn from state control—to change the criteria by which customers are to be determined and so to change the business. It is suggested that the State gets the power from its power over the streets which it is necessary for the telegraph to cross. But if we assume that the plaintiffs in error under their present charters could be excluded from the streets, the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end, United States v. Reading Co., 226 U. S. 324, 357, 33 Sup. Ct. 90, 57 L. Ed. 243, and a constitutional power cannot be used by way of condition to attain an unconstitutional result. Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; Pullman Co. v. Kansas, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; Sioux Remedy Co. v. Cope, 235 U. S. 197, 203, 35 Sup. Ct. 57, 59 L. Ed. 193. The regulation in question is quite as great an inter-

ference as a tax of the kind that repeated decisions have held void. It cannot be justified "under that somewhat ambiguous term of police powers." Western Union Telegraph Co. v. Pendleton, 122 U. S. 347, 359, 7 Sup. Ct. 1126, 30 L. Ed. 1187; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; Savage v. Jones, 225 U. S. 501, 520, 32 Sup. Ct. 715, 56 L. Ed. 1182; Western Union Telegraph Co. v. Brown, 234 U. S. 542, 547, 34 Sup. Ct. 955, 58 L. Ed. 1457. Without going into further reasons we are of opinion that the decree of the Supreme Judicial Court must be reversed.

[2] The other two cases were suits brought by the New York Stock Exchange against the Telegraph Companies severally and Foster. The bills set forth the respective contracts with the companies, allege that Foster made applications to them in the prescribed form, was given a full hearing before a committee of the Exchange, and that as a result the *115 Exchange reached the conclusion that*Foster had been conducting bucket shops and wanted the quotations in aid of such shops, and therefore disapproved the applications. They set forth the order of the State Commission, the decree of the State Court and the intent of the Telegraph Companies to comply with the order, and allege that it is void as beyond the jurisdiction of the State Commission under the Constitution and Acts of Congress and also as depriving the plaintiff of its property without due process of law. Injunctions are prayed against delivery of continuous quotations to Foster or receipt of them by him unless and until he shall have acquired the right by contract with the approval of the Exchange. Subsequently the members of the Public Service Commission were made parties, and then upon their motion the bills were dismissed by the District Court, the judge accepting the reasoning of the Supreme Court of the State. The decision seems to have been upon the merits, but the question is certified whether the bill presents a controversy which arises under the Constitution or laws of the United States within the meaning of section 24 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. 1916, § 991]). In view of the decision in the State cases probably it will not be necessary to prosecute these suits farther. But it follows from what we have said that the decision of the District Court was wrong and that the decrees in these cases also must be reversed. It is suggested, to be sure, that the Exchange would be barred by the state decree against the Telegraph Companies if it stood, because the Exchange by its contracts reserved the right to intervene in such suits. It did not intervene and therefore would not have been bound.

Decrees reversed.

(247 U. S. 91)

McGINIS et al. v. PEOPLE OF STATE OF CALIFORNIA.

(Argued April 26, 1918. Decided May 20, 1918.)

No. 133.

POISONS ⟸9 — INTERSTATE AND FOREIGN COMMERCE — STATE LAWS — ADMISSION OF EVIDENCE.

Where defendants denied having possession, in violation of the California statute, of opium which had been shipped from another state into California for export into Mexico, and asserted that the drug, which was weighed in California at a point adjacent to Mexican border, was then in transit, it was error to exclude evidence that defendants had permission of the Treasury Department to export the drug, and that the weighing, in which one of the defendants assisted, was done by a customs officer, as such, because required by Mexican law before the opium could be introduced into that country.

In Error to the Superior Court of Imperial County, State of California.

C. F. McGinis and E. E. Young were convicted in justice court with having in their possession opium in a quantity forbidden by California statute, and the judgment of conviction being modified and affirmed on appeal to the superior court of Imperial county, state of California, defendants bring error. Reversed and remanded, with directions.

Messrs. William Sea, Jr., of Calexico, Cal., and Frederick S. Tyler, of Washington, D. C., for plaintiffs in error.

Mr. James M. Oliver, of San Francisco, Cal., for the People of State of California.

*93 *Mr. Justice McKENNA delivered the opinion of the Court.

This case is here to review a judgment of the Superior Court modifying and affirming as modified a judgment pronounced against plaintiffs in error (whom we shall call defendants) after a verdict of a jury finding them guilty of violating a law of the State entitled "An act to regulate the sale and use of poisons in the State of California and providing a penalty for the violation thereof." St. 1907, p. 124, as amended by St. 1909, p. 422, and St. 1913, c. 342, p. 692.

The action was commenced by filing a verified complaint in a justice's court of the county charging them with having in their possession at Calexico in that county a preparation of opium containing more than two grains of opium to the fluid ounce, they, the defendants, not being within any of the exceptions of the statute.

Their trial was by jury which returned a verdict of guilty against them, and, after motion for new trial made upon the rulings hereinafter stated and denied, judgment was entered fining each of them in the sum of $300, the imprisonment to be suspended during good behavior if the fine be paid. It was further adjudged that until the fine be paid each should be imprisoned in the coun-

ty jail one day for each dollar of the fine not exceeding 180 days.

On appeal to the Superior Court of the county the judgment was reversed as to imprisonment until the fine be paid; in all else affirmed. This writ of error was then allowed by the presiding judge.

The case is in narrow compass. The charge was, as we have seen, that the defendants had opium in their possession in violation of the statute of the State. The defense was, among others, that the opium was in transit from St. Louis, Missouri, to Mexicali, Mexico. The latter town and Calexico are really but one, having, however, different names and being in different countries—the international boundary being a street.

Necessarily the United States custom house is in Calexico, and to the practical singleness of the towns is added the fact that Wells Fargo & Company, the carrier of the drug from St. Louis, has its terminal in Calexico, and has the same office that the custom house broker has, whose relations with defendants were the subject of testimony and contention.

It is clear, however, that the drug was shipped from St. Louis and could have been carried by Wells Fargo & Company no farther than Calexico and that the consignees could have paid—indeed, had to pay, and did pay—the express charges at that place, and could have received the drug upon payment. It is in dispute whether they did or whether one McCoy, the custom house broker, received it and weighed it, assisted by Young. The weighing, it was testified, was made necessary by the requirement of the law of Mexico. It was therefore a dispute of fact or inference in the case whether Young received the drug or McCoy did as a customs officer and that Young did no more than assist in the preparation of the shipment to Mexico, not participating in the possession.

In explanation of the situation Young testified that he did not remove the box (it was quite large and weighed, with contents, 72 pounds and, we may say in passing, was valued at $960.00) or take possession of it, arrangements having been made with McCoy to have the box taken to Mexicali, he, McCoy, being a common carrier. And he testified that McCoy weighed its contents. He was then asked the question if he knew why McCoy weighed the contents. The question was objected to as immaterial on the ground that it made no difference what the purpose of weighing the contents was. The objection was sustained and counsel for Young replied, "We want to show that Mr. McCoy was to make out the American and Mexican papers for the exportation of the box to McGinis and Young at Mexicali." The question was then put whether McGinis and Young had authority to export the opium that was seized. Again the attorney for the State objected, saying, "It can have no bearing in this case. It is only a question of possession." The objection was sustained, to which it was replied by defendants' attorney, "If the court will not permit us to put in our defense as to having permission and authority to export the opium, cocaine and morphine mentioned in interstate and foreign commerce under the regulations of the Treasury Department of the United States, the defendants will rest."

A series of instructions were asked by defendants to be given which expressed the supremacy of Congress over interstate and foreign commerce and that therefore, even if defendants had control of the opium, if it was in transit or being transported from the United States to Mexico through a chain of carriers, then the defendants did not have possession of the opium in violation of the law of the State, and that it was the duty of the jury to acquit them. The instructions were refused.

It is clear, therefore, that defendants asserted rights under the commerce clause of the Constitution and that the evidence ruled out as immaterial was offered to sustain them. It was certainly pertinent and the circumstances of the case and the evidence made it competent. In other words, there was a dispute as to whether defendants had taken possession of the opium—of which the jury were to be the judges, not the court—and whether the drug was in transit; and the conditions of transit were elements to be considered.

The judgment of the Superior Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

(247 U. S. 95)

McGINIS et al. v. PEOPLE OF STATE OF CALIFORNIA.

(Argued April 26, 1918. Decided May 20, 1918.)

No. 134.

1. Poisons ⊂⊃9—Interstate and Foreign Commerce — State Laws — Admission of Evidence.

Where defendants denied having possession, in violation of the California statute, of cocaine which had been shipped from another state into California for export into Mexico, and asserted that the drug, which was weighed in California at a point adjacent to Mexican border, was then in transit, it was error to exclude evidence that defendants had permission of the Treasury Department to export the drug, and that the weighing, in which one of the defendants assisted, was done by a customs officer, as such, because required by Mexican law before the cocaine could be introduced into that country.

2. Criminal Law ⊂⊃1170(1) — Appeal — Harmless Error.

In such case, though cocaine was added in repacking the original package, yet as one of the defendants was not shown to have had any connection with the cocaine added, and the case was tried and submitted on the basis of the

original shipment, the exclusion of the testimony cannot be deemed harmless error.

In Error to the Superior Court of Imperial County, State of California.

C. F. McGinis and E. E. Young were convicted in justice court with having in their possession cocaine in a quantity forbidden by California statute, and the judgment of conviction being modified and affirmed on appeal to the superior court of Imperial county, state of California, defendants bring error. Reversed and remanded, with directions.

Messrs. William Sea, Jr., of Calexico, Cal., and Frederick S. Tyler, of Washington, D. C., for plaintiffs in error. Messrs. James M. Oliver, and Thomas E. Haven, both of San Francisco, Cal., for the People of the State of California.

*Mr. Justice McKENNA delivered the opinion of the Court.

This case was submitted with No. 133, 247 U. S. 91, 38 Sup. Ct. 440, 62 L. Ed. —

As in the latter case plaintiffs in error, whom we shall call defendants, were charged in a justice's court of Imperial county with having cocaine in their possession in a quantity forbidden by the statute of the state regulating the sale and use of poisons. After trial and verdict of guilty, there was judgment exactly the same as in No. 133, which judgment, after motion for new trial made and denied, and upon appeal to the Superior Court of the county, was modified, and as modified affirmed as in that case.

[1, 2] The drug was shipped from St. Louis in the same box as the opium in case No. 133. The testimony in this case, however, as to its being in transit to Mexico is somewhat fuller. In addition to the exclusion of such testimony the defendants were prevented from showing permission from the Treasury Department to export a quantity of cocaine to Mexico. Such permission and the purpose of weighing the contents of the box were decided to be immaterial, possession alone being determinative of guilt.

We think the rulings were error. But it is said that the error was without detriment to defendants; that the testimony showed that there were only 100 ounces of cocaine in the original package from St. Louis and that 85 ounces were added in the repacking. However, it is not shown from whence it came, and the trial of the case and the submission of it were based on the shipment from St. Louis. The judgment of the Superior Court was rendered in both actions and made no distinction between them. And, besides, McGinis was not shown to have had any connection with the 85 ounces, and we may remark that cross-examination as to the fact was, on the objection of the*prosecution, prevented. We think, therefore, the error in excluding the testimony cannot be said to have been without detriment to defendants.

The court was asked to instruct the jury as in No. 133 and refused. It gave, however, a number of instructions requested by the prosecution, some abstract, as to the extent of the police power of the state, and others directed to the effect of possession of the drug, if found by the jury, and its determination of defendants' guilt. We do not consider it necessary to comment upon them further than to say that they give emphasis to the rulings upon the testimony offered by the defendants.

The judgment of the Superior Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

(247 U. S. 197)

CHICAGO & A. R. CO. v. UNITED STATES.

(Submitted April 18, 1918. Decided May 20, 1918.)

No. 640.

MASTER AND SERVANT ⊂⊃13—HOURS OF SERVICE—SWITCH TENDERS—TELEPHONE ORDERS.

Switch tenders, who regularly conduct movements of trains in and through a yard receiving the yardmaster's telephone orders in their shanties and executing them by transmitting them verbally or by signal to the enginemen or train crews, and by manipulating switches, are within the proviso of Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (Comp. St. 1916, § 8678), limiting to nine hours the service of an employé who by use of the telephone receives orders pertaining to or affecting train movements.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Action by the United States against the Chicago & Alton Railroad Company. A judgment for the United States was on defendant's writ of error affirmed by the Circuit Court of Appeals (244 Fed. 945, 157 C. C. A. 295), and defendant brings certiorari. Affirmed.

Messrs. Silas H. Strawn, of Chicago, Ill., and William L. Patton, of Springfield, Ill., for petitioner.

Mr. Assistant Attorney General Frierson, for the United States.

*Mr. Justice McREYNOLDS delivered the opinion of the Court.

Following its decisions in Chicago, Rock Island & Pacific Ry. Co. v. United States, 226 Fed. 27, 141 C. C. A. 135, and Chicago & Northwestern Ry. Co. v. United States, 226 Fed. 30, 141 C. C. A. 138, the Circuit Court of Appeals affirmed a judgment of the District Court against plaintiff in error for one hundred dollars, penalty for violating the Hours of Service Act (chapter 2939, 34 Stat. 1415) by permitting a switch tender to remain on duty more than nine hours.

*Section 2 of the act declares it unlawful for any interstate carrier by railroad to re-

quire or permit an employé "actually engaged in or connected with the movement of any train" to remain on duty longer than sixteen consecutive hours:

"Provided, That no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employés named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week."

The cause was tried upon an agreed statement of facts, a jury being waived.

Plaintiff in error's "Yard" at Bloomington, Illinois, is seven and three-fourths miles long. During April, 1915, it maintained therein three switch shanties located upon its double track main line, one five hundred feet, another eleven hundred feet and the third a mile north of its passenger station. Trains operated over this portion of the line are under control of the yardmaster and subject to a rule which provides: "All trains will reduce speed on passing through yard limits and proceed only after the way is seen or known to be clear." Each of these shanties was continuously operated night and day by two men, alternately on duty therein for twelve hours during every twenty-four.

"All of the work regularly and generally required of said employés, as well as that required on the days mentioned in said declaration, was in connection with the use of certain switches and telephones, which said work pertained to and affected the movements of trains of defendant engaged in interstate commerce; each of said shanties was equipped with a telephone all three being on the same circuit, and connected with the yardmaster's office." At the first shanty eight switches were handled; at the second twelve and two sets of cross-overs; at the third eight switches for south-bound trains and a cross-over one. "The work of these employés is to throw switches, relieve yard, train and engine crews of this work, and to avoid delays to trains moving through the yard; the telephones are used to permit the yardmaster, who directs all yard movements to keep in closer touch with such movements and to issue instructions or orders to yard, train or engine crews as to the handling of cars or trains, or as to any other work that he may desire performed." "The telephones at the three places were installed principally for the purpose of making more convenient communication between the yardmaster's office and said shanties."

"All instructions or orders received from the yardmaster, as above set forth, were always transmitted by said employés to the engine or train crews, either verbally or by hand signals, and in no case were said employés required to write out said instructions or orders for transmission to these crews." "None of the service required of any of said employés on the days mentioned in said declaration was necessitated by reason of any emergency, they were the regular assigned hours of said employés, fixed in that manner by defendant's operating department which acted under instructions received from its legal department."

The purpose of the statute is to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task. B. & O. R. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 619, 31 Sup. Ct. 621, 55 L. Ed. 878. It must be construed and applied in view of that purpose and well-known circumstances attending the practical operation of trains.

The individuals within the ambit of the proviso's pertinent provisions are marked by the nature of service performed—an "operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements." And the railroad is forbidden to permit one performing such service in "towers, offices, places and stations continuously operated night and day" to remain on duty therein longer than nine hours in twenty-four. Both the post of duty and character of work are essential elements. If, in due course of his work, an employé while in any of the locations specified uses the telegraph or telephone for sending or receiving messages concerning train movements he may not lawfully remain on duty therein exceeding nine hours during any twenty-four hour period, except in case of emergency.

Here, the facts disclose the switch tender on duty for twelve consecutive hours in a shanty continuously operated night and day where, by the use of the telephone, he received and delivered orders pertaining to train movements—not mere switching movements within the yard; and in such service mental and physical alertness are of great importance. By permitting this, the railroad violated both language and purpose of the act.

The judgment below is

Affirmed.

(247 U. S. 132)

NORTHWESTERN MUT. LIFE INS. CO. v. STATE OF WISCONSIN.

(Argued March 22, 1918. Decided May 20, 1918.)

No. 240.

1. COMMERCE ⟸63—INTERSTATE COMMERCE—BURDEN BY STATE TAXATION.

St. 1911 Wis. § 1220, requiring every company, corporation, or association transacting the business of life insurance within the state, excepting fraternal societies having lodge organizations, to pay an annual license fee, and requiring domestic companies in lieu of other personal property taxes to pay 3 per cent. of their gross income from all sources excepting income from rents of real estate and premiums collected outside of the state of Wisconsin on policies held by nonresidents of such state, must, in its application to domestic companies having large surpluses and reserves taxable within the state, be deemed a commutation tax, and so is not invalid as imposing a burden on interstate commerce, though applying to a domestic company carrying on a large foreign investment business involving shipments of securities, correspondence, etc., beyond the state.

2. COMMERCE ⟸45 — "INTERSTATE COMMERCE"—WHAT CONSTITUTES.

The license tax feature of such act is not invalid as casting the burden on interstate commerce; the business of life insurance not being interstate commerce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

3. CONSTITUTIONAL LAW ⟸229(1) — EQUAL PROTECTION OF LAWS—DISCRIMINATION.

Const. U. S. Amend. 14, prohibiting a denial of equal protection of the laws, does not require the states to tax all property alike, and provided the classification is not arbitrary and rests upon real differences, a state may classify the subjects selected for taxation.

4. CONSTITUTIONAL LAW ⟸229(1) — EQUAL PROTECTION OF LAWS—DISCRIMINATION.

St. 1911 Wis. §§ 1220, 1221, providing for taxation of insurance companies which discriminates between domestic companies and foreign companies, is not invalid as denying to the domestic companies equal protection of the laws in violation of Const. U. S. Amend. 14, for the classification was warranted, not only because the domestic companies have reserves and surpluses taxable in the state while those of foreign companies are taxable in the state of their incorporation, but because it is not improper for a state to impose a different rate of taxation upon a foreign corporation for the privilege of doing business in the state than it applies to its own corporations.

5. CONSTITUTIONAL LAW ⟸229(1) — EQUAL PROTECTION OF THE LAWS — DISCRIMINATION.

In so far as St. 1911 Wis. § 1220, discriminates between old line commercial companies and fraternal beneficiary associations, there is no denial of equal protection of the laws as to commercial companies in violation of Const. U. S. Amend. 14, the distinction on which classification was based being obvious.

In Error to the Supreme Court of the State of Wisconsin.

Original action in the Supreme Court of Wisconsin, by the Northwestern Mutual Life Insurance Company, against the State of Wisconsin. Demurrers were sustained to the original and the amended complaint, and judgment was rendered for the State (163 Wis. 484, 155 N. W. 609, 158 N. W. 328), whereupon plaintiff brings error. Affirmed.

Mr. Harry L. Butler, of Madison, Wis., for plaintiff in error.

Mr. Walter Drew, of Milwaukee, Wis., for the State of Wisconsin.

*133 *Mr. Justice DAY delivered the opinion of the Court.

This suit was brought to recover certain taxes or license fees paid by the Northwestern Mutual Life Insurance Company to the state of Wisconsin; the same were paid under protest, and this action was to recover $482,193.23 paid in 1912, and $505,643.22 in 1913. The case was decided in the Supreme Court of Wisconsin, upon demurrer to the original and amended complaints, and judgment was rendered in favor of the state. 163 Wis. 484, 155 N. W. 609, 158 N. W. 328.

The taxes in question were collected under the statutes of Wisconsin. Section 1220, Wis. Stats. of 1911, being section 51.32 of the later Stats.; section 1221, now section 51.33, being the so-called retaliatory law; section 1222, subsec. 5 of section 1947; and section 1948.

The substance of the statute immediately involved is thus stated by the plaintiff in error:

*134 *"Every company * * * transacting the business of life insurance within this state (excepting only such fraternal societies as have lodge organizations and insure only the lives of their own members) shall annually, on or before March 1, pay 'in lieu of all taxes for any purpose authorized by the laws of this state (except taxes on real estate), certain prescribed license fees for transacting such business.'"

It appears that fraternal societies with lodge organizations insuring only the lives of their own members are not subject to this tax, and foreign level premium companies, similar to the plaintiff in error, are subject to an annual tax of but $300.00 liable to increase under the so-called retaliatory law according as other states impose like taxes on similar companies of Wisconsin. Assessment and stipulated premium companies, domestic and foreign, are taxed $300.00, or as to foreign companies such larger amounts as may be proposed under the retaliatory law. The license when granted authorizes the company to transact business until the first of March of the ensuing year unless sooner revoked or forfeited.

The contentions of a federal nature, raised by the plaintiff in error, are that this license tax imposes an unlawful burden upon interstate commerce in contravention of section 8, article 1 of the federal Constitution; that it violates the Fourteenth Amendment in denying the equal protection of the laws to the Northwestern Company by arbitrarily discriminating against it and in favor of for-

eign insurance companies, and between it and fraternal associations, both domestic and foreign; that it violates the Fourteenth Amendment in imposing an arbitrary, discriminatory, and confiscatory burden upon the Northwestern Company.

As to the annual license fee, it is made up as follows:

*135 "Domestic Companies. (1) If such company, corporation or association is organized under the laws of this *state, and is not purely an assessment or stipulated premium plan company under chapter 270, Laws of 1899 (section 1955—1), 3 per centum of its gross income from all sources for the year ending December thirty-first, next prior to said first day of March, excepting therefrom income from rents of real estate, upon which said company, corporation or association has paid the taxes assessed thereon, and excepting also premiums collected outside of the state of Wisconsin on policies held by nonresidents of the state of Wisconsin. In ascertaining the income upon which such license fee shall be computed as aforesaid, no deduction shall be made from premiums, whether paid in cash or premium notes, on account of dividends allowed or paid to the insured."

The statute also provides that such license fee shall be in lieu of all taxes for any purpose authorized by the laws of the state except taxes on real estate. The Northwestern Company was thus obliged to pay 3 per cent. of its gross income less income from rents of real estate, and less premium receipts from outside of the state.

Before entering upon a consideration of the errors assigned the nature and effect of this system of taxation must be borne in mind. The Northwestern Mutual Life Insurance Company is a corporation of the state of Wisconsin, having large reserves in that state, having a taxable situs therein. Of this statute the Supreme Court of Wisconsin said:

"It covers all the contributions which the state demands from the company or its business except real estate taxes, which are relatively small in amount. It is common knowledge that all of the great level premium insurance companies of the present day have vast reserve funds, to protect their liabilities on policies, running up into the hundreds of millions of dollars, and that these reserves are invested in interest-bearing securities, of *which real estate loans secured by mortgage generally form the largest part. In the complaint in the present case it appears that on December 31, 1911, the plaintiff had outstanding loans secured by real estate mortgages amounting to $153,562,654.39, of which only $5,654,369.10 covered real estate in Wisconsin. It also appears that the plaintiff's income from real estate mortgages for the year ending on said last-named date amounted to $7,446,393.10 and its income from bonds to $3,172,489.58. These securities are all credits, i. e., personal property of an intangible character, the situs of which for the purposes of taxation is in this state at the residence of the corporation."

And in the opinion on the filing of the amended complaint, added:

"In this connection it is argued that if a personal property tax had been levied on the plaintiff's reserve, consisting of securities and credits, there would have been deducted from the amount thereof, under the existing policy of the state with regard to the taxation of such property, its liabilities to policy holders, i. e., the present value of its outstanding policies valued as required by law, which is about 90 per cent., of the reserve. It is also argued that if the plaintiff had been subjected to income taxation under the state law it would have paid much less than under the 3 per cent. license fee requirement.

"We do not regard either contention as well founded. Our statutes governing the taxation of securities and credits for many years provided that there should be exempted from taxation so much thereof as 'shall equal the amount of bona fide and unconditional debts by him owing.' This provision was repealed by the Income Tax Law, which marked the abandonment of the attempt to levy personal property taxes upon that species of property. Chapter 658, Laws 1911.

*137 "It seems entirely clear that the liability to policy *holders which the plaintiff refers to is not in any sense an 'unconditional debt,' and as the policy of the state has never extended the exemption to any liability short of an unconditional debt we are unable to see any sound basis for the argument made.

"As to the contention that if the plaintiff were taxed under the income tax system its tax burden would be far less than under the present license system, we shall not attempt to go into the arguments and figures presented in detail. It is sufficient to say that we do not think it appears from the allegations of the amended complaint that the plaintiff now pays substantially greater sums than it would pay under either the income taxation system or the former personal property taxation system.

"At all events there does not affirmatively appear to be any such disparity as would condemn the law as arbitrarily discriminatory."

While these views of the nature and effect of the law are not conclusive upon us, they are accepted unless they appear to be ill-founded, and we find no reason to reject them. The tax in question is, therefore, not only one for the privilege of doing life insurance business within the state, but is in effect a commutation tax, levied by the state in place of all other taxation upon the personal property of the company in the state of Wisconsin.

[1] It is insisted that because of the foreign investment business of the company, large in amount, and involving shipments of securities, correspondence, etc., beyond the state, this law burdens interstate commerce. We need not reiterate the reasoning upon which this court has repeatedly held that a state may not by its system of taxation impose burdens upon interstate commerce, the cases have been recently reviewed and the doctrine reaffirmed. Looney v. Crane Co., 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. ——; International Paper Company v. Massachusetts, 246 U. S. 135, 38 Sup. Ct. 292, 62 L. Ed. ——; Cheney Bros. Co. v. Massachusetts, 246 U. S. 147, 38 Sup. Ct. 295, 62 L. Ed. ——.

*138 *The construction of the act by the state court brings the case within the decisions of this court in U. S. Express Co. v. Minnesota, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 38 Sup. Ct. 373, 62 L. Ed. ——, decided April 15, 1918. In the former case a commutation tax upon gross receipts of the express company from state and interstate

business was sustained as casting no burden upon interstate commerce. In the Cudahy Packing Company Case a tax of like character was held not a burden upon interstate commerce, although much of the gross receipts, which measured the property tax, was derived from such commerce. In both of these cases, following the previous decisions of this court, the tax was held to be within the authority of the state, and the inclusion in the measure of taxation of the receipts partly derived from interstate commerce was held not to invalidate the tax, its amount not being in excess of what would be legitimate as an ordinary tax on the property taken at its value.

We have said thus much as to the alleged invalidity of this license tax as a burden upon interstate commerce, without deciding, as we do not find it necessary to decide, whether the so-called foreign investment business of the company does or does not of itself amount to interstate commerce. If it amounts to commerce of that character no burden is cast upon it by such tax as is here involved, since the gross receipts coming from that character of business are used only as a measure of the value of the property and franchise lawfully taxable in the state.

[2] That the tax upon the life insurance business, which is the subject-matter of the license tax here involved, is not a tax upon interstate commerce is established by a reference to the recent full consideration of the subject by this court. N. Y. Life Insurance Co. v. Deer Lodge Co., 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. 332.

[3, 4] This brings us to the question whether the statute denies to the company the *139 equal protection of the laws. That *the state is not because of the Fourteenth Amendment required to tax all property alike, and may classify the subjects selected for taxation, is too well established to require citation of the many cases in this court which have so held. The classification may not be arbitrary and must rest upon real differences—subject to these qualifications the state has a wide discretion. In this connection the Northwestern Company contends that the tax upon it is so different from that imposed upon foreign level premium companies doing a like business within the state, that an arbitrary discrimination, amounting to a denial of equal protection, is exercised as against it and in favor of the foreign company. As we have already said, the foreign companies of like character pay a privilege or occupation tax in the sum of $300.00 per annum. The state court held, and we think properly so, that foreign insurance companies occupy a relation to the state which is different from that of a domestic company. The latter has within the borders and taxing jurisdiction of the state a large amount of personal property, receiving protection, and subject to taxation. The foreign company has its reserves in the state of its domicile, and there subject to local taxation, which is of itself a substantial difference. Moreover, we have held that it is no denial of equal protection for a state to impose a different rate upon one of its own corporations than that imposed upon a foreign corporation, for the privilege of doing business within its borders. Kansas City, Memphis & Birmingham R. R. Co. v Stiles, 242 U. S. 111, 118, 37 Sup. Ct. 58, 61 L. Ed. 176. In the case of Cheney Brothers Co. v. Massachusetts, supra, this court said:

"* * * A state does not surrender or abridge its power to change and revise its taxing system and tax rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits, and, second, that 'a state may impose a *different rate of taxation upon a foreign *140 corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchises which the state grants in creating them.' Kansas City, Memphis & Birmingham R. R. Co. v. Stiles, 242 U. S. 111, 118 [37 Sup. Ct. 58, 61 L. Ed. 176]."

But, it is said that these decisions are opposed to the decision of this court in Southern Railway Co. v. Greene, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247. In that case the railway corporation of another state came into the state of Alabama in compliance with its laws, paid the license and property tax imposed upon other corporations doing business within the state, under sanction of the laws of the state acquired a large amount of railroad property therein, when it was attempted to subject it to a further tax for the privilege of doing business as a foreign corporation, which tax was not imposed upon domestic corporations doing the same kind of business in the same manner, and it was held that such classification was arbitrary and void under the Fourteenth Amendment. In that case we laid stress upon the fact that the tax related to railroad property not susceptible of other uses, which placed in the state had to remain there permanently, and could not be withdrawn at the pleasure of its owners. Under such circumstances, and dealing with that character of property, we held that the particular tax constituted such discrimination as to deny to the company the equal protection of the laws. That case was distinguished in the decision in Kansas City, Memphis & Birmingham R. R. Co. v. Stiles, supra, and also in disposing of the case of the White Company involved in Cheney Brothers Company et al. v. Massachusetts, supra. The difference between the Southern Railway Company Case and the one under consideration is quite obvious.

[5] As to the alleged discrimination between old line level premium companies and beneficial associations, which are exempted from taxation under this statute, we think the differences are plain. The fraternal and *141 beneficial *features are wanting in organiza-

tions like that of the Northwestern Company. The ascertainment and collection of premiums and payments for insurance are upon wholly different plans. As to the alleged discrimination in favor of stipulated premium companies and assessment companies, the plaintiff in error in its brief says that no domestic company of these classes and but one foreign company existed in Wisconsin in 1912, and that as to this its argument as to discrimination in favor of foreign level premium companies applies. What we have already said disposes of that contention. We find no reason to disagree with the Supreme Court of Wisconsin in the conclusion that differences upon which classification rests in this statute are not fanciful, but real and substantial, and that the dissimilarities in treatment fall short of that arbitrary classification which amounts to a denial of the equal protection of the laws.

We find no error in the judgment of the Supreme Court of Wisconsin.

Affirmed.

Mr. Justice CLARKE took no part in the consideration or decision of this case.

(247 U. S. 27)

In re ABDU et al.

(Argued April 29, 1918. Decided May 20, 1918.)

No. 31.

1. MANDAMUS ⟸57(1)—PROCEEDINGS—JURISDICTION.

Where the clerk of the Circuit Court of Appeals declined, without the required deposit to secure costs, to file the record on appeal by seamen from a decree dismissing their libel to enforce payment of wages, the Supreme Court, in view of its ultimate power to review the cause on the merits and the effect of the refusal, may issue a writ of mandamus to compel filing of the record without the deposit.

2. MANDAMUS ⟸151(2) — JURISDICTION — PARTIES.

Where, in obedience to the direction of the court, the clerk of the Circuit Court of Appeals declined, without a deposit to secure costs as required, to file the record of an appeal by seamen from a decree dismissing their libel to enforce payment of wages, and such seamen applied to the Supreme Court for a writ of mandamus against the clerk, that tribunal may, in view of the circumstances, disregard the fact that the clerk only was a technical party, and in the exercise of a sound discretion determine the propriety of the order.

3. COURTS ⟸356—APPEAL—COSTS—SEAMEN.

In view of the construction of the act conferring the right to prosecute in forma pauperis suits in courts of the United States of which Congress must have had knowledge, the provision in Appropriation Act June 12, 1917, c. 27, 40 Stat. 157, that courts of the United States shall be open to seamen without furnishing bonds or prepayment of, or making deposit to secure, fees or costs, for the purpose of prosecuting suits for wages or salvage, does not authorize seamen, whose libel to enforce payment of wages was dismissed, to perfect an appeal from the District to the Circuit Court of Appeals without making the deposits for costs required, for there is a broad distinction between the right to be heard in courts of justice, and the grant of authority to review the results of such hearing by proceedings in error or appeal.

Mr. Justice Brandeis and Mr. Justice Clarke, dissenting.

In the matter of ex parte petition of Hassan Abdu and others for a writ of mandamus against the clerk of a Circuit Court of Appeals. On rule to show cause. Rule discharged.

Mr. Silas B. Axtell, of New York City, for petitioners.

Mr. Robert S. Erskine, of New York City, for respondent.

Mr. Chief Justice WHITE delivered the opinion of the Court.

In the trial court the petitioners, six in number, Arabian seamen and members of the crew of a British ship, as libelants sought to enforce the payment of one-half their wages in reliance upon the provisions of section 4530, Revised Statutes, as amended by section 4 of the Act of March 4, 1915, c. 153, 38 Stat. 1165 (Comp. St. 1916, § 8322). In granting an appeal from a decree dismissing their claim the court, in view either of the provisions of the Act of Congress of July 1, 1916, c. 209, 39 Stat. 313 (Comp. St. 1916, § 1630a), or those of the Act of June 12, 1917, c. 27, 40 Stat. 157, or both, directed that the appellants be permitted to perfect their appeal without costs.

In the Circuit Court of Appeals the clerk declined to file the record without the deposit to secure costs required by the rules. The court was asked to direct the clerk to do otherwise, but for reasons stated in a brief memorandum (The Nigretia, 249 Fed. 348) it refused to do so. Assuming that this action was based solely on the view that the act of 1916 had ceased to be operative by limitation of time, relying upon the act of 1917, the request for direction to the clerk to file the record without costs or security for the same was again made to the court and refused upon the ground of want of merit in the application, that is, upon the conclusion that the act of Congress relied upon did not relieve seamen from costs in appellate courts. Leave to present a petition for mandamus against the clerk to compel him to file the record without costs was then here granted and the matter is before us on the submission of the rule to show cause consequent upon such permission and the answer of the clerk to the rule setting out the action of the court, in which answer reliance is placed upon the orders of the court which are appended and the two opinions expressed by the court on the subject.

[1, 2] The existence of ultimate discretionary power here to review the cause on

its merits and the deterrent influence which the refusal to file must have upon the practical exertion of that power in a case properly made gives the authority to consider the subject which the rule presents.[1] But that does not without more dispel the seeming confusion resulting from the fact that the remedy prayed is directed not to the court below but to its clerk and hence in form the relief sought is a mandamus to direct the clerk to disobey the order of the court, leaving the order unreviewed and unreversed. The incongruity is obvious and we cannot as a general rule sanction it. Looking, however, through form to the essence of things, as no mere independent action of the clerk as clerk is involved, but the authority exerted by the court in directing the action of the clerk complained of is the subject-matter at issue and is the only justification relied upon by the clerk in the answer to the rule, we are of the opinion that in the exercise of a sound discretion we may treat the case from that point of view, that is to say, under the circumstances consider the authority to have made the order with the clerk alone as a technical party to the proceeding.

[3] The contention that the court mistakenly refused to permit the appellate proceedings to be conducted without payment of costs is based upon a provision in the Appropriation Act of June 12, 1917, as follows:

"Provided, that courts of the United States shall be open to seamen, without furnishing bonds, or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for their own benefit for wages or salvage and to enforce laws made for their health and safety."

The provision does not in express words relate to appellate proceedings and the whole argument advanced to sustain the theory that it includes such proceedings rests upon the conception that because the provision was intended to benefit seamen by giving them access to the courts without cost, therefore by necessary implication the statute should be construed as all-embracing, that is, as giving the right to carry on appellate proceedings free from costs. But this simply assumes the proposition contended for and after all comes but to the contention that because the statute gives the right which is asserted therefore the statute should be construed as conferring it and its enjoyment consequently sustained. The error results from disregarding the broad distinction which exists between the right to be heard in courts of justice on the one hand and the necessity for the grant of authority on the other to review the results of such hearing by proceedings in error or appeal. Reetz v. Michigan, 188 U. S. 505, 507–508, 23 Sup. Ct. 390, 47 L. Ed. 563; United States v. Heinze, 218 U. S. 532, 545–546, 31 Sup. Ct. 98, 54 L. Ed. 1139, 21 Ann. Cas. 884; Lott v. Pittman, 243 U. S. 588, 591, 37 Sup. Ct. 473, 61 L. Ed. 915. This obvious distinction between the two we are of opinion in the absence of a clear and express legislative direction to the contrary excludes the possibility of giving the statute the all-embracing construction sought to be applied to it. And the correctness of this opinion is we think conclusively illustrated by a consideration of prior statutes dealing with a somewhat cognate subject and the decisions concerning the same. Act July 20, 1892, c. 209, 27 Stat. 252 (Comp. St. 1916, §§ 1626–1630); Act June 25, 1910, c. 435, 36 Stat. 866 (Comp. St. 1916, § 1626); Bradford v. Southern Railway Co., 195 U. S. 243, 25 Sup. Ct. 55, 49 L. Ed. 178; Kinney v. Plymouth Rock Squab Co., 236 U. S. 43, 35 Sup. Ct. 236, 59 L. Ed. 457. In other words, under the act of 1892 conferring a right to prosecute in forma pauperis suits in courts of the United States, which was certainly as broad in its language as the one now under consideration, it was decided in the Bradford Case that the right did not embrace appellate proceedings. And when following that decision the statute was amended by the act of 1910 so as to cause it in express terms to be applicable to appellate proceedings, the right was subjected to accompanying restrictions and safeguards which as held in the Kinney Case made the new right not absolute, but dependent not only upon the limitations which were otherwise put in the statute but also upon the exercise of a sound discretion by the appellate court. The statute before us, as we have seen, which was enacted in 1917 after the decision in the Bradford Case, contains none of the express provisions as to appellate proceedings inserted in the act of 1910. Thus if resort is to be had to legislative history and the implication of legislative intent as a means of reading into the statute that which it does not contain, a contrary result must necessarily follow, since the conclusion from considering that subject must be that the act of 1917 enacted after the Bradford Case in not expressing the right to be exempt from costs in appellate proceedings was intended to conform and give effect to the rule announced in the Bradford Case.

Rule discharged.

Mr. Justice BRANDEIS, dissenting.

I am unable to concur in the decision of the court. Congress declared without qualification: "That courts of the United States shall be open to seamen * * * for purpose of entering and prosecuting suit * * * without * * * making deposit to secure fees or costs." There being no qualification, the words, "courts of the Unit-

[1] Ex parte Crane, 5 Pet. 190, 193, 194, 8 L. Ed. 92; Chateaugay Iron Co., Petitioner, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508; Hollon Parker, Petitioner, 131 U. S. 221, 225, 226, 9 Sup. Ct. 708, 33 L. Ed. 123; Re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; In re Grossmayer, Petitioner, 177 U. S. 48, 49, 50, 20 Sup. Ct. 535, 44 L. Ed. 665.

ed States" mean all the courts in which seamen may have occasion to enter and prosecute suits. Seamen have occasion to enter and prosecute such suits in appellate courts. Consequently they should be permitted to do so "without making deposit to secure fees or costs."

Mr. Justice CLARKE joins in this dissent.

(247 U. S. 102)

CARNEY v. CHAPMAN et al.

(Argued May 1, 1918. Decided May 20, 1918.)

No. 281.

1. COURTS ⟹396(7) — SUPREME COURT—FEDERAL QUESTION.

Where, in action to quiet title, plaintiff, grantee of father of deceased Chickasaw Indian allottee, claimed deceased was a legitimate child, and hence his father was his heir, and defendant claimed as heir of deceased as being illegitimate, refusal of requests by defendant for a ruling, in effect, that a marriage of Chickasaws, although in accord with their customs, was invalid under Chickasaw Act Oct. 12, 1876, unless solemnized by a judge or preacher, and hence not validated by Act May 2, 1890, c. 182, § 38, 26 Stat. 81, 98, validating previous marriages "contracted under the laws or tribal customs of any Indian nation," opened, although somewhat remotely, a federal question, as to the proper construction of the 1890 act.

2. MARRIAGE ⟹38 — INDIANS — CURATIVE STATUTE.

Under Act of May 2, 1890, c. 182, § 38, 26 Stat. 81, 98, validating all marriages theretofore contracted under "laws or tribal customs of any Indian nation," a marriage of a Chickasaw woman in 1887 was sufficiently established by evidence that she and the man held themselves as man and wife and were reputed married, and that it was customary to disregard solemnization before a judge or preacher, despite Chickasaw Act Oct. 12, 1876, declaring that all marriages should be solemnized by a judge or preacher, since it would be going far to construe the Chickasaw statute as purporting to invalidate marriages not so solemnized.

In Error to the Supreme Court of the State of Oklahoma.

Action by J. C. Chapman, against Lottie Carney, David Alberson, and others. A judgment for plaintiff was affirmed (158 Pac. 1125), and defendant Carney brings error to the Supreme Court of the State of Oklahoma. Affirmed.

Mr. Kirby Fitzpatrick, of Oklahoma City, Okl., for plaintiff in error.

Mr. W. C. Duncan, of Ada, Okl., for defendants in error.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit by the defendant in error J. C. Chapman to recover possession of certain land and to have his title quieted against the claims of Lottie Carney, the plaintiff in error, and of the Albersons, the other defendants in error. The right of possession is immaterial now, but there was a judgment quieting the title of the plaintiff against the above named parties which was affirmed by the Supreme Court of the State and in which error is alleged by Lottie Carney. The land was allotted to John Alberson, a Chickasaw Indian, who was averred by the plaintiff to *103 be the lawful son of Charles Puller, a Chickasaw, and Louisa James, an Indian woman. She died and later Alberson died leaving Puller his sole heir, if Puller was married as alleged. Puller conveyed to the plaintiff. The defendants denied the marriage and if they were right Lottie Carney is Alberson's heir.

[1] If any federal question is presented in the case it arises under the Act of Congress of May 2, 1890, c. 182, § 38, 26 Stat. 81, 98, by which all marriages theretofore "contracted under the laws or tribal customs of any Indian nation" located in the Indian Territory are declared valid. The date of the supposed marriage was in 1887 and therefore if it complied with the terms of the act it was validated if not valid before. The plaintiff in error, after asking instructions as to what constituted a common law marriage that were given in substance, asked for another that a common law marriage was not recognized by the Chickasaws and that a marriage of Chickasaws without a compliance with their laws was void. Taking all the requests for rulings and the rulings together we are inclined to agree with the Court below that common law marriage and marriage under the customs of the tribe were used as equivalent phrases and to assume in favor of the plaintiff in error that the request means that a marriage of Chickasaws although in accord with their customs was invalid under a Chickasaw Act of October 12, 1876, unless solemnized by a judge or ordained preacher of the Gospel. This assumption would seem to carry with it the implication that the Act of Congress did not validate a marriage in accordance with still prevailing custom if no judge or preacher added his sanction, and so to ask a construction of that Act that, again by implication, was refused.

[2] In this somewhat remote way a federal question is opened, but it cannot profit the plaintiff in error. There was some evidence that Charles Puller and Louisa James held themselves out as man and wife and were re- *104 puted* married. There was evidence also* that it was customary to disregard solemnization before a judge or preacher. It would be going somewhat far to construe the Chickasaw statute as purporting to invalidate marriages not so solemnized. The Act of Congress made valid marriages under either custom or law. Whatever may be the requisites to satisfy that Act the above mentioned evidence warranted a finding that they had been complied with, as is expressly provided by statute for the case of a marriage of a white man with an Indian woman. Act of

August 9, 1888, c. 818, § 3, 25 Stat. 392 (Comp. St. 1916, § 4105). The reason for the rule is stronger here.

Judgment affirmed.

(247 U. S. 207)

FRIEDERICHSEN v. RENARD et al.

(Argued April 25 and 26, 1918. Decided May 20, 1918.)

No. 270.

1. LIMITATION OF ACTIONS ⟸127(18)—RUNNING OF STATUTE—"BEGINNING OF NEW ACTION."

The conversion of a suit in equity into an action at law, or vice versa, is not alone sufficient to constitute the beginning of a new action within the limitation statutes.

[Ed. Note.—For other definitions see Words and Phrases, Second Series, Commencement of New Action.]

2. ELECTION OF REMEDIES ⟸3(3) — WHAT CONSTITUTES.

Where plaintiff, who sued to cancel a contract for the exchange of lands and a deed made thereunder, might have prayed in the alternative for monetary relief, he cannot be deemed to have elected a remedy inconsistent with such relief, by an amendment praying affirmance of the contract and monetary relief, filed on the law side of the court, pursuant to an order under equity rule 22 (33 Sup. Ct. xxiv) transferring the cause.

3. LIMITATION OF ACTIONS ⟸127(18) — PLEADING—AMENDMENTS—"NEW CAUSE OF ACTION."

Where a bill to cancel a contract for the exchange of lands, and a deed executed thereunder for fraud was transferred to the law side of the court under equity rule 22 (33 Sup. Ct. xxiv), because plaintiff had put it out of his power to restore defendants to their former position, an amended petition, setting up the same transaction and fraud, cannot be regarded as stating a new cause of action, distinct from that set up in the bill, but must be considered a continuation of the original suit, and so not affected by the running of limitations since its commencement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, New Cause of Action.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Action by John H. Friederichsen against G. H. Renard, as executor of the estate of Edward Renard, deceased, and others. A judgment for defendants was affirmed by the Circuit Court of Appeals (231 Fed. 882, 146 C. C. A. 78), and plaintiff brings certiorari. Reversed and remanded, with directions.

Mr. William V. Allen, of Madison, Neb., and Mr. W. C. Bibb, of Louisa, Va., for petitioner.

Mr. R. E. Evans, of Dakota City, Neb., and Mr. William D. Funk, of Bloomfield, Neb., for respondents.

*208 *Mr. Justice CLARKE delivered the opinion of the Court.

On March 12, 1908, the petitioner, Friederichsen, contracted in writing to exchange land which he owned in Nebraska for land in Virginia owned by the respondent, Mary C. Gilmore, who in the transaction acted through her agent, Edward Renard, the decedent of the respondent G. H. Renard. We shall refer to the parties as they were in the courts below, Friederichsen as plaintiff, and Gilmore and Renard as defendants.

On September 22, 1908, Friederichsen filed a bill in equity in the United States District Court for the District of Nebraska, praying for a decree canceling the contract and the deed made pursuant thereto and for damages sustained, on the ground of fraud practiced upon him.

Defendants answered denying the fraud charged, and on August 20, 1912, a master, theretofore appointed in the case, reported that Friederichsen at the time of the exchange "was below the average in mental ability"; that he had been induced to enter into the contract by the fraudulent representations of Renard, as alleged; and that he had sustained damage in the sum of $5,880. But the master also reported that Friederichsen, after taking possession of the Virginia lands, after filing his bill in the case, and after having had time to discover the condition and value of the land, had cut down a considerable amount of timber growing thereon. *209

On the coming in of this report, the court on September 19, 1913, found that the plaintiff was not entitled to equitable relief because he had ratified the contract of exchange by cutting timber on the Virginia lands, thereby preventing the defendants from being placed in statu quo, but that his remedy was at law for damages, and thereupon it was ordered: that the master's report be vacated; that pursuant to equity rule 22 (33 Sup. Ct. xxiv) the cause be transferred to the law side of the court; and "that the parties file amended pleadings to conform with an action at law."

Complying with this order, on September 25, 1913, the plaintiff filed an "amended petition" on the law side of the court, and, upon the same facts stated in the original bill in equity, prayed for a judgment for damages. The defendants filed answers the same in substance as those filed in the equity suit, but adding the defense that the cause of action stated in the amended petition was barred by the Nebraska four-year statute of limitations.

When the case came on for trial, and after it was stipulated by counsel for the defendants that the plaintiff had introduced sufficient evidence to entitle him to recover a verdict, unless barred by the statute of limitations, it was ruled "that the cause of action stated in the plaintiff's amended petition was barred by the statute of limitations of the state of Nebraska and that the filing of the amended petition did not relate

back to the commencement of the action in such a way as to prevent the bar of the statute," and a verdict was directed for the defendants. The judgment entered on this verdict affirmed by the Circuit Court of Appeals for the Eighth Circuit, is now before us for review on writ of certiorari.

*210 Thus the case presents for decision the single question, whether the filing of the "amended petition" on the law*side of the court on September 25, 1913, was the commencement of a new action more than four years after the fraud was discovered (which must have been prior to the filing of the bill in equity on September 22, 1908), which was therefore barred, or whether the proceeding at law was but pursuing toward a conclusion, in another form, the same cause of action stated in the original bill, so that the suspension of the statute of limitations continued, which began with the date of the service of the subpœna in chancery.

It is argued by the respondents that in the bill in equity the petitioner disaffirmed, while in the amended petition he affirmed, the contract of exchange; that the latter, for this reason, states a new and different cause of action from the former, and that, against this new cause of action, the running of the statute of limitations was not arrested until the amended petition was filed, and that then it had become barred.

But the allegations of fraud in the two papers are the same in substance, and practically the same in form, the only substantial difference between them being that the prayer for relief in the bill is for mutual return of lands, with incidental damages, while in the amended petition, it is for damages alone. The cause of action is the wrong done, not the measure of compensation for it, or the character of the relief sought, and, considered as a matter of substance, the change in the statement of that wrong in the amended petition cannot in any just sense be considered a new or different cause of action.

[1] It is settled upon reason and authority that the conversion of a suit in equity into an action at law or vice versa is not alone sufficient to constitute the beginning of a new action and that with respect to the statute of limitations it is a mere incident in the progress of the original case.

*211 It was so held by the Supreme Court of Nebraska long*prior to the origin of the controversy we have here, when an action in ejectment was converted into a suit to redeem (McKeighan v. Hopkins, 19 Neb. 33, 26 N. W. 614), and again, in Butler v. Smith, 84 Neb. 78, 120 N. W. 1106, 28 L. R. A. (N. S.) 436, in a similar case in 1909, the question was held not to be an open one.

In Smith v. Butler, 176 Mass. 38, 57 N. E. 322, followed with approval in 1917 in Reynolds v. M., K. & T. R. R. Co. (Mass.) 117 N. E. 913, the Supreme Judicial Court of Massachusetts declared that it had been the settled practice in that commonwealth for a period of over fifty years to allow actions at law to be amended into suits in equity, in place of putting the plaintiff to a new suit, and to "allow those amendments on the ground that if a new suit were brought, it would be barred by the statute." It will suffice to add that in Schurmeier v. Connecticut Mutual Life Ins. Co., 171 Fed. 1, 96 C. C. A. 107, the Circuit Court of Appeals, a judgment of which we are here reviewing, held that the amendment of a law action into one in equity for the express purpose of meeting an anticipated defense of the statute of limitations, did not change the cause of action and that the amendment related to the time of the commencement of the action.

[2] There remains to be considered the ground on which the lower courts chiefly rested their judgment, viz.: That, in disaffirming the contract by his suit in equity, the petitioner elected to pursue one of two inconsistent remedies open to him, until the period of the statute of limitations had expired, and that he therefore cannot escape that bar when afterwards, by amendment of his pleadings, he seeks to affirm the contract and recover damages.

No matter what may be thought of the merit of the doctrine of election of remedies, it is a long observed and deeply entrenched rule of procedure. But, for obvious reasons, it has never been a favorite of equity and it has been specifically decided by this court that the two forms of relief pursued, before and after the amendment of the*pleadings in *212 this case, are not so inconsistent but that both may be prayed for in one bill in equity and either granted, as the evidence and the equities of the case may require. Thus, in Hardin v. Boyd, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. Ed. 1141, in a suit to annul a land contract for fraud the trial court permitted an amendment to the bill, adding a prayer in the alternative for a decree affirming the contract, granting a lien for the unpaid purchase money and for foreclosure. The decree in the case was entered on the alternative prayer.

This court affirmed that decree on principle and authority holding that:

"Under the liberal rules of chancery practice which now obtain, there is no sound reason why the original bill in this case might not have been framed with a prayer for the cancellation of the contract upon the ground of fraud, and an accounting between the parties, and, in the alternative, for a decree which, without disturbing the contract, would give a lien on the lands for unpaid purchase money. * * * The amendment had no other effect than to make the bill read just as it might have been originally prepared consistently with the established rules of equity practice. It suggested no change or modification of its allegations, and, in no just sense, made a new case."

In view of the new equity rules of 1912, especially rule 22, and of the Act of Congress of March 3, 1915 (38 Stat. at L. 956, c. 90 [Comp. St. 1916, §§ 1251a, 1251b, 1251c]),

it cannot be said that the power of courts of equity to amend pleadings, or to permit them to be amended, to accomplish the ends of justice, has been curtailed since the Hardin Case was decided in 1884.

Thus in express terms was it decided that a properly framed prayer would have allowed the petitioner the relief in equity which he sought before the amendment or, in the alternative, that for which he now prays, and to this it must be added, that the order *213 which converted his suit in equity into an action at law was made in the*exercise of a chancellor's discretion under warrant of an equity rule.

At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended, as it must be in order to reach the case at bar, for here the "amended petition" was not filed by petitioner's counsel of their own motion, but on the order of the court, entered in its discretion, to promote the ends of justice.

Thus, we are brought to the conclusion that since the two remedies asserted by the petitioner were alternative remedies, and since the order made, requiring the conversion of the suit in equity into one at law, was entered by the court sitting in chancery, for us to affirm the judgment of the Circuit Court of Appeals that the petitioner, in obeying the order of the trial court, made a fatal choice of an inconsistent remedy, would be to subordinate substance to form of procedure, with the result of defeating a claim which the respondents stipulated had been sufficiently established to justify a verdict against them. This we cannot consent to do.

[3] The questions of procedure being thus cleared away, there is little further difficulty with the case. As we have seen the "amended petition" was not filed in a new case but was simply a step forward in progress toward settlement of the original controversy; the allegations of fact are precisely the same in substance, and almost the same in form, as they were in the original bill and therefore looking to substance and realities, they cannot be regarded as stating a new cause of action. The case falls clearly within the scope of the principle of the decisions of this court in Texas & Pacific Ry. Co. v. Cox, 145 U. S. 593-604, 12 Sup. Ct. 905, 36 L. Ed. 829; Atlantic & Pacific R. R. Co. v. Laird, 164 U. S. 393, 401, 17 Sup. Ct. 120, 41 L. Ed. 485; M., K. & T. Ry. Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; Seaboard Air Line Ry. v. Renn, 241 U. S. 290, 36 Sup. Ct. 567, 60 L. Ed. 1006; Washington Ry. & El. Co. v. Scala, Adm'x, 244 U. S. 630, 640, 37 Sup. Ct. *214 654, 61 L. Ed. 1360.

*The decision in Union Pacific Ry. Co. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, is so clearly distinguished in the Wulf Case, supra, from the principle of these decisions that additional comment would be superfluous.

It results that the judgments of the Circuit Court of Appeals and of the District Court must be reversed and the cause remanded to the latter for further proceedings in conformity with this opinion.

(247 U. S. 142)

MARIN v. AUGEDAHL.

(Submitted March 18, 1918. Decided May 20, 1918.)

No. 227.

1. JUDGMENT ⊂⊃819—FOREIGN JUDGMENT—COLLATERAL ATTACK—CONCLUSIVENESS.

Where, in sequestration proceedings under Rev. Laws Minn. 1905, §§ 3173, 3184–3187, against a Minnesota corporation by a judgment creditor on whose judgment execution had been returned unsatisfied, a Minnesota district court, which had jurisdiction of the corporation, entered an order appointing a receiver and laying an assessment on stockholders generally, such order is not subject to collateral attack in a North Dakota court on the ground that, the corporation being a manufacturing corporation, the assessment was prohibited by Const. Minn. art. 10, § 3, declaring that each stockholder in any corporation, excepting those organized for manufacturing or mechanical purposes, shall be liable to the amount of stock held and owned by him, for the district court was expressly given jurisdiction over such proceedings, and its order was at the most merely erroneous.

2. JUDGMENT ⊂⊃701—PERSONS CONCLUDED—REPRESENTATION OF STOCKHOLDERS.

In sequestration proceedings against an insolvent corporation under Rev. Laws Minn. 1905, §§ 3173, 3184–3187, a judgment levying an assessment against stockholders is, in accordance with the general rule, deemed binding on them, though they were not formal parties to the proceeding, upon the theory that they were represented by the corporation.

3. JUDGMENT ⊂⊃818(2)—FOREIGN JUDGMENT—FULL FAITH AND CREDIT.

Where a Minnesota district court by the law of its organization had jurisdiction over a sequestration suit, in which an assessment was levied against stockholders of an insolvent corporation, and the stockholders were represented by the corporation, which was duly served, the court had jurisdiction, both over the subject-matter and the person, so that, when such judgment was made the basis of an action against a stockholder in a foreign state, it should, under the full faith and credit clause of the federal Constitution, be given the same force as if rendered by a competent court of the foreign state.

Mr. Justice Clarke, Mr. Justice Pitney, and Mr. Justice Brandeis, dissenting.

In Error to the District Court of Cass County, State of North Dakota.

Action by W. A. Marin, as receiver of the American Biscuit Company of Crookston, an insolvent corporation, against Ole J. Augedahl. A judgment sustaining a demurrer to the complaint and dismissing the action with prejudice was on plaintiff's appeal affirmed by the Supreme Court of North Dakota (32 N. D. 536, 156 N. W. 101), and plaintiff brings error. Reversed.

Mr. Edward Engerud, of Fargo, N. D., and Mr. Arthur A. Miller, of Crookston, Minn., for plaintiff in error.

Mr. Emerson H. Smith, of Fargo, N. D., for defendant in error.

*144 *Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This was an action at law in North Dakota by a receiver of an insolvent Minnesota corporation to enforce against one of its stockholders an order of a Minnesota court laying an assessment on the stockholders generally. The defendant prevailed because the North Dakota court was of opinion that the order laying the assessment was made in the absence of such jurisdiction as was essential to bind him (32 N. D. 536, 156 N. W. 101), and the question for decision here is whether that court gave to the laws and proceedings in Minnesota the full faith and credit to which they are entitled under the Constitution and laws of the United States. See Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986; Tilt v. Kelsey, 207 U. S. 43, 51, 28 Sup. Ct. 1, 52 L. Ed. 95.

*145 Under the law of Minnesota, where an execution on a judgment against a corporation of that state is returned unsatisfied, the court, in a suit by the judgment creditor, may sequestrate the property of the corporation, appoint a receiver of the same, cause the property to be sold and apply the proceeds to the payment of the receivership expenses and the corporate debts. And where in such a suit the receiver presents a petition asserting that "any constitutional, statutory or other liability of stockholders" exists, and that resort thereto is necessary, the court must appoint a time for a hearing on the petition and cause such notice thereof as it deems proper to be given by publication or otherwise. If from the evidence presented at the hearing, including such as may be produced by any creditor or stockholder appearing in person or by attorney, it appears that there is a liability of stockholders and that the available assets are not sufficient to pay the expenses and debts, the court is required to make an order ratably assessing the stockholders on account of such liability and to direct that the assessment be paid to the receiver. If payment be not made, the duty is laid on the receiver of enforcing the same by actions against the defaulting stockholders, "whether resident or nonresident, and wherever found." The court's order is expressly made "conclusive as to all matters relating to the amount, propriety, and necessity of the assessment." Rev. Laws 1905, §§ 3173, 3184–3187.

According to a settled line of local decisions the proceeding on the receiver's petition for an assessment on the stockholders is not an independent suit, but simply a step in the original sequestration suit (Ueland v. Haugan, 70 Minn. 349, 73 N. W. 169) and the conclusive effect of the court's order is not dependent on the personal presence of the stockholders, because they are so far in privity with the corporation as to be represented by it, and a judgment against it is in effect a judgment against them (Hanson v. Davison, 73 Minn. 454, 462, 76 N. W. 254; *146 Town of Hinckley v. Kettle River R. R. Co., 80 Minn. 32, 39, 82 N. W. 1088. But while the order is conclusive "as to all matters relating to the amount, propriety and necessity of the assessment"—matters which concern all stockholders alike—it leaves open the questions whether a particular person is a stockholder or holds the number of shares attributed to him, whether he has discharged his liability or has a claim which may be set off against the assessment, and whether he has any other defense which is "personal to himself." Straw & Ellsworth Co. v. Kilbourne Co., 80 Minn. 125, 136, 83 N. W. 36.

As so applied, the Minnesota law has been sustained by this court against various claims that as to stockholders it infringes the due process clause of the Fourteenth Amendment; and we have also recognized and enforced the duty of courts of other states, under the due faith and credit clause of the Constitution and the legislation of Congress on that subject, to give effect to orders of Minnesota courts making assessments under that law, although the stockholders were not personally made parties to the suits wherein the orders were made. Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292; Selig v. Hamilton, 234 U. S. 652, 34 Sup. Ct. 926, 58 L. Ed. 1518, Ann. Cas. 1917A, 104. And see Royal Arcanum v. Green, 237 U. S. 531, 543–545, 35 Sup. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771.

[1] The order with which we here are concerned was made by a Minnesota court in a sequestration suit against a Minnesota corporation. Besides being a court of general jurisdiction, both at law and in equity, the court making the order had full jurisdiction of that suit. The suit was begun by a judgment creditor after an execution on his judgment was returned unsatisfied. The defendant corporation had its principal place of business in the county where the suit was begun, and was brought into the suit by due service of process. Thus much is not questioned. Nor is it questioned that a receiver was appointed, or that by a petition in the *147 suit he sought an assessment on the stockholders, or that public notice of the hearing on the petition was given as the court directed, or that there was a hearing as contemplated. But it is insisted that the court was without jurisdiction to make the assessment and that in consequence the order is open to collateral attack. In support of this contention it is said that in making the assessment

the court evidently proceeded on the mistaken assumption that the corporation was one on whose stockholders a liability was imposed by section 3 of article 10 of the state Constitution,[1] whereas in truth the corporation was one of a class whose stockholders were excepted from the operation of that provision. But is this anything other than saying that the court erred in ruling on a matter of substantive law regularly presented to it for decision in a pending suit? The constitutional provision does no more than to declare a general rule of liability and to except therefrom stockholders of a certain class of corporations. It does not purport to deal with the jurisdiction of courts—their power to hear and determine—but only to prescribe in a general way the relative rights of stockholders and creditors. It therefore must be taken as going to the merits rather than to the jurisdiction. The Minnesota courts evidently so regard it; and they also treat the question whether a particular corporation belongs to one class or another as a matter the decision of which in a suit against the corporation is binding on the stockholders in subsequent litigation with the latter. Merchants' National Bank v. Minnesota Thresher Manufacturing Co., 90 Minn. 144, 149, 95 N. W. 767.

Four Minnesota cases are cited as making against these views, but we do not so understand them. In Dwinnell v. Kramer, 87 Minn. 392, 92 N. W. 227, a policy holder in an *insolvent mutual fire insurance company, against whom a general assessment on the policy holders was sought to be enforced, successfully defended on the ground that his policy did not conform to the mutual plan, but was an "ordinary contract of insurance" issued on receipt of a cash premium. The defense plainly was personal to him. Swing v. Humbird, 94 Minn. 1, 101 N. W. 938, arose under an Ohio law and not the law of Minnesota. An assessment made in Ohio on the policy holders of an insolvent fire insurance company was sought to be enforced in Minnesota, and the defendant prevailed because his policy had been fully paid for and had terminated prior to the assessment. That also was a personal defense. In Swing v. Red River Lumber Co., 105 Minn. 336, 117 N. W. 442, an attempt was made to enforce a similar Ohio assessment, but it failed for the reason, among others, that when the defendant's policy was issued the insurance company was doing business in Minnesota in violation of the laws of that state—a matter which was personal to him and to other Minnesota policy holders if there were such. In Finch, Van Slyck & McConville v. Vanasek, 132 Minn. 9, 155 N. W. 754, there was a direct appeal from an order levying an assessment on stockholders in a sequestration suit. The character of the corporation was not in controversy, and the "only controverted question before the [trial] court was the amount to be levied." There also was a question in the appellate court as to whether the trial should have been to a jury. With this in mind, it seems plain that what was said can have no particular bearing here.

Had the Minnesota court in this instance held that the corporation was in the excepted class and then denied the receiver's petition, is it not certain that the order, if neither vacated nor reversed, would have settled conclusively the nonexistence of the asserted liability? And if in a subsequent suit the receiver or the creditors represented by him had again asserted such a liability on the part of *the stockholders, is there any doubt that the latter could have relied safely on the order as a prior adjudication in their favor? The answers seem obvious. Charged with the duty, as the court was, of ascertaining whether there was any liability to be enforced, it was its province to consider and decide every question which was an element in that problem, including the one of whether the corporation was in the excepted class. That question required solution and the power to solve it was lodged in the court. The court did solve it, for, as is said in Neff v. Lamm, 99 Minn. 115, 117, 108 N. W. 849, 850, the order making the assessment is "necessarily based upon a determination that the corporation is of the class whose stock is assessable, and not of the excepted class." Whether the decision was right or wrong is not open to discussion here. If wrong it was subject to correction on proper application to the court which made it, or on appeal, but it was not void or open to collateral attack. Deposit Bank v. Frankfort, 191 U. S. 499, 510, 512, 24 Sup. Ct. 154, 48 L. Ed. 276; Noble v. Union River Logging R. R. Co., 147 U. S. 165, 172–174, 13 Sup. Ct. 271, 37 L. Ed. 123; Dowell v. Applegate, 152 U. S. 327, 340, 14 Sup. Ct. 611, 38 L. Ed. 453; In re First National Bank, 152 Fed. 64, 68–70, 81 C. C. A. 260, 11 Ann. Cas. 355. Of course, it was the duty of the court to have due regard for the exception in the constitutional provision because of its bearing on the merits; and if proper effect was not given to it an error of law was committed, but nothing more. The true view of the subject is indicated in the following excerpts from our opinion in Fauntleroy v. Lum, 210 U. S. 230, 234, 237, 28 Sup. Ct. 641, 642 (52 L. Ed. 1039):

"No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty of the court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless *

[1] Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him.

reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction of the court dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense. When it affects a court of general jurisdiction and deals with a matter upon which that court must pass, we naturally are slow to read ambiguous words, as meaning to leave the judgment open to dispute, or as intended to do more than to fix the rule by which the court should decide."

"A judgment is conclusive as to all the media concludendi, United States v. California & Oregon Land Co., 192 U. S. 355 [24 Sup. Ct. 266, 48 L. Ed. 476] and it needs no authority to show that it cannot be impeached either in or out of the state by showing that it was based upon a mistake of law."

[2] Whether the stockholder against whom the order is here sought to be enforced was personally a party to the suit in which it was made does not appear; nor is it material. Under the rule in Minnesota, as also the general rule, he was sufficiently represented by the corporation to be bound by the order in so far as it determined the character and insolvency of the corporation and other matters affecting the propriety of a general assessment such as was made. This court frequently has recognized and applied that rule. In Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184, an assessment ordered by a Virginia court having the corporation before it was sustained as against stockholders residing in another state and not personally brought into the suit, the ground of decision being that "a stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member." Of similar import are Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220; Glenn v. Liggett, 135 U. S. 533, 10 Sup. Ct. 867, 34 L. Ed. 262; Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 336, 16 Sup. Ct. 810, 40 L. Ed. 986; Hancock National Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619; Bernheimer v. Converse, 206 U. S. 516, 532, 27 Sup. Ct. 755, 51 L. Ed. 1163; Royal Arcanum v. Green, 237 U. S. 531, 544, 35 Sup. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771.

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[3] No doubt the order might be attacked collaterally by showing an absence of jurisdiction of person or subject-matter. The cases of Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897, and National Exchange Bank v. Wiley, 195 U. S. 257, 25 Sup. Ct. 70, 49 L. Ed. 184, hold nothing more. Neither gives any warrant for saying that the order may be attacked collaterally by showing that error was committed in deciding the merits. One dealt with a judgment by a court having no jurisdiction whatever over the subject-matter, and the other dealt with a personal judgment rendered without service of process or personal appearance, but confessed under a warrant of attorney which did not cover it—in other words, a judgment rendered without jurisdiction of the person through a representative or otherwise. Both are inapposite here. By the law of its organization the Minnesota court was empowered to take cognizance of, hear and determine, the suit to sequestrate and the receiver's petition for an assessment. Thus it had jurisdiction of the subject-matter. Cooper v. Reynolds, 10 Wall. 308, 316, 19 L. Ed. 931. The corporation was before it in virtue of process duly served, and the stockholders, as has been said, were represented by the corporation. Thus there was jurisdiction of the person.

Under these circumstances, the order is entitled, under the Constitution and laws of the United States, to the same faith and credit in the courts of North Dakota as by law or usage are given to such an order in the courts of Minnesota. Hancock National Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619; Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292. In Minnesota, as before said, it is conclusive of all matters relating to the propriety of the assessment, including the questions of the character and insolvency of the corporation, and therefore it should have been held similarly conclusive in North Dakota. The court of that state declined to regard it as determining the character of the corporation, and so failed to give it the faith and credit to which it is entitled.

*152

Judgment reversed.

Mr. Justice CLARKE, dissenting.

The importance of the question involved in this case leads me to state somewhat fully my reasons for dissenting from the decision of the court.

The plaintiff in error, as receiver of the American Biscuit Company of Crookston, an insolvent corporation, organized under the laws of the state of Minnesota, instituted suit in a district court of North Dakota against the defendant in error, a stockholder in the company, to recover upon an order, treated in the record as a judgment, entered by, an inferior, a district court of the state of Minnesota, which is described in the amended complaint as follows:

"The said court * * * made an order in said proceedings ordering and assessing against each and every share of the capital stock of said American Biscuit Company of Crookston the sum of one hundred dollars ($100) and against the persons and parties liable as such stockholders * * * and further ordering that each and every party or person liable as such stockholder pay to this plaintiff as receiver of said insolvent corporation the sum of one hundred dollars ($100) for each and every share of stock on which he should be liable," etc.

It is further alleged that the defendant is the owner of one share of stock of the said company of the par value of $100 and that he has not paid to the court the assessment made.

The complaint sets out in detail the statutes under which the Minnesota court pro-

*153 ceeded and alleges that the Biscuit Company—

"by its articles of incorporation was empowered to manufacture and sell biscuits, crackers, candies, confections, cereals, and other kindred products or supplies [necessary] or component parts thereof, and ["to purchase or own" probably omitted] the machinery, fixtures, equipment and supplies necessary for the manufacturing and dealing in the same * * * and to maintain and operate stores and depots for the sale and disposal of its products and the purchase of its supplies, and in general to do and perform all matters and things necessary and proper in the successful conducting of the said business."

The district court of North Dakota sustained a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and its judgment was affirmed by the Supreme Court of the state.

The Constitution of Minnesota in effect at the time of the transactions involved in the case contains the following provision:

Article 10, section 3: "Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him."

It is admitted that this is the only warrant for the Minnesota order, which was for the amount of the personal or double liability of stockholders.

The theory on which the North Dakota courts proceeded was that the complaint showed that the Biscuit Company was a manufacturing corporation such that no double liability could attach to its stockholders, and that therefore the Minnesota court did not have jurisdiction, under the Constitution and laws of that state, to enter an order which precluded the defendant from showing that he was not, and could not be, liable to a valid double liability assessment.

*154 The distinction between provisions of law which are jurisdictional and those which are not, has not been, perhaps cannot be, made the subject of hard and fast definition. A much quoted statement is that the distinction, while difficult of application, is between "a rule of law for the guidance of the court and a limit set to its power." Interstate Commerce Commission v. Northern Pacific Ry. Co., 216 U. S. 538, 544, 30 Sup. Ct. 417, 54 L. Ed. 608; Fauntleroy v. Lum, 210 U. S. 230, 235, 28 Sup. Ct. 641, 52 L. Ed. 1039.

In the opinion of the court it is said that the district court which entered the order sued on is a court of general jurisdiction. As a general statement this may be accepted, but when that court entered the order we are here considering it was not acting as a court of general jurisdiction, but—as we shall see, from the decisions of the Supreme Court of Minnesota—as a statutory court of narrowly limited powers, authorized to enter orders "conclusive" in specifically defined respects. As a court of general jurisdiction, and independent of the statute under which the court was acting, its receiver could not have maintained this action in North Dakota. Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380.

In the case at bar we are dealing with a constitutional provision, obviously intended for the encouragement of manufactures in the state of Minnesota, which places it beyond the power of the Legislature to attach double liability to holders of stock in any manufacturing corporation organized under the laws of that state.

Shall it be said that this, clearly a limitation on the power of the Legislature, is not also a limitation on the power of the Minnesota courts? That it is a jurisdictional limitation upon the Legislature but was only a rule for the guidance of the court, the jurisdiction of which, when entering the order involved, was determined by the act of the Legislature? It is not merely a rule to guide courts in determining whether stockholders in manufacturing corporations are subject to double liability, for it prohibits both the Legislature and the courts from imposing such *155 liability upon stockholders in such corporations under any circumstances and is therefor a limitation upon the power of courts as certainly as it is a limitation on legislative power.

The validity, in a proper case, of such an order as was entered by the Minnesota court, and the right of such a receiver to maintain a suit upon it in a foreign state to collect from stockholders resident therein, have both been sustained by this court. Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292. But in each of these cases it was expressly found that the insolvent company was within the general terms of section 3, art. 10, of the Minnesota Constitution, and that therefore personal liability attached to its stockholders.

Notwithstanding this fact, the defendant in error contends that the Minnesota court was without jurisdiction to render the order sued upon, and argues in substance as follows:

(1) That the Minnesota court had authority to render such a "judgment" only as against stockholders in other than corporations organized for manufacturing or mechanical business.

This is not contested by the plaintiff in error in argument, but the answer to it, relied upon, is that the first question confronting the Minnesota court hearing the petition of creditors for the assessment was whether the Biscuit Company was a corporation whose stockholders were subject to double liability; that the order making the assessment could have been rendered only upon a holding that it was such a corporation; and that such an order, not appealed from, is conclusive as to this question, upon all stockholders.

(2) That the character of the corporation as pleaded shows it to have been a manufacturing company, that therefore no personal liability attached to its stockholders and that *156 thereby the Minnesota court is shown to have been without jurisdiction to render the "judgment" sued upon.

This contention also is not contested by the plaintiff in error, who contents himself, again, with relying upon the implication springing from the rendering of the Minnesota order.

It seems clear enough that a corporation "empowered to manufacture and sell biscuits, crackers, candy, etc., and to own and use the machinery, fixtures, equipment, and supplies necessary for the manufacturing and dealing in the same" must be classed as one "organized for the purpose of carrying on" a "manufacturing business."

But the Supreme Court of Minnesota has placed this conclusion beyond discussion.

In Senour Mfg. Co. v. Church Paint Mfg. Co., 81 Minn. 294, 84 N. W. 109, it is held:

"In proceedings to enforce the personal liability of stockholders for the debts of the corporation, the articles of association are the sole criterion as to the purposes for which the corporation was formed."

And corporations organized for purposes stated as follows have been held by that court to be manufacturing corporations such that they came within the constitutional exception, so that personal liability did not attach to holders of stock in them, viz., companies organized for:

"The manufacture of painters' materials and supplies," Senour Case, supra; "for the manufacturing or brewing of lager beer, and selling and disposing of same," Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28, 67 N. W. 652; "for the manufacture of cloth of every description and the sale of cloth so manufactured," Nicollet National Bank v. Frisk-Turner Co., 71 Minn. 413, 74 N. W. 160, 70 Am. St. Rep. 334; "to produce and create water, steam and other motive power for transmission and use as may be desirable for any legitimate purpose," Cuyler v. City Power Co., 74 Minn. 22, *157 76 N. W. 948; "for the purpose of generating electricity for distribution to the public," Vencedor Investment Co. v. Highland Canal & Power Co., 125 Minn. 20, 145 N. W. 611.

The test prescribed by the Supreme Court of Minnesota is, whether the entire business which the corporation is authorized to engage in is manufacturing and disposing of its products and such incidental business as may reasonably be necessary for the purposes of its organization. Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28, 31, 67 N. W. 652. Again, and obviously, in Nicollet National Bank v. Frisk-Turner Co., 71 Minn. 413, 74 N. W. 160, 70 Am. St. Rep. 334, it was held that the buying of raw materials and the selling of manufactured products are within the scope of the incidental powers of a manufacturing corporation, and do not constitute doing business other than the manufacturing business authorized. Clearly the Biscuit Company meets the constitutional requirement thus interpreted.

The difference between the case at bar and the Bernheimer and Converse Cases, supra, is manifest and fundamental. These two cases were concerned with the affairs of the same corporation, and the Supreme Court of Minnesota held that on their face the articles of incorporation of the company provided for the purchase of the capital stock, evidences of indebtedness and assets of another corporation and also for a manufacturing purpose; that the former business was not incidental to the latter and that, therefore, the company not being organized exclusively for a manufacturing purpose, did not come within the constitutional exception and that the personal liability attached to the stockholders. With this conclusion this court expressed itself satisfied in both cases.

The question remains whether in the proceeding in which the order relied upon was entered, the Minnesota court had jurisdiction to render and actually did render an order such that a stockholder when sued upon it, either in Minnesota or in another state, would not have open to him the defense that the insolvent corporation was of *158 such character that double liability did not attach to the owners of its stock.

That the court did not have such jurisdiction and did not enter such an order in this case seems to me clear for the reasons following, viz.:

In Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897, a decision obviously "rendered on great consideration," prior decisions dealing with the full faith and credit clause of the Constitution were carefully reviewed, and it was there decided that when the question of jurisdiction is appropriately presented the record of a judgment rendered may, constitutionally, be assailed in a collateral proceeding to enforce it in another state, even as to facts therein stated to have been passed upon by the court. This decision has been repeatedly affirmed and followed, and in National Exchange Bank v. Wiley, 195 U. S. 257, 25 Sup. Ct. 70, 49 L. Ed. 184, it was accepted as authority sufficient for holding that a judgment by confession under warrant of attorney could be collaterally attacked in a foreign state by showing that the plaintiff in whose favor it was rendered in an Ohio court of general jurisdiction was not the owner of the note in suit at the time, and that the court entering it was, therefore, without jurisdiction, although the rendering of the judgment involved, or implied, the finding that the plaintiff was then the owner of the note.

These authorities will suffice to illustrate the scope of the established rule that a judgment sued on in a foreign state may be shown in defense to have been entered by the court rendering it without jurisdiction, regardless of the form which such judgment make take on.

With this rule in mind let us examine the

character and scope of the "order" sued upon in this case.

The order was entered in a special statutory proceeding of a character such that the Supreme Court of Minnesota has declared that it is intended to be "summary and without formal pleadings and not controlled by all the forms usually incident to judicial procedure" (132 Minn. 9, 12, 155 N. W. 754); the hearing in such cases is upon "such notice as it [the court] deems proper" by publication or otherwise to be given"; upon the hearing the court "shall receive and consider such evidence by affidavit or otherwise as may be presented by the receiver, or by any creditor, officer or stockholder appearing in person or by attorney"; and the statute expressly provides that:

"Such order shall be conclusive as to all matters relating to the amount, propriety and necessity of the assessment, against all parties therein adjudged liable upon, or on account of, any stock or shares of such corporation, whether appearing or being represented at the hearing or not or having notice thereof or not." Chapter 272, § 5, General Laws of Minn. 1899.

That the conclusive character of the order entered in such a proceeding has been strictly confined by the Minnesota Supreme Court to the respects in which the statute just quoted declares it shall be conclusive, leaving all other defenses open to the stockholder, is shown by the following decisions:

The act in force when the order now under discussion was entered was passed in 1899 and in the following year the Supreme Court of Minnesota sustained its constitutionality in Straw & Ellsworth Manufacturing Co. v. L. D. Kilbourne Boot & Shoe Co., 80 Minn. 125, 83 N. W. 36, a case cited with approval by this court in both the Bernheimer and Converse Cases, supra. It was there held as follows:

"Although the court inquires into the amount of the liabilities as well as to what will probably be realized out of the assets, its sole determination is that it is necessary and proper that an assessment of a given amount shall be levied against each share of stock. That, and that only, is the ultimate issuable fact to be found by the court.

"The plain purport of sections 3 and 5 is that after an order of assessment has been duly made, and the receiver has sued an alleged stockholder to recover upon the assessment, the order cannot be attacked in that action upon the ground that the assessment was unnecessary or excessive, or upon the ground that the defendant was not actually [made] a party to, or personally notified of, the hearing upon which the assessment was made. * * *

"But, as we have heretofore intimated, the stockholders are not concluded in all respects by the determination of the court, nor is that the fair meaning of chapter 272, § 5. A person sued as a shareholder may show, if he can, that he is not a shareholder at all, or that he is not the holder of so large an amount of stock as is alleged, or that he has discharged his liability, or that he has a claim against the corporation which he may, in law or equity, set off against the claim or judgment in assessment, or he may make any other defense which is personal to himself."

Again, in its latest construction of the act, in 1916, in Finch, Van Slyck & McConville v. John F. Vanasek et al., 132 Minn. 9, 12, 155 N. W. 754, 755, the court uses this language:

"It was intended by the statute that the proceeding should be summary and without formal pleadings, and it is not controlled by all of the forms usually incident to judicial procedure. The court under the statute deals in the main with probabilities, and is not authorized to determine any fact, other than that of insolvency and the amount of the assessment to be made, which in any way precludes the stockholders in a subsequent action brought to enforce the assessment. The assessment is but preliminary to such an action and therein the stockholders may present all matters that may be available to them in defense. Straw & Ellsworth Mnfg. Co. v. L. D. Kilbourne Boot & Shoe Co.," supra.

Thus is the expression in the earlier case, "He [the stockholder] may make any other defense personal to himself," interpreted in this later case as meaning "all matters that may be available to them [the stockholders] in defense."

During the sixteen years between these two decisions that court had under consideration the scope of several such "orders" [following the language of the act, the court habitually refers to them as "orders" not "judgments"] and it has expressed its conclusions as follows:

In Dwinnell v. Kramer, 87 Minn. 392, 92 N. W. 227 (1902) in a suit upon an assessment order, made under the act we are considering, against the holder of a policy in a mutual insurance company—there is no "difference, in principle in respect to the question now under consideration, between an action to recover on premium notes, when insolvency of the company has made an assessment on the members necessary, and an action to enforce a stockholder's liability, constitutional or statutory," 80 Minn. 134, 83 N. W. 38—the defense was made on demurrer that the policy issued to the defendants "shows upon its face that the defendants were not insured on the mutual plan, and that the extent of their liability by the terms of the policy was the amount of the premium named therein which has been paid." This defense was entertained and held valid by the court against precisely such a "judgment" as this court now holds conclusive against a defense in principle precisely similar—that under the contract relation of the defendant to the corporation he was not liable for any double liability assessment.

Again, in Swing v. Humbird, 94 Minn. 1, 101 N. W. 938 (1904) in an action on an assessment made by the Supreme Court of Ohio in a suit on a mutual insurance company policy, under a statute similar to that of Minnesota, the court holds in the syllabus, paragraph 1:

"Such assessment is not conclusive upon any policyholder as to the question whether his relation to the company was such as to subject him to liability for an assessment. The judgment making the assessment is, however, conclusive as to matters relating to the necessity for, and the amount of, the assessment."

In the opinion the court says:

"The plaintiff contends, in effect, that the ex parte decree in question is conclusive upon the defendants upon the question of their liability to assessment for the losses of the company, and that they are barred from urging the defense pleaded in this case. The question of the conclusiveness of an assessment upon stockholders and members of a corporation for the payment of its liabilities made by a court having jurisdiction to wind up its affairs is too well settled in this state to justify any extended discussion of it. Where a court has such jurisdiction of a corporation, its order or decree making an assessment upon its stockholders or members without personal notice to them is conclusive as to all matters relating to the necessity for making the assessment, and the amount thereof. But it does not conclude any stockholder or member as to the question whether his relation to the corporation was such as to subject him to liability for an assessment, or as to any other defense personal to himself" [citing cases]. * * * The assessment in the case last cited [Dwinnell v. Kramer, supra] was made by one of the courts of our own state, yet effect was given to the claim of the defendant that by virtue of his policy contract he was not liable to assessment."

Here again the same character of defense urged in the instant case was entertained and sustained, viz.: That, notwithstanding the order or judgment, the policies on which the assessment was entered were "of a class which imposed no liability upon the holders thereof beyond the amount of the cash deposit required." In the case at bar the character of the corporation is such that no double liability can constitutionally be imposed on any of its stockholders.

*163 Again, in Swing v. Red River Lumber Co., 105 Minn. 336, 117 N. W. 442 (1908), the court had under consideration an assessment upon the policy holders of a mutual insurance company, entered by the Ohio Supreme Court, under a statute similar to that of Minnesota, and the court said:

"The last contention of the plaintiff to be considered is to the effect that the decree of the Supreme Court of Ohio making the assessment is conclusive upon the defendant upon the question of its liability to be assessed for the losses of the company, and that the trial court in this case, by refusing to give such conclusive effect to the decree, refused to give full faith and credit to the judicial proceedings of the state of Ohio, as required by section 1, art. 4, of the federal Constitution. The decree was ex parte as respects the defendant, it having been made without notice to the defendant. The decree, then, the court having jurisdiction of the corporation, was conclusive as to all matters relating to the necessity for and the amount of the assessment; but it is not conclusive as to the question whether the contract relations of an alleged member to the company were such as to subject him to liability for the assessment. It did not, nor could it, deprive a member of the company of any defense going to show that he was not liable to be assessed for the losses of the company. Great Western Tel. Co. v. Purdy, 162 U. S. 329 [16 Sup. Ct. 810, 40 L. Ed. 986]; Swing v. Weston Lumber Co., 205 U. S. 275 [27 Sup. Ct. 497, 51 L. Ed. 799]."

These cases, made complete by Finch, Van Slyck & McConville v. John F. Vanasek, supra, decided in 1916, give us a line of decision, not only general in terms but specific in application, consistently maintained for sixteen years, which, it seems to me, makes it very clear that if the suit commenced in North Dakota, which we are considering, had been instituted in a Minnesota court it would have been open to the defendant stockholder to show, in defense, that his relations to the company were such as not to subject him to liability (94 Minn. 1, 101 N. W. 938, and 105 Minn. 336, 117 N. W. 442, supra), and that, therefore, the opinion of the court gives to the *"order" of an inferior court of *164 Minnesota a faith and credit in North Dakota which it would not have had in the state of its origin, a result which I venture to think is unsound in principle, anomalous in our judicial history and likely to lead to most unfortunate results.

The opinion of the court concedes that, notwithstanding this "judgment," it was open to the defendant stockholder, in the North Dakota case, to show, if such were the fact, that he was not a stockholder at all; that he owned but half as many shares as was alleged; that he had paid the amount assessed against him in whole or in part, or that he had a set-off to apply on the amount of the assessment. But, nevertheless, the court concludes that he cannot be permitted to show, as was true, that he was not, and could never have been, indebted to the receiver on the liability relied upon—and this, notwithstanding that the latest decision of the Supreme Court of Minnesota, construing the statute of its own state, holds, as quoted above, that in such a suit the stockholders "may present all matters that may be available to them in defense," and notwithstanding the fact that the earlier cases also held that such an order is not conclusive as to "whether the contract relations of the alleged member and the company were such as to subject him to liability for the assessment" (94 Minn. 1, 101 N. W. 938, and 105 Minn. 336, 117 N. W. 442, supra). When we add that the holding of this court in the Bernheimer Case, repeated in the Converse Case, supra, was that "it may be regarded as settled that upon acquiring stock the stockholder [in a Minnesota corporation] incurred an obligation arising from the constitutional provision, contractual in its nature," we are seemingly confronted with the conclusion that the decisions of a Supreme Court of a state, construing its own statutes, of the character such as we have here (Flash v. Conn, 109 U. S. 371, 378, 3 Sup. Ct. 263, 27 L. Ed. 966), are no longer of controlling influence on this court but may be ignored in its discretion.

*Believing, as I do, that upon the discussion *165 in this opinion and upon the authorities cited, the defense that the insolvent corporation involved was one within the exception of the Minnesota Constitution and that, therefore, no double liability attached to the defendant in error; that under the Minnesota decisions cited this defense could have been successfully made against the

order if it had been sued on in a Minnesota court; that the implied finding that the corporation was not within the exception is necessarily jurisdictional, and that therefore it was open to the stockholder to assail it when sued in North Dakota, as it would have been in Minnesota; and that facts sufficient appeared on the face of the complaint to show that in this case the defense was a valid one—I think the judgment of the Dakota courts should be affirmed and therefore I dissent from the decision of the court.

Mr. Justice PITNEY and Mr. Justice BRANDEIS concur in this dissent.

(247 U. S. 214)

LOONEY, Atty. Gen., et al. v. EASTERN TEXAS R. CO. et al.

(Argued April 16 and 17, 1918. Decided May 20, 1918.)

No. 756.

1. COURTS ⟸385(7) — UNITED STATES SUPREME COURT—JURISDICTION—APPEALS FROM INJUNCTION.

Where, notwithstanding a temporary injunction issued by the federal District Court restraining the Attorney General for Texas from instituting suits against carriers to enforce state rates in conflict with those prescribed by the Interstate Commerce Commission and during the pendency of a re-examination by the Commission, such Attorney General began a suit in the Texas court, a second injunction restraining him from proceeding therewith must be deemed in aid of and to protect the District Court's previously acquired jurisdiction, and so was not an appealable order under Jud. Code, § 266 (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, § 1243]), on the theory that it was one restraining the Attorney General, in his capacity as a state officer, from enforcing statutes of the state of Texas, etc., on the ground that they were unconstitutional.

2. COURTS ⟸508(1)—STATE COURT—INJUNCTION BY FEDERAL COURT.

The use of injunction by federal courts, first acquiring jurisdiction over the parties or the subject-matter of a suit for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished, is well recognized, and Jud. Code, § 265 (Comp. St. 1916, § 1242), prohibiting injunctions staying proceedings in state court, is not applicable to such proceedings.

Appeal from the District Court of the United States for the Western District of Texas.

Bill by the Eastern Texas Railway Company and others against B. F. Looney, Attorney General, and others. Despite a temporary injunction granted by the District Court of the United States for the Western District of Texas (242 Fed. 300), the named defendant instituted suit in a Texas state court, whereupon complainants filed a supplemental bill. From an order granting a temporary injunction restraining prosecution of such suit, the defendant Attorney General appeals. On motion to dismiss, motion granted.

Mr. Luther Nickels, of Austin, Tex., for appellant.

Mr. J. W. Terry, of Galveston, Tex., for appellees.

*215 * Mr. Justice CLARKE delivered the opinion of the Court.

This case presents for decision a motion by appellees to dismiss the appeal for want of jurisdiction, and it involves the consideration of the latest chapter in a litigation which was commenced in 1911, when the Railroad Commission of Louisiana filed with the Interstate Commerce Commission a complaint charging various railroad companies with maintaining unreasonable rates on traffic from Shreveport, Louisiana, to points in Texas, and with maintaining rates which unjustly discriminated in favor of traffic moving wholly within the state of Texas as against that between Louisiana and Texas.

A hearing resulted in an order by the Commission, which was assailed by the railroad companies as invalid, but which this court sustained in Houston, East & West Texas Ry. Co. v. United States, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341, in a decision rendered in 1913, which has come to be widely referred to as the "Shreveport case."

After this decision there were further proceedings before the Interstate Commerce Commission, which resulted, on July 7, 1916, in the order out of which this litigation arose, which required many railroad companies, among other things,

"To establish, on or before November 1, 1916, * * * and thereafter to maintain and apply to transportation of property between Shreveport, Louisiana, and points in the State of Texas, class rates and rates on the above named (in the order) commodities not in excess of those contemporaneously applied by them for the transportation of like property for like distances between points in the State of Texas, except in those instances where the rates between Texas points have been depressed by reason of water competition along the Gulf of Mexico, or waters contiguous thereto."

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Immediately after this order was entered the Attorney General of Texas declared that it was void and that he would institute suits under the Texas laws for damages and penalties against any carrier which should comply with it. Thereupon the carriers filed a bill in the United States District Court for the Western District of Texas, in which they averred the validity of the order, the necessity for their obeying it, their intention to obey it, the threat of suits by the Attorney General, and, attaching a copy of the tariff they had compiled to comply with the order (designated as Texas Lines Tariff 2–B), they prayed for an injunction restraining the Attorney General from executing the threat which he had made. A temporary restraining order was granted and on November 1, 1916, the tariffs were duly filed.

Issue was joined on this bill, and elaborate pleadings were filed by both parties, such

that there can be no doubt that the Attorney General challenged the validity of the order as arbitrary, unreasonable, unsupported by the evidence and void, and especially as being inapplicable, in the terms and for want of power, to the western part of Texas, which, for rate-making purposes, is designated "differential territory."

An application for a temporary injunction, on the issues thus joined, was heard on April 4, 1917, by three judges, and resulted in an order as prayed for. The court, in arriving at its announced conclusion, expressly disclaimed passing on the merits of the controversy, and granted the injunction because, as is variously stated in the opinions rendered, it deemed it necessary to prevent a multiplicity of destructive suits against the carriers; because the order of the Commission could not be held void on a preliminary hearing; and
*217 because the Texas rate situation involved was at the time in process of re-examination by the Interstate Commerce Commission. No appeal was taken from this order.

Between the time of the filing of the bill for the injunction and the hearing on April 4th, the Interstate Commerce Commission had entered two orders in the proceeding in which the order of July 7, 1916, had been granted, one that the tariff filed by the carriers on November 1st, Texas Lines Tariff 2–B, slightly modified, should be permitted to remain effective until further order; and another reopening the proceeding to give to the Texas authorities an opportunity to introduce new and material evidence, which they asserted should lead to a modification or vacating of the order and might bring about a just and reasonable settlement of the controversy.

Immediately after the granting of the preliminary injunction the taking of testimony in the reopened inquiry was commenced by the Interstate Commerce Commission, the Attorney General participating, and went forward until in May, when it was continued to the following October for the filing of briefs and for oral argument.

And now, notwithstanding the temporary injunction and notwithstanding the pendency of the re-opened hearing before the Interstate Commerce Commission, the Attorney General on July 20th, instituted suit in a Texas state court, in which he prayed for an injunction restraining the carriers from giving the effect which they had been giving to the Texas Lines Tariff 2–B, since November 1st of the preceding year, as applied to intrastate traffic moving less than 351 miles within, to and from "differential territory" in Texas. Before the date set for this application by the Attorney General for an injunction, the carriers filed a second supplemental bill in their suit in the United States court,
*218 detailing the facts with respect to the various proceedings and hearings which had been had therein, and with respect to the injunction, not appealed from, granted in the preceding April, and prayed that the Attorney General be enjoined from prosecuting the suit commenced by him in the state court or any other suit of like character, for the reason, among others, that:

"It is necessary to protect the jurisdiction of this court already acquired over the subject-matter and in order to afford these plaintiffs [the carriers] full and complete relief."

The Attorney General answered this bill, denying that the rates complained of in the state court were warranted by the order of July 7, 1916, or by the proper construction of the Texas Lines Tariff 2–B and then went forward and again assailed the validity of the order of July 7, 1916, on substantially the same grounds stated in answers filed by him in the case prior to the granting of the injunction in the preceding April, and he prayed that the order be declared to be null and void, in whole or in part.

On this supplemental bill an injunction was granted, to continue until final hearing or until further order of the court, enjoining the Attorney General and his assistants from prosecuting the suit thus commenced by him in the Texas court, and from instituting or prosecuting any similiar suits in any court other than the United States District Court for the Western District of Texas and from in any way interfering with the carriers in charging the rates published in Texas Lines Tariff 2–B and supplements thereto.

[1] From this temporary injunction the Attorney General appeals to this court, and the case has been heard on the motion of the appellees to dismiss the appeal for want of jurisdiction. One ground, among others, urged for sustaining this motion is that the federal District Court having acquired, and having entered upon the exercise of jurisdiction over the parties to and the subject-matter of the suit in that court, prior to the
*219 commencement of the suit in the state court, the injunction issued against the Attorney General was granted in aid of and was necessary to protect that jurisdiction until a conclusion should be reached completely disposing of the case and controversy, and is therefore not an appealable order within section 266 of the Judicial Code.

The theory upon which the Attorney General seeks to sustain his appeal is, that the injunction of September 22d is one restraining him in his capacity as a state officer from enforcing statutes of the state of Texas and orders by the Railroad Commission of that state entered pursuant thereto, on the ground that the statutes are unconstitutional and that the orders are unlawful, and therefore, it is claimed, an appeal direct to this court is warranted under section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, § 1243]).

With this contention of the Attorney General we cannot agree. There is no claim in the second supplemental bill, on which this injunction was granted, that any state statute is unconstitutional or that the execution

of any order of the Railroad Commission of Texas should be suspended because invalid. The bill is very voluminous, but as we interpret its allegations it simply sets out in detail the history of the suit in which it was filed, for the purpose of showing: That by the pleadings of the parties—by those of the carriers not more than by those of the Attorney General—every phase of the controversy, and definitely the aspect of it involved in the petition filed in the state court by the Attorney General on July 20, 1917, had been submitted to and was considered by the court when the application for a temporary injunction was heard in the preceding April, and also what the facts were with respect to the re-opened inquiry before the Interstate Commerce Commission, so that it should appear to the court that the Texas rate situation, again involving the phase of it presented by the Attorney General in the state suit, was pending, undisposed of before the*Commission when his petition was filed. The specific ground of the prayer for the injunction is:

*220

"Because the state court is without jurisdiction of the subject-matter and because it is necessary to protect the jurisdiction of this court already acquired over the subject-matter and in order to afford these plaintiffs the full and complete relief contemplated by the opinions of the circuit judges and in the order made by them granting the injunction herein."

The opinion of the court in granting the injunction appealed from is a satisfactory and sufficient statement of what this record discloses had been done in the case prior to the application for the injunction and amply justifies the granting of it. This statement is as follows:

"The subject-matter of the state suit is a part of that involved in this case. The jurisdiction of this court with reference thereto has been invoked by the parties plaintiff and defendant and by interveners; the jurisdiction has been exercised by this court in granting an injunction at the prayer of plaintiffs, and refusing one asked by defendants, and by considering and determining an application for a continuance. * * * Jurisdiction having been conferred by law, having been invoked by all the parties, and having been exercised by the court, its protection is a right and duty not limited by section 266, Judicial Code. The injunction prayed for by complainants is granted. * * *

"* * * But, waiving all questions as to the legality or propriety of modifying their action (that of the judges in April preceding), our conclusion is that the present status should be maintained until such time as this court may consider all of the grave questions of law and all the great mass of facts connected with this complicated and important litigation. The fact that the matters involved are again before the Interstate Commerce Commission, and that their action may affect the rates attacked,*furnishes an additional reason for our conclusion. The relief asked by defendants is refused."

*221

[2] The use of the writ of injunction, by federal courts first acquiring jurisdiction over the parties or the subject-matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties is familiar and long established practice, Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Harkrader v. Wadley, 172 U. S. 148, 163, 164, 19 Sup. Ct. 119, 43 L. Ed. 399, in a rate case, Missouri v. Chi., Bur. & Quincy R. R. Co., 241 U. S. 533, 543, 36 Sup. Ct. 715, 60 L. Ed. 1148. So important is it that unseemly conflict of authority between state and federal courts should be avoided by maintaining the jurisdiction of each free from the encroachments of the other, that section 265 of the Judicial Code, Revised Statutes, section 720, Act of March 2, 1793, c. 22, 1 Stat. L. 334 (Comp. St. 1916, § 1242), has repeatedly been held not applicable to such an injunction. Julian v. Central Trust Co., 193 U. S. 93, 113, 24 Sup. Ct. 399, 48 L. Ed. 629; Simon v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492.

The motion to dismiss is granted.

(247 U. S. 116)

UNITED STATES v. BIWABIK MINING CO.

(Argued March 4, 5, and 6, 1918. Decided May 20, 1918.)

No. 594.

1. INTERNAL REVENUE ⊂⊃9 — CORPORATION EXCISE TAX—DEDUCTIONS FROM INCOME.

Where, for a large sum then paid, the owner of ore lands granted a lease, entitling the lessee to extract ores on payment of royalties, the lessee was not a purchaser of the ore in place, and a corporation to which the lease had been assigned was not entitled, in determining its net income, under Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112, imposing an annual excise tax on corporations equivalent to 1 per cent. of their income, to deduct from its gross income derived from the extraction of ores during the year the value of such ores in place in the mine.

2. CERTIORARI ⊂⊃64(1)—REVIEW—QUESTIONS PRESENTED.

Where, in an action to recover 1 per cent. of an item alleged to have been wrongfully omitted from a corporation's return of net income required by the Corporation Tax Act of 1909, the United States took no writ of error as to the ruling of the District Court allowing a part of the item as a proper deduction, the propriety of the partial deduction cannot be considered by the Supreme Court, on certiorari to review the judgment of the Circuit Court of Appeals allowing the whole item as a proper deduction.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Action by the United States against the Biwabik Mining Company. A judgment for the United States was reversed, and the petition dismissed conditionally, on writ of error to the Circuit Court of Appeals (242 Fed. 9, 154 C. C. A. 601), and the United States brings certiorari. Judgment of the Circuit Court of Appeals reversed, and that of the District Court affirmed.

Mr. Solicitor General Davis, of Washington, D. C., for the United States.

Mr. A. C. Dustin, of Cleveland, Ohio, for respondent.

*118 * Mr. Justice DAY delivered the opinion of the Court.

This case is here upon a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. It was instituted by the United States in the District Court of the United States for the Northern District of Ohio to recover the sum of $2,653.72, being 1 per cent. upon $265,372.08, which, it was claimed, the mining company had wrongfully omitted from the return of its net income for the year 1910 under the Corporation Tax Act of 1909.

The case was tried upon an agreed statement of facts which, omitting unnecessary details, were epitomized by the District Court as follows:

"In the year 1898 the defendant, by assignment of a lease, acquired a leasehold estate in certain ore-producing properties in the state of Minnesota, from which it mined ore from that date to and including the year 1910. For *119 the year 1910 the defendant made a return to the Collector* of Internal Revenue of its gross income, and from this amount it deducted, 'to cover realization of unearned increment,' the sum of $265,372.08. The amount of this deduction was arrived at by multiplying the number of tons of ore mined during the year by 48¾ cents, which was the market value of the ore in place on the premises on the 1st day of January, 1909, as estimated by the defendant, this being the date upon which the returns for taxation were to commence. It is stipulated that this deduction was made in good faith upon the claim that it was 'a reasonable allowance for depreciation' of the property of the defendant for that year.

"In June, 1911, payment was made in accordance with this return, but the Treasury Department about the month of October, 1914, after investigating the books and records of the defendant, made the claim that because the defendant was not the owner in fee of the premises from which it was mining ore, but was lessee of the same and was paying a royalty to the fee owners, it was not entitled to deduct anything for depletion of the ore body on the premises. Thereupon the defendant was requested to amend its return for the year 1910 so as to include in its gross income the amount of said deduction, which it declined to do, and thereupon this suit was instituted to recover the tax upon the amount of this deduction, amounting to $2,653.72.

"Some time prior to the making of the return for the year 1910 the defendant estimated the tonnage and the market value of the ore in place upon the premises upon which it held its lease, which estimate gave to the ore in place a value of 48¾ cents per ton, exclusive of royalty.

"The rights of the defendant in the iron ore mined in the year 1910 were derived from the assignment to it of a written lease dated April 4, 1898, by the Biwabik Bessemer Company, lessor. By the terms of that lease the *120 defendant acquired the right for the term of fifty years* and three months from the 1st day of May, 1898, to explore for, mine out, and remove the merchantable shipping iron ore which might be found upon the lands described in the lease upon the payment of a royalty of 30 cents for each ton mined. The expression 'merchantable ore' is defined as including 'all ores which grade 55 per cent. and above in metallic iron regardless of other ingredients.'

"The lessee contracted to mine and remove at least 300,000 tons of ore annually, or to pay to the lessor 30 cents per ton on that amount if it should not be mined, but payments made in any year in excess of royalty on ore actually mined could be credited upon the excess which might be mined over the minimum requirement in subsequent years. Any failure to keep or perform any of the covenants or conditions of the lease gave to the lessor the option to take immediate possession of the premises.

"The lessor in the lease reserved a lien upon any ore mined and upon all improvements for any unpaid balance of royalty, and it was also provided in the lease that the lessee should have the right to terminate the lease on any 1st day of January during its term by giving ninety days' notice of the purpose and desire so to do.

"The defendant, at the time it acquired this lease, paid to the prior lessee the sum of $612,000, in addition to contracting to pay the 30 cents per ton royalty upon the ore mined, as has been stated.

"It is stipulated in the agreed statement of facts that the deposit of ore on the leased premises is of such character that its quality and quantity were capable of determination 'with extraordinary accuracy' by drilling and shafts, and that the defendant 'by drilling and by standard recognized methods' had calculated the tonnage remaining on the land on January 1, 1909, as 6,874,695 tons, all of which could be easily removed within the term of the lease."

121 Upon these facts the District Court reached the conclusion that the leases in question were not conveyances of ore in place, but were grants of the privilege of entering upon the premises and mining and removing the ore, and, consequently, that the deduction claimed as being one from capital investment could not be allowed. In reaching this conclusion the court cited the opinion of this court in Stratton's Independence, Ltd., v. Howbert, Collector, 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. 285, and the judgment of the Circuit Court of Appeals for the Eighth Circuit (211 Fed. 1023, 127 C. C. A. 667), affirming the judgment of the District Court (207 Fed. 419), which decision of the Circuit Court of Appeals was made after the return of the answer to the questions propounded by that court to this court in the Stratton's Independence Case.

[1] Coming to the question as to what allowance should be made to the mining company by way of deduction from its income in making return the District Judge said:

"The defendant paid $612,000 for the lease under consideration and in addition assumed the payment of the royalties stipulated for therein. This may properly and justly be considered a payment in advance of an increased royalty on ore to be mined, and that is precisely the character which the defendant gave to the payment when dealing with it in its private accounts, in which the stipulation shows (Exhibit H) that it carried one account, entitled 'Rate of General Ledger or Capitalized Value .03885 per Ton,' and another account, entitled 'Rate of Increment Value, January 1, 1909, .44865 per Ton.' These two values added make the 48¾ cents per ton which the defendant deducted in making its return.

"Thus in its own bookkeeping the defendant gives its private opinion as to the requisite reimbursement necessary to maintain its capital investment, and thereby is made applicable that long-standing rule for the construction of contracts, viz. 'Show me what men have done under a contract and I will tell you what it

*122 means.' The defendant should not complain if it be held to that*construction of this lease and its investment under it which it adopted for purposes of its own accounting before the question of taxation had arisen to call forth ingenuity of interpretation.

"It results that a decree will be entered allowing instead of the deduction computed on the basis of 48.75 cents per ton of ore mined, the sum of .03885 cents per ton, and there being no question of bad faith in the case, the ends of justice will be served by the payment of interest at the rate of 6 per cent. per annum from the date when the additional payment found due should have been made."

The District Court thereupon entered judgment:

"And the court finds as conclusions of law from said facts that the defendant was entitled to deduct for and on account of the 544,353 tons of iron ore mined by it under its lease in the year 1910, the sum of .03885 cents per ton (which amount the parties agree hereby is the cost to defendant of said ore at the time it acquired the property in the year 1898, interest, taxes, surveys, and other carrying charges on the said ore up to the time of its removal from the said mine having been charged annually including the year 1910 into operating expenses), and defendant is not entitled to deduct the 48.75 cents per ton deducted by it in its return, and there is due from the defendant to the plaintiff the sum of $2,442.23, with interest thereon at 6 per cent. from the 30th day of June, 1911, the date when said sum should have been paid, and the court assesses the plaintiff's damages herein at $3,140.70, and judgment is hereby rendered against the defendant in favor of the plaintiff of the sum of $3,140.70, with interest from the first day of this term of court."

The company took the case to the Circuit Court of Appeals upon writ of error, that court reversed the judgment of the District Court, holding that the company was entitled to the deduction of 48.75 cents per ton upon *123 each ton of ore mined, as so much depletion of capital assets. • 242 Fed. 9, 154 C. C. A. 601. This conclusion was reached upon a construction of the lease in view of the character of the mining property involved, and largely because of the fact that the quantity of the ore in place could be estimated with substantial accuracy. The court held that the selling price of the ore in any one year so far as it represented the actual value to the mining company of the ore in the ground on January 1, 1909, was not income within the meaning of the Corporation Tax Act of 1909. In the course of its opinion the Circuit Court of Appeals announced the decisive question of law to be:

"So far as the selling price of the ore in 1910 represented its actual value to the company in the ground on January 1, 1909, was it income or was it the sale price of capital assets?"

And after dealing with the character of this lease and the property covered by it, said:

"We think that the lessee of such property and under such a lease is as much entitled as is the owner of the fee to treat the value of his interest in the ore in the ground at the beginning of the tax period as his capital—indeed, the lessee's right to do so, is, in some respects, the stronger of the two, as hereafter pointed out. Such a lease, as applied to this situation, is in every substantial way pro tanto a purchase."

This view of the character of these instruments and their legal effect differs from that taken by this court in the Sargent Land Company Case, 242 U. S. 503, 37 Sup. Ct. 201, 61 L. Ed. 460, wherein precisely similar iron ore leases were under consideration. In that case this court reached the conclusion that such leases were not conveyances of the ore in place, but were grants of the privilege of entering upon, discovering, and developing and removing the minerals from the land, and that the lessor's income from such operations was obtained by a corporation shown to be carrying on business, and upon principles laid down in previous cases in this court (Stratton's Independence v. Howbert, *124 supra; Stanton*v. Baltic Mining Company,* 240 U. S. 103, 36 Sup. Ct. 278, 60 L. Ed. 546) that such income was subject to taxation under the Corporation Tax Act of 1909.

In the Sargent Land Company Case it was pointed out that the courts of Minnesota, certainly familiar with the physical characteristics of the ore deposits involved, had in a series of cases held these instruments to be leases, and that the royalties agreed to be paid were rentals in compensation for the privileges granted the lessee. We held the conclusion of the Minnesota courts to be warranted by reason and authority. 242 U. S. 503, and cases cited in margin, page 518, 37 Sup. Ct. 201, 61 L. Ed. 460.

The Circuit Court of Appeals distinguished the Sargent Land Company Case, and of it said:

"Finally, it is urged that this case is controlled by the decision of the Supreme Court in the Sargent Land Company Case. The mining leases involved in that case and in this one seem to be identical in substance, and it is now said with great plausibility that the ore in the ground and affected by such a lease belongs partly to the lessor and partly to the lessee, and that, if the interest of the lessor is not capital assets no more is the interest of the lessee, and that, if the receipts of the former are income so must those of the latter be. We are convinced that the analogy between the two cases is superficial and not substantial. In that case the Supreme Court had to determine whether the royalties received by the lessor were income or were a depletion of capital. Many considerations led to the conclusion that they must be treated as income. The contract was a 'lease,' the receipts were 'royalties,' and royalties, being rentals, are inherently income and have been commonly so considered. All these things seem to have affected the conclusion of the court, but, after all the dominating thought appears to be that, when land is devoted to mining it is put to only one of those productive uses of which it is capable, and that the product of*the use should be called in- *125 come. The land itself is the chief thing. After the mining is finished the land remains suitable for other uses; and the fact—if it is a fact—that the minerals are the greater part of its value cannot operate to make the incidental overshadow the principal. These reasons do not apply at all to the case of the lessee whose existing interest, at the beginning of the taxing period, over and above the royalty which

he must pay, amounted to $3,000,000; his entire interest was each year, as far as he went, consumed and exhausted forever; he did not have remaining the principal thing, the land, which he could put to some other use; the receipt in 1910 of his January 1, 1909, interest in the ore was not the offshoot and income of his property; it was the transformation and eating up of the very property, and of the whole of it. We therefore think that applying the principle of the Sargent Case results in holding that these receipts were from the sale of capital assets and not from income."

We are unable to concur in this view expressed in the opinion of the Circuit Court of Appeals as to the effect of the Sargent Land Company Case. Certainly this court had not in mind the distinction suggested. In the Sargent Land Company Case the Circuit Court of Appeals for the Eighth Circuit found that the land including the ore in it was worth hundreds of thousands of dollars, and without the right to the ore the land was worth practically nothing. 219 Fed. 38, 134 C. C. A. 649. This finding, as well as facts of general knowledge leave little room to suppose that this court made its decision concerning the rights of the lessor influenced by the fact that the land itself was the chief thing, and the ownership of it after the exhaustion of the minerals one of the controlling reasons in reaching the conclusion announced in that case. The lessee takes from the property the ore mined, paying for the privilege so much per ton for each ton removed. He has this right or
*126 privilege under the form of lease here involved so long as he sees fit to hold the same without exercising the privilege of cancellation therein contained. He is, as we held in the Sargent Land Company Case, in no legal sense a purchaser of ore in place.

[2] In this case the government took no writ of error as to the partial deduction allowed by the District Court, it follows that the correctness of that ruling is not open here. The Circuit Court of Appeals erred in making the additional allowance for capital depletion. It follows that the judgment of the Circuit Court of Appeals must be reversed, and that of the District Court affirmed, and it is so ordered.

Reversed.

Mr. Justice CLARKE took no part in the consideration or decision of this case.

(247 U. S. 126)

GOLDFIELD CONSOL. MINES CO. v. SCOTT, Collector of Internal Revenue, Fourth California District.

(Argued March 4, 5, and 6, 1918. Decided May 20, 1918.)

No. 334.

1. INTERNAL REVENUE ⟹9 — CORPORATION EXCISE TAX—INCOME—DEDUCTIONS.

Under Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112, imposing an excise tax on every corporation equivalent to 1 per cent. of the entire net income over and above $5,000 received by it from all sources during the year, and providing that the net income shall be ascertained by deducting from the gross income all expenses and losses including a reasonable allowance for depreciation of property, a mining corporation, for the purpose of determining its net income, is entitled to deduct from its gross income no amount whatever on account of depletion or exhaustion of ore bodies, caused by its operations for the year during which the tax was assessed.

2. INTERNAL REVENUE ⟹9 — CORPORATION EXCISE TAX—INCOME—DEDUCTIONS.

Under such act, a mining corporation is not entitled, in the ascertainment of its net income, to a deduction against gross proceeds from the mining and treatment of ores to the extent of the cost value of the ore in the mine before it was mined, ascertained in accordance with the regulations of the Treasury Department.

On a Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

Action by the Goldfield Consolidated Mines Company against Joseph J. Scott, as Collector of United States Internal Revenue, Fourth California District. There was a judgment for defendant, and plaintiff brought error. On certificate from the United States Circuit Court of Appeals for the Ninth District. Certified questions answered.

Mr. Henry M. Hoyt, 2d, of Reno, Nev., for Goldfield Co.

Mr. Solicitor General Davis, of Washington, D. C., for Scott, Collector.

*127 *Mr. Justice DAY delivered the opinion of the Court.

This case is here upon certificate from the United States Circuit Court of Appeals for the Ninth Circuit, from which it appears that the Goldfield Consolidated Mines Company brought an action against Scott, United States Collector of Internal Revenue, Fourth California District, to recover certain taxes levied for the years 1909 and 1910 under the Corporation Tax Act of 1909. The District Court sustained a demurrer to the complaint, and entered judgment against the present plaintiff in error.

In the certificate the Circuit Court of Appeals sets out the allegations of the complaint as to the first cause of action, stating that the second cause of action need not be repeated as the facts are of the same character as those set out in the first. Omitting formal and unnecessary matters the Circuit Court of Appeals certifies as the allegations of the complaint, to which the demurrer was sustained, the following:

"The plaintiff below, and plaintiff in error herein, the Goldfield Consolidated Mines Company, is and was a corporation engaged in mining in the State of Nevada, which State is within the jurisdiction of the Fourth Internal Revenue District of California.

*128 *"An assessment of an excise tax under section 38 of the Act of Congress approved August 5, 1909 entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' was lev-

ied upon the plaintiff in error by the then Collector of Internal Revenue for the said District amounting to $41,890.91, upon an assessment of $4,189,091.61 which tax was paid under protest of the levy and assessment. The plaintiff in error had made a return of annual net income for that year, 1909, claiming a deduction for the value of the ore in the ground before it was mined, of 230,463 tons of ore, of the value in the ground before it was mined, of $5,646,940.46, upon the ground that such ore constituted exhaustion of the capital value of the property owned by it, and its protest against the assessment and levy was based thereon. Thereafter, the plaintiff in error made application for refund of said tax pursuant to sections 3220 and 3226 of the Revised Statutes [Comp. St. 1916, §§ 5944, 5949] and based its claim to such refund upon the propriety of the deduction so claimed, and stated in said application that such exhaustion of capital assets constituted a depreciation within the meaning of the act in question, and that the same would have more than offset the total net income of the plaintiff in error.

"Thereafter, during the pendency before the Commissioner of Internal Revenue of said application for refund, the plaintiff in error, by its duly authorized officials, made full explanation before the Commissioner of Internal Revenue, and offered full proof of the correctness in all respects of its said return of annual net income for the year 1909 and of all statements of fact contained therein, and while the Commissioner of Internal Revenue was holding said application under consideration, the plaintiff in error was duly and regularly granted by said Commissioner, leave to comply fully with the then rules *129 and regulations of the Treasury Department embodied in *Treasury Decision 1675 promulgated February 14th, 1911, and particularly sections 80 to 89 thereof relating to depreciation of property of corporations whose business involved wasting assets, and like leave was so given to present to the Commissioner of Internal Revenue, an amended statement and return of annual net income for said year with explanations of fact in support thereof, and to ascertain the unit cost per ton of the estimated ore bodies belonging to the plaintiff in its various mining properties as of January 1st, 1909, and the estimated value of the ore in the ground before it was mined for the year 1909, by multiplying the said unit cost per ton by the total number of tons mined in said year, all of which was done, and the same was filed by the plaintiff in error during the time so provided." The rules and regulations are then set out.

* * * * * *

"In addition to the rules and regulations as above set out, the plaintiff in error was further required by the Commissioner of Internal Revenue to make a calculation for the year 1909 and of previous years of operation, to ascertain the total exhaustion of ore which had taken place in the operation of its mining properties, and to enter such amount of tonnage exhaustion, multiplied by the unit cost per ton, in its official corporate books of account, and also cause the same to be included in its printed annual report of that current year to its stockholders and the public with appropriate explanation thereof, all of which requirements were performed by the plaintiff in error in obedience to said orders of the Commissioner of Internal Revenue, and within the time granted therefor.

"The complaint alleged that the resulting figures so rendered in said return were and are in *130 all respects true and correct, and resulted in a showing of net income measuring the excise tax under the rules and regulations *amounting to $765,380.02 upon which the tax would have been $7,653.80; it also appeared from said complaint that this compliance with the requirements of the Commissioner of Internal Revenue was made by the plaintiff in error without waiving its claim to the full deduction originally claimed.

"It further appears from the complaint, that in disobedience and disregard of the law and of the rules and regulations of the Treasury Department, the Commissioner of Internal Revenue disallowed the application for refund of the plaintiff in error in toto, which disallowance was communicated to the plaintiff in error December 29, 1913, by the defendant in error, Collector of Internal Revenue, the then collector having succeeded to the office of the Collector of Internal Revenue who had originally levied the tax in question. The complaint alleges that no part of the said tax has been refunded or paid back, and that the same is still due and unpaid."

The questions propounded are:

1. Under the provisions of paragraph 38 of the Act of Congress entitled: "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, (36 Statutes at Large, p. 11, at p. 112), is a mining corporation, for the purpose of determining its net income for the basis of taxation, entitled to deduct from its gross income any amount whatever on account of depletion or exhaustion of ore bodies caused by its operations for the year for which the tax is assessed?

2. Is such a corporation under said act, entitled in the ascertainment of its net income, to a deduction against gross proceeds from the mining and treatment of ores to the extent of the cost value of the ore in the ground before it was mined, ascertained in strict compliance with the rules and regulations of the Treasury Department of February 14, 1911 (Tr. Dec. 1675)? *131

* 3. Where such a corporation claimed originally in its return of net income under said act a deduction for depreciation from exhaustion of ore for the year equal to the actual value of the ore in the ground before it was mined, and having been denied any deduction whatever for exhaustion of ore, and having been assessed accordingly and having paid the resulting tax, made application pursuant to sections 3220 and 3226, Revised Statutes for refund, during the pendency of which application said corporation was granted leave to amend and did amend its return of net income in strict accordance with the rules and regulations promulgated February 14, 1911, sections 80 to 89 T. D. 1675, resulting in an amended return based upon cost as provided in said regulations and showing claimed deductions therefrom less than the corporation's net realizations for the year from the ore actually mined, is such corporation entitled to an allowance of deductions and refund of taxes accordingly?

4. In what, if any, way is the right to such claimed deductions affected by the fact that such corporation, in obedience to requirements imposed by the Commissioner of Internal Revenue at the time of filing its amended returns showing the cost value as of January 1, 1909, of the ores mined during

the year, caused to be entered in its official books of account and printed in its annual report of that current year to all of its stockholders and to the public, a statement of the total amount of ore exhaustions, multiplied by the unit cost per ton on its mining properties for that and all previous years?

[1, 2] In the brief submitted for the Goldfield Consolidated Mines Company counsel frankly admit that if this court is to adhere to the principles laid down in Stratton's Independence v. Howbert, 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. 285, and Von Baumbach, Collector, v. Sargent Land Company, 242 U. S. 503, 37 Sup. Ct. 201, 61 L. Ed. 460, those cases are conclusive against the contentions of the Mines Company in this proceeding. In view of the discussion of the *132 nature of mining property in Stratton's Independence v. Howbert, supra, and the application of the principles therein laid down in the subsequent cases of Stanton v. Baltic Mining Company, 240 U. S. 103, 36 Sup. Ct. 278, 60 L. Ed. 546, and Von Baumbach, Collector, v. Sargent Land Company, supra, it is unnecessary to enter upon further consideration of the matters disposed of in those cases. We find no occasion to depart from the principles therein announced, or the rulings therein made. They have been reaffirmed in the case of United States v. Biwabik Mining Company, 247 U. S. 116, 38 Sup Ct. 462, 62 L. Ed. ——, just decided. In this view it follows that the first and second questions must be answered in the negative, and that it is unnecessary to answer the third and fourth questions.

So ordered.

(247 U. S. 179)

DOYLE, Collector of Internal Revenue, v. MITCHELL BROS. CO.

(Argued March 4, 5, and 6. Decided May 20, 1918.)

No. 492.

1. INTERNAL REVENUE ⟸9 — CORPORATION EXCISE TAX—CONSTRUCTION.

The legislative purpose of Corporation Tax Act Aug. 5, 1909, c. 6, 36 Stat. 112, imposing on every corporation organized for profit an excise tax equivalent to 1 per cent. on the entire net income above $5,000 received from all sources during the year, was not to tax property as such, or the mere conversion of property into money, but to tax the conduct of the business of corporations organized for profit.

2. INTERNAL REVENUE ⟸9—CORPORATIONS—EXCISE TAX—"INCOME."

A corporation which converted into lumber its own stumpage acquired timber lands some years prior to the enactment of Corporation Tax Act Aug. 5, 1909, c. 6, § 38. At the time the law went into effect the lands had greatly increased in value, owing to the increase in the price of stumpage. Preparatory to making an income return for 1909, the company revalued its stumpage as of December 31, 1908; but the new valuation was not entered on its books. *Held*, in view of the purpose of the act, and as income may be defined as the gain derived from capital, from labor, or from both combined, the corporation was entitled, for the purpose of computing its net income, to deduct from its gross income the market value, as fixed on December 31, 1908, of the stumpage cut during the year.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

3. INTERNAL REVENUE ⟸9—CORPORATION—EXCISE TAX—CORPORATE BOOKS.

In such case, the result is not affected by the failure of the corporation to enter the increased values on its books, for the corporate books are no more than evidential, being neither indispensable nor conclusive.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Action by the Mitchell Bros. Company against Emanuel J. Doyle, as Collector of Internal Revenue. A judgment for plaintiff (225 Fed. 437) was affirmed by the Circuit Court of Appeals (235 Fed. 686, 149 C. C. A. 106, L. R. A. 1917E, 568), and defendant brings certiorari. Affirmed.

Mr. Solicitor General Davis, of Washington, D. C., for petitioner.

Messrs. Mark Norris and Oscar E. Waer, both of Grand Rapids, Mich., for respondent.

*Mr. Justice PITNEY delivered the opinion *180 of the Court.

This was an action to recover from the Collector additional taxes assessed against the respondent under the Corporation Excise Tax Act of August 5, 1909 (chapter 6, 36 Stat. 11, 112, § 38), and paid under protest. The District Court gave judgment for the plaintiff, which was affirmed by the Circuit Court of Appeals (225 Fed. 437; 235 Fed. 686, 149 C. C. A. 106, L. R. A. 1917E, 568), and the case comes here on certiorari.

It was submitted at the same time with several other cases decided this day, arising under the same act.

*The facts are as follows: Plaintiff is a *181 lumber manufacturing corporation which operates its own mills, manufactures into lumber therein its own stumpage, sells the lumber in the market, and from these sales and sales of various by-products makes its profits, declares its dividends, and creates its surplus. It sells its stumpage lands, so-called, after the timber is cut and removed. Its sole business is as described; it is not a real estate trading corporation. Plaintiff acquired certain timber lands at its organization in 1903 and paid for them at a valuation approximately equivalent to $20 per acre. Owing to increases in the market price of stumpage the market value of the timber land, on December 31, 1908, had become approximately $40 per acre.[1] The company

[1] The valuations were based upon the quantity of standing timber, at certain prices per thousand feet for the different varieties. The approximate acreage equivalent is employed for convenience.

made no entry upon its books representing this increase, but each year entered as a profit the difference between the original cost of the timber cut and the sums received for the manufactured product, less the cost of manufacture. After the passage of the Excise Tax Act, and preparatory to making a return of income for the year 1909, the company revalued its timber stumpage as of December 31, 1908, at approximately $40 per acre. The good faith and accuracy of this valuation are not in question, but the figures representing it never were entered in the corporate books.

Under the act the company made a return for each of the years 1909, 1910, 1911, and 1912, and in each instance deducted from its gross receipts the market value, as of December 31, 1908, of the stumpage cut and converted during the year covered by the tax. There appears to have been no change in its market value during these years.

*182 The Commissioner of Internal Revenue having *allowed a deduction of the cost of the timber in 1903 and refused to allow the difference between that cost and the fair market value of the timber on December 31, 1908, the question is whether this difference (made the basis of the additional taxes) was income for the years in which it was converted into money, within the meaning of the act.

Other items are involved in the case, arising from the sale of certain stump lands, certain by-products, and a parcel of real estate, but they raise no different question from that which arises upon the valuation of the stumpage, and need not be further mentioned.

[1] The act became effective January 1, 1909, and provided for the annual payment by every domestic corporation "organized for profit and having a capital stock represented by shares" of an excise tax "equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year," with exceptions not now material. It declared that such net income should be ascertained by deducting from the gross income received within the year from all sources the expenses paid within the year out of income in the maintenance and operation of business and property, including rentals and the like; losses sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property; interest paid within the year to a limited extent; taxes; and amounts received within the year as dividends upon stock of other corporations subject to the same tax. In the case of a corporation organized under the laws of a foreign country, the net income was to be ascertained by taking into account the gross income received within the year "from business transacted and capital invested within the United States and any of its territories, Alaska, and the District of Columbia," with deductions for expenses of maintenance and operation, *business losses, interest, and taxes, all *183 referable to that portion of its business transacted and capital invested within the United States, etc.

An examination of these and other provisions of the act makes it plain that the legislative purpose was not to tax property as such, or the mere conversion of property, but to tax the conduct of the business of corporations organized for profit by a measure based upon the gainful returns from their business operations and property from the time the act took effect. As was pointed out in Flint v. Stone Tracy Co., 220 U. S. 107, 145, 31 Sup. Ct. 342, 347 (55 L. Ed. 389, Ann. Cas. 1912B, 1312) the tax was imposed "not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof"; an exposition that has been consistently adhered to. McCoach v. Minehill R. R. Co., 228 U. S. 295, 300, 33 Sup. Ct. 419, 57 L. Ed. 842; United States v. Whitridge, 231 U. S. 144, 147, 34 Sup. Ct. 24, 58 L. Ed. 159; Anderson v. Forty-Two Broadway, 239 U. S. 69, 72, 36 Sup. Ct. 17, 60 L. Ed. 152.

[2, 3] When we come to apply the act to gains acquired through an increase in the value of capital assets acquired before and converted into money after the taking effect of the act, questions of difficulty are encountered. The suggestion that the entire proceeds of the conversion should be still treated as the same capital, changed only in form and containing no element of income although including an increment of value, we reject at once as inconsistent with the general purpose of the act. Selling for profit is too familiar a business transaction to permit us to suppose that it was intended to be omitted from consideration in an act for taxing the doing of business in corporate form upon the basis of the income received "from all sources."

Starting from this point, the learned Solicitor General has submitted an elaborate *184 argument in behalf of the *government, based in part upon theoretical definitions of "capital," "income," "profits," etc., and in part upon expressions quoted from our opinions in Flint v. Stone Tracy Co., 220 U. S. 107, 147, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, and Anderson v. Forty-Two Broadway, 239 U. S. 69, 72, 36 Sup. Ct. 17, 60 L. Ed. 152, with the object of showing that a conversion of capital into money always produces income, and that for the purposes of the present case the words "gross income" are equivalent to "gross receipts"; the insistence being that the entire proceeds of a conversion of capital assets should be treated as gross income, and that by de-

ducting the mere cost of such assets we arrive at net income. The cases referred to throw little light upon the present matter, and the expressions quoted from the opinions were employed by us with reference to questions wholly remote from any that is here presented.

The formula that the entire receipts derived from a conversion of capital assets after deducting cost value must be treated as net income, so far as it is applied to a conversion of assets acquired before the act took effect and so as to tax as income any increased value that accrued before that date, finds no support in either the letter or the spirit of the act, and brings the former into incongruity with the latter. If the gross receipts upon such a conversion are to be treated as gross income, what authority have we for deducting either the cost or the previous market value of the assets converted in order to arrive at net income? The deductions specifically authorized are only such as expenses of maintenance and operation of the business and property, rentals, uncompensated losses, depreciation, interest, and taxes. There is no express provision that even allows a merchant to deduct the cost of the goods that he sells.

Yet it is plain, we think, that by the true intent and meaning of the act the entire proceeds of a mere conversion of capital assets were not to be treated as income. *185 Whatever difficulty there may be about a precise and scientific definition of "income," it imports, as used here, something entirely distinct from principal or capital either as a subject of taxation or as a measure of the tax; conveying rather the idea of gain or increase arising from corporate activities. As was said in Stratton's Independence v. Howbert, 231 U. S. 399, 415, 34 Sup. Ct. 136, 58 L. Ed. 285: "Income may be defined as the gain derived from capital, from labor, or from both combined."

Understanding the term in this natural and obvious sense, it cannot be said that a conversion of capital assets invariably produces income. If sold at less than cost, it produces rather loss or outgo. Nevertheless, in many if not in most cases there results a gain that properly may be accounted as a part of the "gross income" received "from all sources"; and by applying to this the authorized deductions we arrive at "net income." In order to determine whether there has been gain or loss, and the amount of the gain if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration.

This has been recognized from the beginning by the administrative officers of the government. Shortly after the passage of the act, and before the time (March 1, 1910) for making the first returns of income, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated Regulations No. 31, under date December 3, 1909, for the guidance of collectors and other subordinate officers in the performance of their duties under the act. These prescribed, with respect to manufacturing companies, that gross income should consist of the difference between the price received for the goods as sold and the cost of such goods as manufactured; cost to be "ascertained by an addition of a charge to the account of goods as manufactured during the year of the sum of the inventory at beginning of the year and a credit to the account of the sum of the inventory at the end of the year." In the case of mercantile companies, gross income was to be the "amount ascertained through inventory, or its equivalent, which shows the difference between the price received for goods sold and the cost of goods purchased during the year, with an addition of a charge to the account of the sum of the inventory at beginning of the year and a credit to the account of the sum of the inventory at the end of the year." And as to miscellaneous corporations, gross income was to be "the gross revenue derived from the operation and management of the business and property of the corporation," with all income derived from other sources. The matter of income arising from a profitable sale of capital assets was dealt with specifically in such a way as to limit the tax to income arising after the effective date of the act. This was done by adopting the rule that an advance in value arising during a period of years should be so adjusted that only so much as properly was attributable to the time subsequent to January 1, 1909 (December 31, 1908, would have been more precise), should be subjected to the tax.[2] Subsequent treasury regulations, promulgated from time to time (T. D. 1606), March 29, 1910, paragraphs 40, 71, 76; T. D. 1675, February 14, 1911, paragraphs 37, 55, 75; T. D. 1742, December 15, 1911, paragraphs 43, 62, 86, 91), adhered to the same rule with respect to lands bought prior to January 1, 1909, and sold during a subsequent year, prescribing, however, that the profits, when not otherwise accurately

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[2] Extract from Treasury Regulations No. 31, issued December 3, 1909.

Sale of Capital Assets.—In ascertaining income derived from the sale of capital assets, if the assets were acquired subsequent to January 1, 1909, the difference between the selling price and the buying price shall constitute an item of gross income to be added to or subtracted from gross income according to whether the selling price was greater or less than the buying price. If the capital assets were acquired prior to January 1, 1909, the amount of increment or depreciation representing the difference between the selling and buying price is to be adjusted so as to fairly determine the proportion of the loss or gain arising subsequent to January 1, 1909, and which proportion shall be deducted from or added to the gross income for the year in which the sale was made.

determinable, should be prorated according to the time elapsed before and after the act took effect; and gave to it an application especially pertinent here, one of the regulations reading:

"The mere removal of timber by cutting from timber lands, unless the timber is otherwise disposed of through sales or plant operations, is considered simply a change in form of assets. If said timber is disposed of through sales or otherwise, it is to be accounted for in accordance with regulations governing disposition of capital and other assets."

In our opinion these regulations correctly interpret the act in its application to the facts of the present case. When the act took effect, plaintiff's timber lands, with whatever value they then possessed, were a part of its capital assets, and a subsequent change of form by conversion into money did not change the essence. Their increased value since purchase, as that value stood on December 31, 1908, was not in any proper sense the result of the operation and management of the business or property of the corporation while the act was in force. Nor is the result altered by the mere fact that the increment of value had not been entered upon plaintiff's books of account. Such books are no more than evidential, being neither indispensable nor conclusive. The decision must rest upon the actual facts, which in the present case are not in dispute.

The plaintiff, in making up its income tax returns for the years 1909, 1910, 1911, and 1912, deducted from its gross receipts the admittedly accurate valuation as of December 31, 1908, of the stumpage cut and con- *188 verted *during the year covered by the tax. There having been no change in market values during these years, the deduction did but restore to the capital in money that which had been withdrawn in stumpage cut, leaving the aggregate of capital neither increased nor decreased, and leaving the residue of the gross receipts to represent the gain realized by the conversion, so far as that gain arose while the act was in effect. This was in accordance with the true intent and meaning of the act.

It may be observed that it is a mere question of methods, not affecting the result, whether the amount necessary to be withdrawn in order to preserve capital intact should be deducted from gross receipts in the process of ascertaining gross income, or should be deducted from gross income in the form of a depreciation account in the process of determining net income. In either case the object is to distinguish capital previously existing from income taxable under the act.

There is only a superficial analogy between this case and the case of an allowance claimed for depreciation of a mining property through the removal of minerals, since we have held that owing to the peculiar nature of mining property its partial exhaustion attributable to the removal of ores cannot be regarded as depreciation within the meaning of the act. Von Baumbach v. Sargent Land Co., 242 U. S. 503, 520, 524, 37 Sup. Ct. 201, 61 L. Ed. 460; United States v. Biwabik Mining Co., 247 U. S. 116, 38 Sup. Ct. 462, 62 L. Ed. ——, this day decided; Goldfield Consolidated Mines Co. v. Scott, 247 U. S. 126, 38 Sup. Ct. 465, 62 L. Ed. ——, this day decided.

It should be added that in this case no question is raised as to whether, in apportioning the profits derived from a disposition of capital assets acquired before and converted after the act took effect, the division should be pro rata, according to the time elapsed, or should be based upon an inventory taken as of December 31, 1908. Plaintiffs, in accordance with Treasury Regulations No. 31, T. D. 1578, January 4, 1910, and T. D. 1588, January *24, 1910, adopted the latter method, *189 and the government makes no contention as to the accuracy of the result thereby reached, under the stipulated facts, if our construction of the act be correct.

Judgment affirmed.

(247 U. S. 189)

HAYS, Collector of Internal Revenue for District of West Virginia, v. GAULEY MOUNTAIN COAL CO.

(Argued March 4, 5, and 6, 1918. Decided May 20, 1918.)

No. 327.

1. INTERNAL REVENUE ⟸9 — CORPORATION EXCISE TAX—"INCOME."

Where a corporation in 1902 purchased stock of another corporation, which it sold in 1911 at an advance of $210,000, that portion of the profit which can be deemed to have accrued since January 1, 1909, must be deemed "income," on which the corporation may be taxed, under Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112, providing that every corporation shall be subject to pay a special excise tax equivalent to 1 per cent. upon the entire net income over and above $5,000 received by it from all sources during the year.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

2. INTERNAL REVENUE ⟸9 — CORPORATION EXCISE TAX—INCOME.

Where a corporation invested in the stock of another corporation, and later sold it at an advance over the purchase price, the amount of the advance must be deemed a gain or profit, for the purpose of computing income, within the Corporation Tax Act; there being no merit in the contention that interest should be added to the purchase price to ascertain the cost of the stock.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Action by the Gauley Mountain Coal Company against S. A. Hays, Collector of Internal Revenue for the District of West Virginia. A judgment for defendant was reversed by the Circuit Court of Appeals (230

Fed. 110, 144 C. C. A. 408), and defendant brings certiorari. Judgment of Circuit Court of Appeals reversed, and that of District Court affirmed.

Mr. Solicitor General Davis, of Washington, D. C., for petitioner.

Mr. Henry B. Closson, of New York City, for respondent.

*190 *Mr. Justice PITNEY delivered the opinion of the Court.

Suit by the Gauley Mountain Coal Company against the Collector to recover taxes alleged to have been unlawfully collected under Corporation Excise Tax Act of August 5, 1909 (chapter 6, 36 Stat. 11, 112, § 38). The District Court gave judgment in favor of defendant, which was reversed by the Circuit Court of Appeals (230 Fed. 110, 144 C. C. A. 408), whereupon a writ of certiorari was allowed. The case was submitted together with several other cases decided this day, arising under the same act.

The agreed facts are in substance as follows: The Company is a mining corporation organized under the laws of the state of West Virginia. The business of trading in stocks is not included among its corporate powers, nor does it appear that, with a single exception, it ever bought or sold any. On December 9, 1902, it purchased certain shares of another mining corporation for $800,000, and sold them October 16, 1911, for $1,010,000, this sum being less by $214,933.33 than the purchase price plus interest at 6 per cent., but greater by $210,000 than cost ignoring interest. The Commissioner of Internal Revenue held that a proportion of the $210,000 represented by the ratio of the 1,019 days that elapsed between January 1, 1909, when the Corporation Excise Tax Act became effective, and October 16, 1911, the date of the sale, to the 3,233 days that elapsed between the date of purchase and the date of sale, constituted income of the corporation for the year 1911 within the meaning of the act. The apportioned sum, $66,189.30, reduced to $52,506 by certain deductions not now in question, was made the basis of an additional assessment at 1 per cent. upon the latter sum; and this assessment, having been collected by duress, formed the subject of the present suit.

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[1, 2] The decision of the Circuit Court of Appeals, and the principal contentions made by respondent in support of it, are based upon the decision of this court in Gray v. Darlington, 15 Wall. 63, 21 L. Ed. 45. That case arose under the act of Congress of March 2, 1867 (14 Stat. 477, c. 169, § 13), which provided that a certain tax should be levied, collected, and paid annually upon the amount over $1,000 of the gains, profits, and income of every person, declaring that "the tax herein provided for shall be assessed, collected, and paid upon the gains, profits, and income for the year ending the thirty-first of December next preceding the time for levying, collecting, and paying said tax." There was this further provision, "That, in estimating the gains, profits, and income of any person, there shall be included all income derived from interest upon notes, bonds, and other securities of the United States; profits realized within the year from sales of real estate purchased within the year or within two years previous to the year for which income is estimated * * * all other gains, profits, and income derived from any source whatever," with an exception that need not be stated. It appeared that plaintiff acquired certain United States bonds in the year 1865 and sold them in 1869 at an advance of $20,000 over their cost, and was taxed upon this amount as gains, profits, and income for the latter year. This court held that by the true construction of the act, except as to gains and profits from trade and commerce and sales of real property, the statute only applied to such gains, profits, and income as were strictly acquisitions made during the year preceding that in which the assessment was levied and collected. We do not regard the decision as controlling, because the language of the act now under consideration is different in material particulars. As pointed out in Doyle, Collector, v. Mitchell Brothers Co., this day decided, 247 U. S. 179, 38 Sup. Ct. 467, 62 L. Ed.*—, it imposes annually a special excise tax with respect to the carrying on or doing business by the corporation "equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year," to be ascertained by taking gross income and applying certain exceptions and deductions. "Gains, profits, and income *for* the year ending the thirty-first day of December next preceding" (act of 1867) conveys a different meaning from "the entire net income * * * *received by it* * * * *during* such year" (act of 1909). The former expression, as this court held (15 Wall. 65, 21 L. Ed. 45), denoted "such gains or profits as may be realized from a business transaction begun and completed during the preceding year," with the exceptions already mentioned. The expression "income *received during* such year," employed in the act of 1909, looks to the time of realization rather than to the period of accruement, except as the taking effect of the act on a specified date (January 1, 1909), excludes income that accrued before that date. There are other differences upon which we need not dwell.

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As we construe the latter act, it measured the tax by the income received within the year for which the assessment was levied, whether it accrued within that year or in some preceding year while the act was in effect; but it excluded all income that accrued prior to January 1, 1909, although afterwards received while the act was in effect.

This brings us to consider whether the proceeds of the sale of stock by respondent in October, 1911, included anything, and if so how much, of "income" accruing on or after January 1, 1909, as the term "income" is employed in the act.

That the sale resulted in a gain or profit to the extent of $210,000, the difference between the buying and selling prices, is *193 not to be doubted, for there is no merit in the contention that interest should be added to the purchase price in order to ascertain its cost. The money that went into the purchase was not loaned at interest; on the contrary, by the very fact of the purchase it was placed where it could not earn interest for the respondent in the ordinary sense, and the gain represented by the increase of selling price over cost price must be regarded as a substitute for whatever return some other form of investment might have yielded.

It results that so much of the $210,000 of profits as may be deemed to have accrued subsequent to December 31, 1908, must be treated as a part of the "gross income" of respondent. For it is the simple case of a conversion of capital assets acquired before and turned into money after the taking effect of the act; and, as we have shown in Doyle, Collector, v. Mitchell Brothers Co., this day decided, since a conversion of capital often results in gain, the general purpose of the act of 1909 to measure the tax by the increase arising from corporate activities together with the income from invested property leads to the inference that that portion of the gross proceeds which represents gain or increase acquired after the taking effect of the act must be regarded as "gross income"; and to this end it must be distinguished from that portion which represents a return of the capital value existing before. In order to do this, it is necessary to ascertain what was the value of the capital assets on December 31, 1908. Whether this should be done by taking an inventory upon the basis of market values then existing, or whether the entire increment accruing between the time of acquiring and the time of disposing of the assets should be prorated as if it had arisen through a series of gradual and imperceptible augmentations, is a matter of detail, to be settled according to the best evidence obtainable, and in accordance with valid departmental regulations. *194 Treasury Regulations No. 31, December 3, 1909, provided for inventories at the beginning and end of each year with respect to manufacturing and mercantile companies; and with regard to a sale of capital assets acquired prior to January 1, 1909, and sold thereafter, required that the amount of increment or depreciation representing the difference between the selling and buying prices should be adjusted so as fairly to determine the proportion of the loss or gain arising subsequent to the date mentioned; but without prescribing any particular method of doing this. Subsequent rulings required that sales of stocks and bonds should be regarded as sales of capital assets and accounted for accordingly under Regulations No. 31, and while still requiring inventories, resorted to the prorating method with respect to real estate, apparently on the ground that increases and decreases in the value of this class of property during particular periods could not be accurately determined. T. D. 1106, March 29, 1910, paragraphs 37, 50, 71; T. D. 1675, February 14, 1911, paragraphs 36, 48, 55, 69; T. D. 1742, December 15, 1911, paragraphs 42, 55, 62, 86.

The present case was heard upon an agreed statement of facts which contains nothing from which the value of the stock at the time the act took effect may be deduced, otherwise than by the prorating method that was adopted; nor is any objection made by the respondent to the application of that method. Hence there is no lawful ground for overthrowing the tax, and the District Court did not err in rendering judgment in favor of the Collector.

Judgment of the Circuit Court of Appeals reversed, and that of the District Court affirmed.

(247 U. S. 195)

UNITED STATES v. CLEVELAND, C., C. & ST. L. RY. CO.

(Argued March 4, 5, and 6, 1918. Decided May 20, 1918.)

No. 593.

INTERNAL REVENUE ⟸9 — CORPORATION EXCISE TAX—"INCOME."

Where a railroad company purchased stock in another company prior to January 1, 1909, and sold it at a profit thereafter, the proceeds of the sale cannot be considered as "income," within Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112, except to the extent that the selling price exceeded the ascertained market value of the stock on December 31, 1908.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Action by the United States of America against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. A judgment for the United States was, on defendant's writ of error, reversed and remanded by the Circuit Court of Appeals (242 Fed. 18), and the United States brings certiorari. Affirmed.

Mr. Solicitor General Davis, of Washington, D. C., for the United States.

Mr. George Hoadly, of Cincinnati, Ohio, for respondent.

Mr. Justice PITNEY delivered the opinion of the Court.

In January, 1900, the respondent purchased 30,000 shares of stock of the Chesapeake & Ohio Railway Company for $981,427.92, and sold them January 28, 1909, for $1,795,719—a profit of over $814,000. It included no portion of this profit in its return for the year 1909 under the Corporation Excise Tax Act of August 5, 1909 (chapter 6, 36 Stat. 11, 112, § 38), and the United States brought this suit to recover the tax of 1 per cent. thereon. The District Court directed a verdict in favor of plaintiff. Upon review the Circuit Court of Appeals held the proceeds of sale of the stock could not be considered as income under the act except to the extent by which they exceeded the market value of the stock on December 31, 1908, ascertained to be $57 per share. It therefore reversed the judgment, and remanded the case with instructions to enter a new judgment to include a tax on this account only upon the balance of the selling price above $57 per share, or $1,710,000 in all. 242 Fed. 18. A writ of certiorari was then allowed.

For reasons sufficiently stated in Doyle, Collector, v. Mitchell Brothers Co., 247 U. S. 179, 38 Sup. Ct. 467, 62 L. Ed. ——, and Hays, Collector, v. Gauley Mountain Coal Co., 247 U. S. 189, 38 Sup. Ct. 470, 62 L. Ed. ——, this day decided, we concur in the view that defendant was not taxable except with respect to so much of the profit upon the stock as accrued after December 31, 1908. Just how this part is to be separated from that which previously accrued is a matter of some nicety, as we have shown in the Hays case. The Circuit Court of Appeals adopted the theory of an inventory taken as of the time the act went into effect; and although the assets here under consideration were not acquired for the purpose of sale in the manner of merchandise, but were bought for investment, and hence were not inventoried on December 31, 1908, it accepted the stipulated fact that the stock had a regular market value of $57 per share on that date as supplying the lack of an inventory. This result accords with the views we have expressed in the cases referred to.

Judgment affirmed.

Mr. Justice HOLMES took no part in the consideration or decision of this case.

(247 U. S. 32)

UNITED STATES v. UNITED SHOE MACHINERY CO. OF NEW JERSEY et al.

(Argued March 16, 19, 20, and 21, 1917. Restored to Docket for Reargument May 21, 1917. Reargued Jan. 11, 14, and 15, 1918. Decided May 20, 1918.)

No. 207.

1. MONOPOLIES ⟸12(1)—VIOLATION OF ANTI-TRUST ACT—DEFENSES.

It is no defense in an action for violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, that defendants, who were charged with forming a combination in restraint of trade, left a limited field open to competition.

2. APPEAL AND ERROR ⟸1009(3)—REVIEW—FINDINGS.

Where, in an equity suit, the testimony, which was conflicting, was heard orally by the court, its findings for that reason are entitled to deference on appeal.

3. MONOPOLIES ⟸24(2)—ANTI-TRUST ACT—EVIDENCE—FINDING.

In a suit under Anti-Trust Act to dissolve the United Shoe Machinery Company, formed by the consolidation of a number of companies, each engaged in making patented machines for use in the manufacture of shoes, on the ground that it was a combination in restraint of trade, the finding of the trial court that the constituent companies were not in competition *held* warranted by the evidence, despite circulars issued by a constituent company and the United Company relative to the consolidation.

4. MONOPOLIES ⟸20 — "COMBINATIONS IN RESTRAINT OF TRADE"—MANUFACTURERS—PATENTED ARTICLES.

The union in one corporation of a number of others, each of which had been engaged in the manufacture of patented noncompeting machines, which were used successively in a manufacturing business, is not a combination in restraint of trade, in violation of Anti-Trust Act, § 1 (Comp. St. 1916, § 8820).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Combinations in Restraint of Trade.]

5. MONOPOLIES ⟸24(1)—SUIT TO DISSOLVE CORPORATION—LAPSE OF TIME.

Where a corporation was formed by the consolidation of numerous other companies, all engaged in the business of making patented machines for the manufacture of shoes, the lapse of a long period of years, during which the consolidation was not attacked as a combination or a conspiracy in restraint of trade, while not a defense, if there was a violation of the Anti-Trust Act, should be considered in refutation of the long-deferred charge, in view of the remedy of dissolution sought, the fact that conditions had changed, and that persons had invested in the stock of the consolidated company in the natural belief that it was not organized in violation of law.

6. MONOPOLIES ⟸20—COMBINATION IN RESTRAINT OF TRADE — CONSOLIDATION OF SHOE MACHINERY COMPANY.

The United Shoe Machinery Company was formed by the consolidation of a number of companies, each engaged in the making of patented machines for use in the manufacture of shoes. Thereafter the company acquired many newly patented devices for shoe machinery, as well as patents for improvements of its own machines, which the company asserted could not be used without an infringement of its basic patents. Its business also was extended to the sale of findings for shoes, and to making of varied accessorial machines for each successive stage of shoe manufacture. *Held*, that the acquisition of other devices, as well as the extension of the company's business, did not show that it was a combination in restraint of trade, or evidence an attempt to create a monopoly within the meaning of the Anti-Trust Act, §§ 1, 2 (Comp. St. 1916, §§ 8820, 8821).

7. MONOPOLIES ⟸12(2)—ANTI-TRUST ACT—CONTRACTS.

In such case a contract whereby an inventor, whose patents were acquired on acquisition of the stock of another corporation, agreed to assign subsequent inventions to the United

Company, did not show any violation of the Anti-Trust Act.

8. PATENTS ⟸1—ANTI-TRUST ACT.

The monopoly given inventors by the patent laws does not fall within the Anti-Trust Act.

9. PATENTS ⟸202(1) — PATENTEE — RIGHTS OF.

While a patentee may even keep his invention out of use, he cannot grant the title and retain the incidents of it; but a lease of patented machinery is not a conveyance passing the title which will free the machines from restrictions contained in the lease.

10. MONOPOLIES ⟸17(1)—ANTI-TRUST ACT—MANNER OF LEASING MACHINES.

Where the United Shoe Machinery Company, which was formed by the consolidation of companies each engaged in making patented machines for use in the manufacture of shoes, and which thereafter acquired new patents, instead of selling its machines, leased them for long terms, with a license for the terms of any patents covering parts thereof, upon a royalty basis, neither the mode of leasing such machines nor the leases themselves were unlawful, as creating a monopoly in violation of the Anti-Trust Act, though the leases contained various provisions requiring the lessees to use the machines to their full capacity, to use the company's machines exclusively, and to lease other related machines in specified cases, under penalty of cancellation of the existing leases, particularly as relaxation of the conditions of the leases could be obtained on certain initial payments, for in the ultimate analysis the leases cannot be deemed coercive, as it was optional with each lessee whether he should take the machines on the terms demanded or forego the benefit of using such patented machinery.

Mr. Justice Day, Mr. Justice Pitney, and Mr. Justice Clarke dissenting.

Appeal from the District Court of the United States for the District of Massachusetts.

Suit by the United States against the United Shoe Machinery Company of New Jersey and others. From a decree for defendants (222 Fed. 349), the United States appeals. Affirmed.

*533 *534 *Suit to dissolve an asserted combination and conspiracy between certain companies, makers or dealers in boot and shoe machinery, and the officers of the companies; also to have declared illegal and canceled certain leases and agreements, charged to be the means of the combination and conspiracy whereby, through control over the manufacturers of boots and shoes, competition has been prevented, inventive genius subjected to the designs of the combiners and conspirators, and auxiliary machines and accessories controlled and made subsidiary.

The charges are met with denials, with justification that the conduct which is asserted to be illegal was in promotion of trade, in natural development of business and in strict compliance with modern trade progress; indeed, that there was simply the fusion of independent and noncompeting businesses, each differing from the other, and the combination of various elements of machinery covered by United States patents and all of it relating to the same art and the same school of manufactures. And that the leases and agreements were but the exercise of patent rights, wholly legal and indeed necessary.

These contentions are displayed in a bill which occupies 46 pages of the record and an answer of equal volume.

The statute of limitations is also pleaded in defense, the greater part of the acts charged being alleged to have taken place more than six years before the filing of the petition.

Three judges sat in the case, who heard the testimony in open court. Upon its completion and consideration a decree was entered dismissing the bill. Each judge rendered an opinion exhibiting the case from a different angle, and the opinions, taken together, display all the phases of the case and the considerations and issues involved. (D. C.) 222 Fed. 349.

Mr. H. La Rue Brown, of Boston, Mass., for the United States.

Messrs. Charles F. Choate, Jr., and Frederick P. Fish, both of Boston, Mass., for appellees.

*532 *Mr. Justice McKENNA, after stating the case as above, delivered the opinion of the Court.

The charge of the bill is that defendants, not being satisfied with the monopoly of their patents and determined to extend it, conceived the idea of acquiring the ownership or control of all concerns engaged in the manufacture of all kinds of shoe machinery. This purpose was achieved, it is charged, and a monopoly acquired, and commerce, interstate and foreign, restrained by the union of competing companies and the acquisition of others. And that leases were exacted which completed and assured the control and monopoly thus acquired.

But this charge of comprehensive trade dominance was modified in the course of the trial. The government disclaimed the assertion of such extensive culpability and confined its contention to machinery adapted to the bottoming of shoes (attaching soles to uppers), machines called clicking machines (cutting-out machines), and eyeletting machines (sufficiently indicated by name), and *539 declared that if the bill did not so limit the actual monopoly counsel would agree so to limit it.

[1] Of course, we agree with the government that defendants cannot be discharged from all guilt merely because they leave open some branches of the business to the enterprise of others, or, as the government puts it, "that a limited field is as yet open to competition." But in view of the large de-

sign attributed to the defendants and the illustration of what it is contended they accomplished, it would be interesting if not instructive to be told when their large scheme was abandoned or broke down, even though it may now be said to be an unimportant detail, since the trial court has decided that neither the greater nor lesser scheme was established by the evidence.

The conclusion, however, is contested, and in description of what is now contended, the government says that "the end which avowedly was sought by the organizers of the United Company was 'the control in one corporation, both in the United States and in foreign countries, of the efficient types of shoe machinery.'" And, further, after stating the business of defendants to be that "of supplying machines used in the manufacture of shoes," and the restraint of interstate and foreign commerce in certain of the machines, it is said:

"The subject matter of the action, therefore, is the effect of the things done by the defendants upon the trade between manufacturers of machines used in the manufacture of shoes and the manufacturers of shoes."

And in further display of the interest which attaches to the issues, it is said:

"Shoes are made in every part of the Union" and "it is obvious that supplying important machines for such an industry must be an exceedingly important part of the interstate trade and commerce of the United States."

And there are contentions as to the dominance achieved. Indeed, it is asserted somewhat fervidly that the United Company "is absolute monarch of the industry" and that "no competitor can exist unless for its own pleasure or policy it withholds its destroying hand."

There are opposing contentions no less fervidly urged. There is denial of the purpose attributed to the defendants or the possession or exercise of baleful power, and the insistence that the United Company is a union of noncompeting businesses conducted under letters patent, effecting through the resources thus acquired greater economies in manufacture and greater efficiency of machinery and "in other ways perfecting the shoemaker's art"—advantages not engrossed by the company but inuring to its patrons and through them to the wearers of their product, a finished shoe.

In final answer to the charge of the government the comprehensive declaration is that the shoe machinery industry is not one open to everybody on equal terms. It is one of patents. And the company's power, if it have power, is not that of combination but the power of the superiority of its inventions—the effect and demonstrated supremacy of its mechanical instrumentalities.

[2] The contentions could not well be more antagonistic, upon each of which there was conflicting testimony, and the important fact is to be borne in mind that it was given in open court (except as to certain contentions about patents, their scope and validity).[1] The fact justifies deference to the findings of the trial court. Adamson v. Gilliland, 242 U. S. 350, 353, 37 Sup. Ct. 169, 61 L. Ed. 356.

There are two accusations against the defendants. One is that at the very outset they combined competing companies and subsequently acquired others, section 1 of the act of 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. 1916, § 8820])[2] being thereby offended. The other is a monopolization of the trade in violation of section 2 of that act (Comp. St. 1916, § 8821). And it is charged, as we have said, that certain leases and license agreements are the instruments which consummate both offenses.

The offense of combination was committed, it is contended, February 7, 1899, at which time seven shoe machinery companies were consolidated into the United Shoe Machinery Company of New Jersey, a corporation organized for that purpose. The companies were: The Goodyear Shoe Machinery Company, the International Goodyear Shoe Machinery Company, Consolidated & McKay Lasting Machine Company, McKay Shoe Machinery Company, Davey Pegging Machine Company, Eppler Welt Machine Company and the International Eppler Welt Machine Company. The last two companies were ac-

[1] During the trial a discussion came up about patents. The presiding judge intimated that the court did not desire to take up the patents themselves but would send them to an examiner. It was stated by counsel in the case that the matter was important. But the court made a distinction between a "patent question" and a "patent controversy"—good faith being an element of the latter—and stated that the latter would not be included in the hearing before the examiner, but would be heard in open court. The court then ordered the taking of testimony of both parties before the examiner as to that section of the bill which charged an unlawful extension of the patents to perpetuate their monopoly at the expense of boot and shoe manufacturers and to use them to acquire a complete monopoly of all kinds of shoe machinery. The examination took place and it was the usual battle of experts, and the conflicts are recorded in a volume of more than eight hundred pages. Their ultimate test, however, and the effect of the patents is the testimony delivered in open court.

[2] "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

quired by the new company after its formation, but they may be regarded as constituent companies. The businesses of these companies were conveyed to the new company, the businesses being those of manufacturing, selling and leasing and dealing in shoe machinery, including patents of the United States and other countries.[3] A more particular distinction we do not deem it necessary to make.

[3] The first question is, Were the companies in competition? It confronts us at the outset; all other considerations are dependent upon it. As an element in the answer to it we must revert to the admission that the charge of combination is only as to machinery for bottoming shoes—that is, the uniting of the sole to the upper—an operation which might be called "simple" if the complexity of this record did not contradict it and if we were not told that the letters patent covering the machinery for the operation are too great in number for explanation or enumeration. It is said that on certain classes of shoes over 100 different operations are performed by different machines. And the government has taken pains to tell us how far "the mysteries of the shoemaker's art and the variations between different methods of making shoes" are outside of the understanding of the purchaser of them. To him, it is said, "shoes are shoes, except as they differ in appearance, comfort, wearing qualities, and price." But to the manufacturer distinctions multiply and to the production of a shoe a complete line of machinery is necessary. Indeed, the government makes the mystery of the art and the necessity of the instrumentalities, in part, the basis of its argument.

We are therefore admonished at once of the complexity of the case and the maze of mechanical technicalities into which we should be plunged in estimating the evidence if we had not the guidance of the opinions of the judges of the trial court. The court found, as we have said, that the companies were not in competition at the time of their union in the United Company, and based the finding not only upon the testimony of witnesses but the uses of the machines of the respective companies and their methods of operation. The testimony was conflicting, it is true, and different judgments might be formed upon it, but from an examination of the record we cannot pronounce that of the trial court to be wrong. Indeed, it seems to us to be supported by the better reason. We should risk misunderstanding and error if we should attempt to pick out that which makes against it and disregard that which makes for it and judge of witnesses from their reported words as against their living presence, the advantage which the trial court had.

The government, however, urges two circumstances which it contends corroborate its oral testimony and against which it asserts that "literal denials of specific intent to restrain trade are of no significance." But there was more than literal denials. There were detailed representation of the condition of the trade and explanation of the machines convincing, as we have seen, in its strength and the confirmation it received. Let us, however, consider the instances upon which the government relies. The most important of them is a circular letter[4] sent by the directors of the Goodyear

[3] There is apparent confusion in the brief of the government In one place it is stated that the United Company was the consolidation of the businesses and properties of seven companies which were taken over as going concerns, to wit: Goodyear Shoe Machinery Company, International Goodyear Machinery Company, Consolidated & McKay Lasting Machine Company, McKay Shoe Machinery Company, Davey Pegging Machine Company, Eppler Welt Machine Company, and International Eppler Welt Machine Company.

In another place the organization of the United Company is stated to be the merger of four companies—Goodyear Company, Consolidated & McKay Company, Eppler Company and the McKay Shoe Machinery Company—and resulted in the immediate suppression of competition between those companies and dominating "to the point of practical exclusion the important field of supplying the principal and essential machines necessary in the manufacture of shoes."

However, in the conclusion of the government's brief it contends that it has established "that there existed vigorous competition between three of the companies merged in the organization of the United Company, and that the fourth company, which at any moment might have become a competitor, was taken in for the purpose and with the effect of furthering the unlawful scheme of the combination thus brought into being." The fourth company referred to is no doubt the McKay Shoe Machinery Company.

The immediate results were, it is contended—

"(1) The suppression of the actual and of the potential competition in lasting machines theretofore existing between the Consolidated & McKay Company and the Goodyear Shoe Machinery Company. It created a monopoly in lasting machines.

"(2) The suppression of the actual and of the potential competition between the Goodyear Shoe Machinery Company and the Eppler Welt Machine Company. It created a monopoly of welting and outsole stitching machinery.

"(3) The absolute prevention of future competition between the McKay Shoe Machinery Company, the Goodyear Shoe Machinery Company, the Eppler Welt Machine Company, and the Consolidated & McKay Company.

"(4) The creation of an absolute and complete monopoly in lasting, pegging, welting, outsole stitching, heeling and metallic fastening machines.

"(5) The creation of an organization with vast resources whose control of many different types of machines necessary to the shoe manufacturing industry gave it a power to extend and intrench its monopoly which none of its constituent companies, however successful, could approach."

[4] "Plaintiff's Exhibit 152.

"To the Stockholders of Goodyear Machinery Company:

"Boston, Mass., Feb. 8, 1899.

"The great advantages to be secured by the control in one corporation, both in the United States and in foreign countries, of the efficient types of shoe machinery, have been for several years recognized by the officers of the principal shoe ma-

Company to its stockholders which set forth that great advantages were to be secured by the control in one corporation of the most efficient types of shoe machinery and that the directors and large stockholders had been in negotiation to accomplish that end; and further that the United Company would from time to time acquire other shoe machinery properties either by direct ownership or by purchase of shares of their stock. Also a like declaration[5] in a contract with its agent in Australia.

* The circular and agreement could not, of themselves, give character to the constituent companies. It is evident, therefore, that both of them need comment to give them sinister significance, and the innuendo of the government is that they meant not only that great competing companies had been united, but that other companies—competitors, it may be—would be acquired. It would be a stout credulity that could accept this explanation against the counter considerations. We cannot put out of mind that according to the government, in repeated assertions, the United Company in 1899, twelve years before the suit was brought, jumped into the field full-panoplied in monopolistic power and started immediately on its career of dominance and restraint of trade. But to preclude the denial of the assertions it is now said that, in stock circulars and trade agreements, the company trumpeted its might and illegal enterprise to two continents. Deliberate guilt—we say deliberate guilt, for it is not a question of ignorance or imbecility—is usually not so bold. It masks its purpose to hide it from prevention and penalty. If it may be asserted that the trade agreement was in secret, certainly the circular letter to the stockholders committed the scheme to publicity.

We cannot, therefore, accept the explanation of the government. Its implications discredit it. It implies that there was governmental supineness for a long time or an extraordinary oversight of conspicuous, indeed vaunted, criminality. Neither can be accepted. And we are persuaded that the circular and agreement were not intended nor regarded to be the avowal, as contended by the government, of monopoly, achieved or to be achieved, but simply the business expression and foresight of the advantages which would result from the concentration in one management of instrumentalities which, however different, supplement one another in the creation of a shoe.

We have given the explanation of the government importance because the government has done so. And we have only answered in estimation of what the circular and agreement are worth as avowals of intention. Of course, if the government is right, they are unimportant circumstances; the demonstration of the United Company's purpose is complete without them; for the government contends that the constituent companies were in open competition and that their union resulted in the "immediate suppression of the actual and potential competition" in shoe machinery and the "creation of an organization of vast resources * * * which gave it a power to extend and intrench its monopoly which none of its constituent companies, however successful, could approach." If this were a fact it would not need the confirmation of words.

The second circumstance cited by the government is that before the union of the companies their machines had a flexibility in use that the testimony of defendants does not now ascribe to them, and that this was declared in advertisements. We are not disposed to give much importance to the circumstance. It may be that there was a certain interchangeability in the described machines, but, in the opinion of the trial court, there was, notwithstanding, no practical competition between them. We can add nothing to what determined its judgment or to the detailed comparison and explanation of the machines made in its opinions. Indeed, we might rest this branch of the case on those opinions. They were considerate of all the elements of the government's contentions and the opposing contentions and tested the machines, their sameness and difference and respective efficiency, by the purposes for which they were designed by the inventors and employed in the trade and by the explanations made of them.

[4] In considering the competition of the

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chinery companies. For more than a year your directors and large shareholders have been in negotiation to accomplish this end.

"After a thorough investigation of the financial condition and the business of the shoe machinery companies named below, the organization of a corporation has been effected under the laws of the state of New Jersey, to be known as United Shoe Machinery Company.

"The United Shoe Machinery Company has already contracted for more than a majority of the capital stock of Goodyear Shoe Machinery Company, Consolidated & McKay Lasting Machine Company, McKay Shoe Machinery Company, Goodyear Shoe Machinery Company of Canada, International Welt Machine Company, Davey Pegging Machine Company, besides stocks in other shoe-machinery companies, letters patent, and other property.

"The United Company will also from time to time acquire other shoe machinery properties, either by direct ownership or by purchase of shares of their stock."

[5] "Plaintiff's Exhibit 189.

"Whereas, the United Company have acquired control of the boot and shoe and leather working machinery made by the following named corporations doing business in said Boston, namely:

"Goodyear Shoe Machinery Company, Consolidated & McKay Lasting Machine Company, Eppler Welt Machine Company, Goddu Metal Fastening Company, Gordon Staple Lasting and Tacking Company, Davey Pegging Machine Company, Gem Flexible Insole Company, Boot & Shoe Sole Laying Company, and contemplates acquiring the control of other lines of boot and shoe and leather working machinery and boot and shoe findings, except leather, linings, lasts, and finished boots and shoes. * * *"

45 machines and in estimating the defendants' acts in uniting the companies, it is to be observed that the machines were all made "under letters patent of the United States and other countries," were owned by the companies, and covered improvements made by the companies from time to time and embodied in the machines, which were so far developed that they were in 1899 principally in use by shoe manufacturers in the kinds of work to which they were respectively adapted. The patents and the business passed to the new company, but necessarily were the same in its hand as before. In other words, the patents did not lose their distinction, nor the machines their difference; and to dwell upon the percentages of manufacture is misleading. Of a like situation we said in United States v. Winslow, 227 U. S. 202, 217, 33 Sup. Ct. 253, 255 (57 L. Ed. 481), and said of it in answer to the charge against the combination here involved, that we could

"see no greater objection to one corporation manufacturing seventy per cent. of three noncompeting groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each. The disintegration aimed at by the statute [act of 1890] does not extend to reducing all manufacture to isolated units of the lowest degree."

Or, as expressed by one of the judges in the court below:

"The combination was not unlawful so far as it did no more than put the different groups of noncompeting machines into one control. * * * It was not unlawful unless, to an extent injurious to the public interest, it destroyed competition."

And it was held that competition was not destroyed to the designated extent. Indeed, the court was repelled, as it might well have been, by the consequences of so holding on account of the change of conditions, the union of the companies not having been questioned by the government for twelve years and large investments having been made not only by the company but by the public.

46 [5] The lapse of time, indeed, may not condone the offense if offense there was. It, however, may call offense in question and be an element in the refutation of accusations long deferred, or determine against particular remedies. It is to be remembered that a dissolution of the offending companies is prayed and that each of them be "separated into such parts that no one of them will constitute a monopoly of the shoe machinery business," or that receivers be appointed to take possession of them and their assets, business and affairs and wind them up and "bring about conditions in trade and commerce among the states and with foreign countries in harmony with law." If there be need for this the difficulties of achievement should not deter; but the difficulties may admonish against the need and demonstrate that the situation may be remediless or to be redressed at a cost too great. Therefore, considering the remedy prayed, which is extreme, even in its mildest demands, we may ask, what of the investments that have been made during these years of extension and development of the new company's business? What of the machines that have become obsolete and the new ones that have been developed? What of the patents that have expired and the new ones that have not yet run out, and how distribute them? And what of their effect when distributed? Will their monopoly cease, or be regarded as an instrument of illegal purpose and forfeited as a deodand? How pick out from the new conditions the conditions of 1899 and restore them and the art of that time and rehabilitate the businesses that are alleged to have ceased to exist or to have become merged in the United Company? How from the complexity only thus suggested, not displayed, "bring about conditions in trade and commerce" in shoe machinery "among the states and with foreign countries in harmony with law," which is the ultimate resource of the government for this part of the case? How radical should the disintegration be? Or should there be a sale in entirety and not in parts? And, if in entirety, will the purchaser get an immunity that the companies did not have? A sale in* entirety would seem to* be absolutely necessary to preserve the works at Beverly. And yet how can that be done if there be a dissolution of the company and a distribution of machines? On the other hand, the idea is repellent that so complete an instrumentality should be dismantled and its concentration and efficiency lost. It has been testified that the purpose of the organization was the consolidating of all the machines in one modern factory and the standardizing of them. This purpose has been attained. The company employs there 4,000 men.

[6, 7] There are, however, certain instances of acquisition which may be said to give confirmation to the charges of the government and justify the demand for redress, at whatever cost or disaster to the offenders; in other words, demonstrate the purpose of the original union of the companies, the persistence of that purpose and the extension of its dominion having the evil consequences depicted by the government. Upon these instances it would seem unnecessary to dwell, the companies not being competitive at the time of their union in the United Company. However, they are made so much of by the government and are so strongly urged that attention must be given to them. The most important of them and the one that was given most prominence in the testimony was that of the plant and machinery of the Thomas G. Plant Company, a New Jersey corporation, a manufacturer of shoes, not of machinery, and of the shoe machinery interest of Thomas G. Plant.

Plant was an inventor of machines of the shoe-bottoming variety and had taken out a

number of letters patent in the United States and foreign countries covering the same. There was in the testimony and is in the argument of counsel dispute as to the efficiency of the machines of themselves. We say *48 "of themselves" to distinguish *them from the inventions embodied in them, a necessary distinction to meet some of the phases of the case. A set was installed in the Plant Company's factory, of which Plant owned a majority of the stock. Two other concerns to which they were offered under inducements refused to accept them. It may be admitted, as the trial court found, that they had experimental promise, and it was testified that a number of shoe manufacturers had concerted to buy them. There were charges of infringements of the United Company's machines and Plant was loath to permit an inspection; indeed for a time refused it. And, besides, for their completion into a set for combined operation important machines were necessary which were not yet developed. As they stood they were undoubtedly inferior to the machines of the United Company, and in the state, therefore, in which the United Company took them they were not found capable of use. Nothing was in them which affords reasonable support for the government's contention that they were "right at the threshold of extensive competition with the United Company." But, suppose they were. It would only be conjecture to say that they would cross it or that their strength would be formidable if they did. It is in the testimony that they broke down upon trial and were supplanted in the Plant factory where Plant had installed them by the United Company's machines. And the substitution was not at the dictation of the latter company. The vice president of the Plant Company and the general *49 manager of its factory *testified that satisfactory work could not be done with them on men's shoes; they broke down even in the manufacture of women's shoes to which they were adapted.

It appeared that some of the machines infringed the United Company's and in some details the latter infringed the Plant machines, and the complexity of rights hence resulting, to which we shall presently refer, had led to and threatened litigation; to compose which, it was testified, and the trial court found, was a contributory inducement of the United Company's purchase from Plant.

The government resists the finding. Its conception is, and to this all of its contentions are addressed, that the United Company combined and was intended to combine great competing companies and to acquire other competing companies. "The United Company acquired," counsel say, "every company then [when the company was organized] actively putting out or planning to put out" machinery adapted to bottoming shoes, and that "in the twelve years before the bringing of this action no substantial change took place, but rather the monopoly so acquired was in some respects extended and in many respects strengthened and intrenched." In the light of this conception and contention the government sees and colors all that the United Company has done, all of the acquisitions it has made, and upon whatever motive made, including the prevention of patent troubles or the composition of litigation. And it directly says of the purchase from Plant that it was made at an overvaluation and by it Plant was tempted to the bargain and the United Company satisfied by getting rid of a competitor.

We get no solution of the purpose of the parties by the price the United Company paid.[6] We must consider what it was paid for. It is to be remembered that we are dealing with a transaction which took place eleven years after the formation of that company and is to be judged of by its own circumstances, the incentives of that time. Plant was eager to sell and the overtures came from him—indeed, he engaged two intermediaries, to one of whom he paid a large commission. There was necessarily negotiation before the final meeting of minds. To estimate the bargain to it the United Com- *50 pany insisted upon an *inspection of the* machines, that is, to estimate their value, as it was testified, "to the advancing of the art of shoe making."[7] Plant refused at first, as we have said, but later yielded, and after inspection the purchase was consummated. Indeed, there were two inspections. The report on the first was adverse to the purchase. Mr. Winslow, president of the United Company, took part in the second and we may quote his testimony, for it is the standpoint of that company we are now considering. His testimony, besides, had confirmation. He believed, he testified, that he had a broader knowledge of shoe machinery than any one else and he therefore studied the Plant machines "personally as an expert." He considered them, he said, from the standpoint of their capacity, the value of the inventions and the improvements embodied in them, the

[6] The price was $3,000,000 in cash and $1,500,000 in common stock of the United Company at par, the market value of which was $3,000,000.

[7] Mr. Winslow gave the following explanation of his purpose in the Plant purchase as stated in conversations with Mr. Plant:

"I always declined to have anything to do not only with buying but considering his propositions without a full and complete right to examine his machinery, determine the value of the inventions—the patents that he had—and Mr. Plant knew that my position all the time, at every interview was that I was not interested in what it cost him to get them up, whether much or little. My entire and only interest was whether those patents could be made of benefit to our customers and the trade. If they could be of benefit, if they were of large benefit, and the trade ought to have them, I should be very glad to buy them and embody them in our machines for what I thought they were worth, irrespective of what they had cost him—but I would not pay a cent more for them."

comparison of their work with the work of the United Company's machines and the mechanical construction of the latter. He further testified that:

"Plant had used the Goodyear machines [the United Company's machines] as a basis for his machines and made important improvements and developments."

He indicated one of the improvements in particular, which he regarded as of the very greatest practical importance, especially when combined with a device that the United Company had just developed and placed in its factories. In a "broad way," he said, the value was almost incalculable.

But there was an interdependency of values. While the Plant device had value over that of the United Company's, it was controlled by the latter, or, as the witness expressed the situation, "in a broad way it was a perfect deadlock." In other words, the United Company had the underlying invention and Plant a patent for a particular form of operation which was necessarily subordinate to the other—a situation familiar in patent law and contests.

It will be seen, therefore, that there was no other way out of the deadlock, if the inventions were to be used together—that is, embodied in one machine, without infringement—than by ownership in one hand of all the patents. That plan was adopted and was the inducement of the purchase of the Plant inventions by the United Company. But there was litigation to be composed as well, and was composed.

Another witness testified as to the relation of the Plant patents and those of the United Company and stated that the result, if Plant had insisted upon his patent rights and the company had insisted upon its patent rights, would have been "a stop in the development of shoe machinery in these lines," and continuing, he said:

"We should hardly have dared to go ahead with the improvements in our machines for fear of not succeeding in our patent litigation, or of conflicting with such improvements as Plant had patented. On the other hand, Plant, or any company which he might form, would have hardly dared to go ahead with the possibility of these infringement suits. These infringement suits, or a good many of them, were then pending, and certainly he would have found very few customers, I think, for his machines."

This, in outline, was the situation that confronted the parties and induced their transaction, the incentives of each being as indicated. And they were justifiable incentives, and we may accept them as an alternative to the contention made by the government that a violation of law was the impelling motive of the parties. And we may say that after the United Company had made the Plant acquisition it proceeded to make improvements on the Plant patents and developed many of them, giving them an efficiency they did not have before.

There are other acquisitions that are emphasized, among them, that of the stock of the Goddu Sons Metal Company. It was acquired March, 1899, a month after the United Company was formed and eleven years before this suit was brought; and the inducement to the acquisition was to settle the patent troubles that came to the United Company through one of its constituent companies. The value obtained was in patents. These were for the metallic variety of machines, and, according to a witness for defendants, "at that time the United Company was putting out commercial machines for doing the work for which the Goddu machines were intended." And, according to another witness, though not then in a condition to be placed in the hands of manufacturers, "they were in a state of development where some of them could have been, without extensive changes, made operative."

By this testimony the defendants justify the purchase; the government condemns it. The defendants say that it was in composition of an inherited litigation and that patents of value were obtained by it. To this the government replies in condemnation that the cost of the settlement of the disputes was excessive, being $150,000, and the purpose of getting the patents was to forestall the competition they threatened and could have accomplished by their development.

The value of a settlement of a dispute about rights which has reached litigation or threatens it cannot be easily or accurately estimated. It depends upon too many considerations which are not reflected in the price paid. The other ground of condemnation has strength. As the government says, quoting Circuit Judge Putnam in another case, neither the letter of the law nor its purpose "distinguishes between strangling of commerce which has been born and preventing the birth of a commerce which does not exist." But there is another view. No one can tell the strength of the competition that may be in a patent. It may be more than competition; it may be destruction, and the Anti-Trust Act surely does not require the acceptance of that or forbid effort to prevent it. But even if such extreme does not impend, certainly improvement of business and its efficiency can be striven for without offense to the law. United States v. Winslow, supra.

We may say here of the contention of the government as to the acquisitions—and the same comment may be made of most of its contentions—that they cast us into speculation for their estimate and urge us to decide between well-sustained conflicting opinions and adjudge the defendants guilty of a violation of law. And this, too, against the considered judgment of the trial court.

We see no illegality in the contract with Goddu for assignment of other inventions he might make, or in like agreement with others. We content ourselves with this general declaration. An analysis of the contracts

is not feasible, nor are the covenants measurable. That they are attempts to subject the inventive genius of the country to the designs of the defendants is too extreme. They can be seen to have more particular use and to be justified in the circumstances of the transaction with which they were connected. Those whom one employs one gives opportunity to (this was Goddu's case) and may exact that it be used for the employer. Those who have conveyed to him special machines may be presumed to have been compensated by their price, and that in either *554 case*there will be such development and use as to make them competitive is too speculative to justify a judgment.

It is to be noted that the acquisitions in this case were not coincident in time nor parts of the same transaction. They were scattered through a period of years and varied each from the other, had no dependency, were different and unrelated steps in the development of the business of defendants. They must hence be judged separately, not in accumulation.

The above comment is applicable to other acquisitions, said to be fifty-six in number. It is impossible to review them. A description of them and wherein the machines acquired were competitive with the machines of the United Company the government sets forth in many pages of its brief, and the defendants reply as circumstantially with opposing delineation and justification. Their effect is hard to estimate. The removal in some degree of competition may be charged against some of them and yet, on the other hand, the acquisitions may be said to be justified by the exigencies or conveniences of the situation. Some of them were merely of accessorial machines; some in composition of patent troubles; some not connected with the special charge of monopoly to which the government has limited itself; some the transfer to defendants of kinds of machines not possessed by them; some of patented improvements and inventions, aiding or completing the defendants' machines, tributary therefore to their efficiency. They give a false impression by their number. They added nothing of obnoxious power to the United Company nor in any practical or large sense removed competition.

Defendants charge that the government not only puts an exaggerated computation upon the acquisitions by defendants but gives no credit for or account to their resistance of applications to buy other and, it is asserted, more important concerns. Their number is given as seventy-five, all of great *555 use and importance. The trial court found that*the offers refused were more numerous and several of them were of concerns more important to the scheme of monopoly charged against defendants than any of the specified acquisitions. The comment is justified by the evidence.

We pass by the charge of the government that the United Company through its president threatened destruction to opponents and the use of his influence in the business world to enforce transfers of competing concerns and the patents they controlled. The charge and its denial or explanation were estimated by the trial judges and the charge was held not to be established, or of no serious importance. The court said that if the declarations could be called "threats" in view of all the surrounding circumstances shown, it was not established that any competitor lost a customer or that anybody was prevented from attempting competition. Besides, they were isolated instances, separated in time, without relation, not co-ordinated acts in a scheme of oppression.

We cannot go into further detail without unduly extending this opinion. It would be repetition, besides, of what was done carefully and thoroughly in the opinions of the trial judges. We sum up with a generalization that the United Company took by its organization "established businesses already of great value, possessing great possibilities of development," as said by the trial court. It was discerned that there was advantage in their concentration, and the expansion that has hence resulted has been as much in necessary evolution as by design. At its foundation there were certain basic patents and many auxiliary ones. Inventors—those connected with and those independent of it —were devising and experimenting, and of this the company had to keep informed. It had to keep up with the mechanical march; to fall back would have been its destruction. There was growth not only in its business proper but in the accessories to it. When it was formed in 1899 it had no facilities for *556 furnishing findings* and supplies. It was business enterprise or, it may be, necessity, to acquire them, and their acquisition became what is called in the case the United Company's "general department," which handles, it is said, between 150 and 200 different kinds of machines. The expansion to this and in this was like the expansion of the department store—an accumulation not only of necessary things, but of incidental, supplemental things, auxiliary to the completion and finish of a boot or shoe. There is a service force as well, estimated at 6,000 men, to repair immediately breaks or deterioration without extra charge. And these men are kept at convenient places to repair machines and replace worn-out parts, and depots of supplies are maintained. There are also instructors of operators as well as furnishing of men in emergency. It is in the testimony that a total of 8,889 operatives were taught in the year 1911 alone.

The company, indeed, has magnitude, but it is at once the result and cause of efficiency, and the charge that it has been oppressively used is not sustained. Patrons are given the benefits of the improvements made by the company and new machines are sub-

stituted for the old ones without disproportionate charge. There has been saving as well in the cost of manufacture of shoes. These are some of the results of the organization of the United Company. Others are testified to and the means of their accomplishment; but time will not permit their statement, and we pass to the leases.

There was complaint of them and the government attacks them. Complaints, however, may be interested lament; but, on the other hand, they may be the expression of real grievance and demand redress. And which they are should be considered. To the attacks of the government the defendants reply that the leases are the exercise of their right as patentees and if there is monopoly in them it is the monopoly of the right. It must, indeed, be said that it is the experience of the world that the utility of an invention entices to its infringement, but it would be a perversion of things to facilitate the wrong by a sacrifice of the right in revulsion from the restraint which the right authorizes. But, on the other hand, we must not overestimate the right or give it a sinister effect—permit it to be a means, to use the words of the government, "to the building up and intrenchment" of an "illegal monopoly." We cannot consider the contentions with the detail that counsel have. We think that their answer is in the statement of certain general propositions.

[8] Of course, there is restraint in a patent. Its strength is in the restraint, the right to exclude others from the use of the invention, absolutely or on the terms the patentee chooses to impose. This strength is the compensation which the law grants for the exercise of invention. Its exertion within the field covered by the patent law is not an offense against the Anti-Trust Act. In other circumstances it may be, as in Standard Sanitary Co. v. United States, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107, to which case that at bar has no resemblance.

The question, then, is, Was the patent right lawfully exerted in the leases? Were they anything more than the exercise of the patent monopoly? The word is descriptive and must be used, but it does not imply oppression. The old instrumentalities exist for all who are content with them and who care not for the better ones which inventive genius creates.

The charge of oppression puts out of view many essential things. We must keep in mind the quality of the right we are considering and that the inventor gets nothing from the law that he did not have before and that the only effect of his patent is to restrain others from dealing with or using its device. United States v. Bell Tel. Co., 167 U. S. 224, 229, 17 Sup. Ct. 809, 42 L. Ed. 144; Paper Bag Patent Case,*210 U. S. 405, 424, 28 Sup. Ct. 748, 52 L. Ed. 1122; Motion Picture Co. v. Universal Film Co., 243 U. S. 502, 510, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959. Or to put it another way, the inventor does not get from the law a right to a use that he did not have before but he gets the right to an exclusive use. Take this from him and you take all that the law gives him and to secure which the public faith is pledged. Chief Justice Marshall in Grant v. Raymond, 6 Pet. 218, 242, 8 L. Ed. 376.

[9] Indeed, we said in the Paper Bag Patent Case that he may keep his invention out of use. Therefore, he necessarily has the power of granting it to some and withholding it from others, a right of selection of persons and terms. There is, however, a limitation upon him; he cannot grant the title and retain the incidents of it. Straus v. Victor Talking Machine Co., 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955; Bauer & Cie v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150; Motion Picture Co. v. Universal Film Co., supra.

These cases have received review and application in Boston Store of Chicago v. American Graphophone Company and Columbia Graphophone Company, 246 U. S. 8, 38 Sup. Ct. 257, 62 L. Ed. ——, decided March 4, 1918. The principle of them was expressed to be that where an article has been sold it passes beyond the monopoly given by the patent and conditions cannot be imposed upon it. Leases are not of this character; they do not convey the title. It is not contended, nor could it be, that in this case they are a disguise for something else, artifices to convey the machinery and yet keep it subject to the patent right and its exercise. It, therefore, follows that conditions may be imposed by them.

It is not certain that the government denies this or means to assert anything more than that the patent right is exercised in oppression, assisting, indeed consummating, a scheme of monopoly, begun by the formation of the United Company, prosecuted in the various ways to which we have referred, and completed by the leases and their clauses.

It is difficult to represent the contentions of the government without under-coloring them or over-coloring them. There is one that the leases are invalid in and of themselves; there is another that "ultimately, of course, it is upon the lease forms themselves and their apparent and necessary effect upon competition that the United States relies." The first contention the government leaves very much to assertion, and defendants charge that it was not made in the trial court; the second contention is necessary to assign to the leases an obnoxious quality in the hands of the United Company which they did not have in the hands of the constituent companies. The distinction would seem to be not material of itself, and the important consideration is not what the leases were in some other relation but what they are in

their present relation and to what purpose are they being rightfully or wrongfully, or can they be rightfully or wrongfully, used or enforced? To this inquiry we shall now address ourselves.

[10] The first objection made to the leases is that they are unchangeable by the lessee —he "has no right," it is urged, to demand either the cancellation or modification of an existing one. The objection is not definite or measurable. It is probably but a representation of what is deemed the severity of the leases, for, of course, a contract is a restraint upon option and can be enforced. This power is its efficacy and indicates its obligation. And further it is of no consequence that the leases cover all of the machines of the United Company if they are an exercise of the patent rights. Whether they are is the broad question in the case and its disposition will dispose of all minor and dependent ones.

What, then, do the leases accomplish? They have clauses called "tying" clauses, so called because, it is said, they tie the use of the machine leased to the use of machines not covered by the particular lease. Their result is, the government asserts, "to make it in effect a condition of the lease that the lessee shall not use the machines of competitors to supply a need for additional machines of the kind leased or for machines of other important though wholly different types."

And it is urged:

"In addition to those clauses there are certain other clauses which have a similar effect upon the freedom of the lessees' choice of machines. They give to the tying clauses their maximum effect as destroyers of the possibility of competition with the defendants."

It is charged that "the objectionable clauses are inter-related and operate together with cumulative effect"; that "they are unlawful both as integral and effective parts of an unlawful whole and, for the most part, in and of themselves." And it is further charged that "it is, however, in their combined effect as a system of leasing, used and insisted upon by a corporation dominant in its field, that the full extent of their illegality is to be perceived." This, however, is assertion and relies for its foundation upon the assumption of an illegal dominance by the United Company that has been found not to exist. This element, therefore, must be put to one side and the leases regarded in and of themselves and by the incentives that induced their execution; and to a suit seeking their dissolution it may well be contended that the lessees are necessary parties, certainly so far as existing leases are concerned. But the contention of the government goes farther and asserts that its purpose and object justify the absence of the lessees from the case. Indeed, the government takes merit to itself in relieving them of a thraldom. "The rights of the lessees," it is said, "are not touched except to preserve them." But a lessee may like his situation, may have deliberately chosen it and may not care for any interposition, benevolent or otherwise.

Finally the government, in possible opposition to both lessor and lessee, asserts that "no one has the right to say that the unlawful conduct of another shall be permitted to continue because he has an interest in it." Perhaps not. But there may be dispute as to the character of the conduct, and its illegality cannot be conceded to mere assertion and the consequent assumption of a destroying power.

However, let us consider the clauses from the standpoint of the government's contentions and determine if they transcend the rights given to patentees. The clauses are: (1) One that prescribes a uniform term of 17 years. The result of this is, the government says, "that during that long period no replacement of a machine so leased by a better machine of defendants or others, no change in the form of the lease or avoidance of any of its requirements, is open to the lessee except with the defendants' consent and upon their terms." To this it is replied that the leases of the constituent companies ran for indefinite periods and, besides, new patents were constantly taken out, and to these the criticism of the government does not apply. And again, the term was assurance to the lessee as well as lessor, and, as defendants' counsel suggest, there is analogy in the term to that of a building lease which may under the hazard of circumstances turn out to be or not to be advantageous. Of this there are two recent examples in this court. Wm. Filene's Sons Co. v. Weed et al., 245 U. S. 597, 38 Sup. Ct. 211, 62 L. Ed. —, and Gardner, Trustee, etc., v. Wm. S. Butler & Co., Inc., 245 U. S. 603, 38 Sup. Ct. 214, 62 L. Ed. ——, decided February 4, 1918. Indeed, we may say of all the clauses, without a minute analysis and discussion of them, that they were simply bargains, based on patent rights and the conditions upon which those rights were granted. (2) The "additional machines" clause, which provides that in case the lessee has more work than can be performed by the machine leased, he will lease additional machinery to perform the work, and that if the lessee does not do so the lessor may cancel the lease if he so elect, and any other lease of machinery of the same kind then in force between them. This clause, we shall presently see, was discontinued in 1907 and was not in use when this suit was brought. (3) An "exclusive use" clause requiring the lessee of particular machinery to use it exclusively and the auxiliary machines which aid or supplement it, and for failure to do so, lessor may at his option terminate forthwith in writing any or all leases or licenses of the particular machines and accessorial machines and they shall become revested

in the lessor. This clause only requires an election of use between the United Company's machines and those of other makers. If the election be of the latter, the lessor may terminate the lease and resume his machines. (4) A prohibitive clause. This clause provides that the particular machine leased shall not be used in the preparation or manufacture of shoes, etc., upon which work is done by any machine not held by the lessee under lease from the lessor. (5) The right to terminate all leases clause. This clause does not need much explanation. Its name expresses its purpose. It gives the lessor the right, in default of the performance of the conditions of the particular lease, not only to cancel that lease but all other leases and requires a delivery of the leased machinery to the lessor at Beverly, Mass., complete and in good order, reasonable wear and tear alone excepted. (6) The full capacity clause. Its name expresses its purpose. It requires the leased machinery to be used to its full capacity upon the work to which it is applicable. This clause was in the lease of the Consolidated Company prior to the formation of the United Company. Its purpose is to secure the royalty which is based on the amount of use of the machine. It does not require the use of any particular machine or the use of other machines. It merely requires that the particular machine that is installed shall be used if the lessee have work for it. Without it defendants say that, as lessors, they would have no assurance of compensation for their machine. (7) A charge upon the return of the machinery leased is required. This needs no comment or further notice. (8) The leases of metallic machinery provide for the purchase from the lessor of certain fastening material. This clause and the next, which provides for the payment of royalties, are mere make-weights and not of special materiality.

The evil potency ascribed to the leases (we use the word as inclusive of the clauses and we do not think it necessary to distinguish them according to their application to particular machines) by the government is their asserted coercion of shoe makers and machinery makers. They limit the freedom of the first, it is contended, and by that limitation preclude the competition of the second with the defendants. In other words, the use of the machines of the United Company is compelled as against the use of machines of other manufacturers, resulting in the restraint of the trade of the latter. To this charge all other charges are subsidiary, and the restraint is said to have been the initial conception of the company and the purpose of its organization. The evidence disproves this. As we have seen, the leasing of their respective machines was the practice of the constituent companies before their union and they were substantially the same after union as before—in instances better. There was a difference as to the prohibitive clause. After the union it related to machines of all of the companies. And the testimony also shows that the advantage of the leases was and is that manufacturers of not large means were able to obtain machinery which they were without capital to buy. They helped, indeed, the big and the little. One manufacturer whose output was 5,000 pairs of shoes a day, testified that if his company had been compelled to buy outright the machinery necessary to equip its factory, it could not have developed as it had.

And sets of machines are necessary to the equipment of a factory, and their best results are obtained when used in proper relation. This relation, indeed, the necessary co-ordination of the machines, was shown pictorially by a number of views in the court below, as well as testified to by witnesses. And there is great economic advantage, it was testified, in the accessory service furnished by the United Company for the reason that—

"the regularity and continuous operation of the machines is dependent upon what may be termed instantaneous service. * * * This factor of service is at the very basis of the successful operation of a shoe factory. The work is planned to travel from one room to another in fixed quantities. So many pair go in in the morning —so many pair come out at night. The operatives are dependent upon that work traveling along regularly to them. The breakdown of some of these machines will in many of the factories block the entire flow of the work."

This was the testimony of the president of the United Company, and it received corroboration from a witness for the United States, who said:

"The margin of profit in making shoes is such that it is very essential that our machinery should work smoothly and regularly and with continuity, and economies in the manufacture of shoes often make the difference between a successful manufacturer and one who is not successful. One of the most important economies is to have our machinery work with continuity and with the highest efficiency and turn out our product with the utmost regularity day after day, just as we want to get it so that there wont be any hitch anywhere in the flow of our product through our factory."

The witness gave praise to the excellence of the machines of the United Company. This excellence and the described service the leases secured to the lessees and secured at the same time rights to the lessors. And the leases are strictly a reservation of the use of the machines, a right recognized in Bauer & Cie v. O'Donnell, Straus v. Victor Talking Machine Co., and Motion Picture Co. v. Universal Film Co., supra. We must assume they were entered into by the lessees upon a calculation of their value—the efficiency of the machines balanced against the restrictions upon and conditions of their use. The lessees had the alternative of the choice of other machines, for other machines were sold side by side with those the leases covered. This, we think, is put out of view.

Let us guard against confusion and not confound things which must be kept in dis-

tinction. A patentee is given rights to his device, but he is given no power to force it on the world. If the world buy it or use it the world will do so upon a voluntary judgment of its utility, demonstrated, it may be, at great cost to the patentee. If its price be too high, whether in dollars or conditions the world will refuse it; if it be worth the price, whether of dollars or conditions, the world will seek it. To say that the world is not recompensed for the price it pays is to attack the policy of the law, is to defy experience and to declare that the objects of inventive genius all around us have contributed nothing to the advancement of mankind. This comment is applicable here. We cannot accept, therefore, the contention of the government. We see nothing else in the circumstances of the parties than that which moves and may move the transactions of men.

We may say further in answer to the criticism of the leases, that relaxations of them were granted by "riders" and that forms other than the restrictive were open to the shoe manufacturers, distinguished in the testimony by the term "independent." They do not contain the prohibitive clause but do contain the other clauses and require an initial payment. Comparison is made of the independent form and the other forms by witnesses and various judgments are expressed. The government sees nothing in any of them but the restraints upon the freedom of business, and regards the independent form as only slightly relaxing what counsel implies is the slavery of the others. The defendants contend that they are the simple exercise of a property right, the mutuality of agreement based on definite and valuable considerations. And it was testified that the machines in the United Company's general department have always been open to sale or lease. It is further said that the additional-machine clauses were removed from all leases of the company as early as 1907 and they were not in use and did not represent its policy at the time of bringing this suit. But leases with that clause are outstanding, the government replies.

However, we need not dwell further upon the leases. It approaches declamation to say that the lessees were coerced to their making. And, as we have said, there was benefit to the lessee. It is easy to say that the leases are against the policy of the law. But when one tries to be definite one comes back to the rights and obligations of the parties. There is no question in the case of the use of circumstances to compel or restrain; the leases are simply bargains, not different from others, moved upon calculated considerations, and, whether provident or improvident, are entitled nevertheless to the sanctions of the law. We have said this, indeed, with iteration, but sometimes propositions which have become postulates have to be justified to meet objections, which, if they do not deny their existence, tend to bring them into question.

Besides, it is impossible to believe, and the court below refused to find, that the great business of the United Shoe Machinery Company has been built up by the coercion of its customers and that its machinery has been installed in most of the large factories of the country by the exercise of power, even that of patents. The installations could have had no other incentive than the excellence of the machines and the advantage of their use, the conditions imposed having adequate compensation and not offensive to the letter or the policy of the law.

Decree affirmed.

Mr. Justice McREYNOLDS and Mr. Justice BRANDEIS took no part in the consideration and decision of the case.

Mr. Justice DAY dissenting.

I concur with the opinion of Mr. Justice CLARKE as to the character of the combination here involved.

There are provisions in the so-called leases attacked in this case which in my view are so clearly within the condemnation of the Sherman Anti-Trust Act, that the further enforcement of them and the making of new leases of like character, should be enjoined. The far-reaching character of a decision sustaining a leasing system such as the defendant has developed and uses justifies a statement of the reasons which impel me to this conclusion.

As to the suggestion that the lessees are not parties to this proceeding, and, therefore, no decree can be had as to them, it seems to me this is not a case of want of indispensable or even necessary parties because of their absence such as should prevent the court from proceeding to a decree to enjoin the United Shoe Machinery Company from the further enforcement of these features of the leases and the making of similar contracts hereafter. If these leases are in violation of the Sherman Anti-Trust Act the makers of them may be proceeded against, and a decree rendered which shall effectually preclude them from further contracts of this sort, without the presence of the lessees if it could be assumed that any of them should desire to be heard in advocacy of the retention of these prohibitive and restrictive features.

The object of this proceeding is to enjoin in equity further violation of a criminal statute, not to determine title or property rights of the defendant. It is sufficient as to the doctrine of indispensable parties to refer to Shields et al. v. Barrow, 17 How. 130, 15 L. Ed. 158, and the cases collected in the discussion of the subject in Waterman v. Canal Bank, 215 U. S. 33, 48, 30 Sup. Ct. 10, 54 L. Ed. 80. There is no reason in this case why the court may not so shape its relief as to reserve the rights of persons not before it, if that should be necessary.

The questions involved in the aspect of the case now under consideration are two-fold. First: Are certain provisions of these lease agreements of themselves considered within the terms of the Sherman Anti-Trust Act? Second: Are such agreements to be held immune from the requirements of the act because of the fact that much, perhaps all the machinery of the United Shoe Machinery Company, is made and leased under letters patent issued by the United States? Of these questions in their order.

It clearly appears from the record that the United Shoe Machinery Company dominates the trade in certain kinds of shoe machinery furnished to manufacturers all over the country; which machinery is essential to the successful prosecution of the business of manufacturing shoes. It has many customers to whom it supplies these machines under leases, and such customers are required to accept the terms of these instruments or go without the machines. The leases are made for a uniform term of seventeen years, and not now considering the conditions of payment for the use of the machines and other terms usual and legal in their nature, they contain certain other features which may be summarized in the requirements: (1) The lessee shall not use the machinery, or any part thereof, in the manufacture or preparation of welted boots, shoes or other footwear which has not had certain operations performed upon it by other machines leased from the lessor. This is called the prohibitive clause. (2) If at any time the lessee shall fail or cease to use exclusively lasting machinery held by him under lease from the lessor, or fail or cease to use exclusively tacking mechanisms and appliances held by him under lease from the lessor, etc., the lessor may at its option terminate any or all leases or licenses of lasting machines, etc., then existing between the lessor and the lessee, and the right of possession shall thereupon vest in the lessor. This is called the exclusive use clause. (3) In case the lessee has work of the kind which can be performed by the machines belonging to the metallic department of the lessor in excess of the capacity of the metallic machinery which he has under lease from the lessor, then the lessee shall either take from the lessor sufficient additional machinery to perform the work, or failing so to do the lessor may cancel the lease forthwith, or any other lease of metallic machinery then in force between the parties. This is called the additional machines clause. (4) The lessee shall obtain from the lessor exclusively, at such prices as it may establish, all the fastening material needed in operating the leased machines. (6) The lessee shall at the election of the lessor, suffer a termination of all leases which he may have, and the removal of all machines leased by him from the defendants, in the event of any violation of any term of any one of the leases.

From familiar decisions of this court it may be said to be now well settled that the Sherman Anti-Trust Act condemns all combinations and contracts the effect of which is to unduly restrain the free and natural flow of interstate commerce, or which monopolize or tend to monopolize such trade or commerce in whole or in part. While the act does not reach normal contracts sanctioned by law and sustained by usage, it does reach any and all means and devices by which the purposes of the act to protect the freedom of interstate commerce may be thwarted and monopolies promoted and created. United States v. American Tobacco Co., 221 U. S. 106, 179, 31 Sup. Ct. 632, 55 L. Ed. 663; United States v. St. Louis Terminal, 224 U. S. 383, 32 Sup. Ct. 507, 56 L. Ed. 810; United States v. Reading Company, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243; United States v. Patten, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325; Eastern States Lumber Ass'n v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490. L. R. A. 1915A, 788. That these lease restrictions tend to prevent the free flow of interstate commerce, and the natural course of its activities, and at least tend to monopolize an important trade in interstate commerce seems apparent from a mere statement of their terms, having in mind their natural and necessary effect.

For the seventeen years term for which all the leases are drawn, the lessees upon failure to use exclusively the defendant's machines for lasting shoes, or upon failure to purchase needed additional machines from the lessor, or to buy certain supplies from the lessor at prices to be fixed by it, are subject to the right of the lessor to terminate all the leases held by the offending lessee and to take possession of the machines to the utter destruction of the lessee's business. The necessary effect of these prohibitive provisions, in view of the dominating control of the business by the lessor, is to prevent the lessee from using other similar machines however advantageous to him it may be to do so, unless he is willing to incur the peril of losing machinery essential to his business. It likewise so curtails the field of free customers as to keep others from manufacturing such machinery.[8] Whenever a

[8] The Judiciary Committee of the House of Representatives, when considering the Clayton Bill (Act Oct. 15, 1914, c. 323, 38 Stat. 730), said of such provisions:

"Where the concern making these contracts is already great and powerful, such as the United Shoe Machinery Company, * * * the exclusive or 'tying' contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors not only from trade in which they are already engaged but from the opportunities to build up trade in any community where these great and powerful conditions

new machine is acquired by the lessee for the period of seventeen years (the full life of a patent under the statutes of the United States) the chain is forged anew which binds him to the use of the lessor's machines, to the practical exclusion of all others.

Nor is the situation changed by the fact that so-called independent leases are offered to manufacturers. These leases require the payment of considerable additional charges and embrace terms which lead the shoe manufacturers to choose the prohibitive and restrictive forms of leases rather than to accept others. Moreover, the questions in this case are to be tried upon the effect of the leases actually made, and for years to remain in force. When it is considered that these results may be obtained in the conduct of a great business industry by this system of "tying" contracts, the necessary effect to restrain the freedom of commerce, and the attempt to effect monopolization, seems to me to be established.

2. The stress of the argument on behalf of the company is rested upon the fact that it is the owner of letters patent issued by the United States, and that within the monopoly created by such patents it has the right to make and enforce such contracts as are herein involved. At an early day this court, speaking by its Chief Justice, declared:

"The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent." Bloomer v. McQuewan, 14 How. 539, 14 L. Ed. 532.

The extent and nature of rights secured by letters patent have been the subject of recent consideration in this court, and the definition, just quoted, has been approved and applied. Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150; Straus v. Victor Talking Machine Co., 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955; Motion Picture Co. v. Universal Film Co., 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959; Boston Store of Chicago v. American Graphophone Co. (decided March 4, 1918), 246 U. S. 8, 38 Sup. Ct 257, 62 L. Ed. ——.

When this case was tried in the District Court Henry v. Dick, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, was the law of this court. In that case a mimeograph, made under letters patent, was sold for less than its full value, with a license agreement limiting its use to certain unpatented articles belonging to the patentee. Such use was held to be within the exclusive right secured by the lessor's patent. In Motion Picture Co. v. Universal Film Co., supra, it was sought to extend the doctrine of that case so as to protect a license agreement evidenced by notice attached to the machine so as to limit the purchaser to the use of certain films, and to restrict the purchaser to other terms to be fixed by the owner of the patent at his discretion. But such extended scope of patent rights was denied and it was again held that the patentee received from the law no more than the exclusive right to make, use, and sell his invention.

It is said, however, that the series of cases beginning with Bauer v. O'Donnell, supra, and ending with Boston Store of Chicago v. American Graphophone Co., supra, decided at this term, hold no more than that a patentee may not sell an article covered by his letters patent, receive his price therefor, and then undertake to impose a restriction upon the price at which resales of the patented article may be made. A reading of those cases shows that the nature and extent of the right to grant to others the use of an invention was fully discussed, and its limitations defined.

In the Motion Picture Case the right of a patentee to place restrictions upon the use of a patented machine, and to limit its use by a purchaser, or purchaser's lessee, to terms stated in the license agreement, was considered. This court held that such limitations as were there involved upon the use of patented machines were not within the scope of the patent. It was upon the expanded right to use an invention that the Button Fastener Case, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, and Henry v. Dick, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, were rested; both cases were overruled in the Motion Picture Company Case. In the latter case it was specifically held that while the patentee might withhold his invention from public use, yet if he consented to its use by himself or others, he was limited to the use described in the claims of his patent, and that there was nothing in the statute which extended his right to control the patented invention by prescribing the use of machines, materials and supplies not covered by the patent. In view of the full discussion of the question in

are appearing under this system and practice. By this method and practice the Shoe Machinery Company has built up a monopoly that owns and controls the entire machinery now being used by all great manufacturing houses of the United States. No independent manufacturer of shoe machines has the slightest opportunity to build up any considerable trade in this country while this condition obtains. If the manufacturer who is using machines of the Shoe Machinery Company were to purchase and place a machine manufactured by an independent company in his establishment, the Shoe Machinery Company could, under its contracts, withdraw all their machinery from the establishment and thereby wreck the business of the manufacturer." Report of Committee, p. 13.

A statute of Massachusetts forbidding patentees from making leases in effect like those here involved was sustained as constitutional by the Supreme Judicial Court of Massachusetts in 193 Mass. 605, 81 N. E. 142.

the series of cases already referred to, it is unnecessary to pursue it further.

Under the system of leasing, now before us, the patentee not only undertakes to grant the use of the machines covered by the letters patent, but to dictate the supplies with which they shall be used; to compel their surrender if the machine of another is used; to prevent their use except with other machinery furnished by the patentee; to extend the monopoly of the invention beyond the 17 years allowed by the statute; to lease the use of the invention only upon terms which permit the lessor to forfeit the patent license, and to terminate, if he chooses, all similar leases to use the machines of the lessor. And these extraordinary claims of right are made under the grant of the patent which gives to the inventor the exclusive right to make, use, and sell his invention, and nothing more. In my opinion such extended power and authority are not consistent with the act as the same has been construed in every case dealing with the subject beginning with the decision in Bauer v. O'Donnell. To sustain such provisions it seems to me amounts to an authority to holders of patented inventions, under the guise of leasing the use of patented machinery, to exercise the right to make combinations necessarily and unduly restraining the freedom of trade, and by virtue of the patent grant to build up monopolies in direct violation of the Sherman Act.

True it is that there is embraced in the patent grant the right or privilege to make licenses and agreements covering the use of the machines patented so long as such agreements are not in themselves unlawful. But the right to make restrictions is controlled by the general principles of law, and because he is at liberty to make them, the patentee may not make contracts in themselves illegal and certainly is not authorized to make contracts in violation of other statutes of the United States. That rights granted under a patent do not authorize the making of contracts in restraint of trade, or monopolizing or tending to monopolize trade and commerce in violation of the Sherman Act, was held by this court in Standard Manufacturing Company v. United States, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107.

In Straus v. American Publishing Company, 231 U. S. 222, 34 Sup. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369, contracts, otherwise clearly within the terms of the Sherman Act, were claimed to be justified because of rights secured under the copyright laws of the United States. Quoting and following the decision in the Standard Manufacturing Company Case, this court said:

"So, in the present case, it cannot be successfully contended that the monopoly of a copyright is in this respect any more extensive than that secured under the patent law. No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly, in violation of the specific terms of the Sherman law, which is broadly designed to reach all combinations in unlawful restraint of trade and tending because of the agreements or combinations entered into to build up and perpetuate monopolies. * * *"

The patent statute and the Sherman Act are each valid laws of the United States. While a patentee should be protected in the exercise of rights secured to the inventor under the patent system enacted into the laws of the United States, there is nothing in the Act which gives the patentee a license to violate other statutes of the United States, and certainly not the one now under consideration. In my opinion the restrictive and prohibitive clauses of these leases are within the Sherman Act, as they are clearly in restraint of interstate trade and tend to monopolize in the sense that those terms have been defined in the decisions of this court. That some of the leases were in existence when the United Shoe Machinery Company was formed affords no protection as against the exercise of the power of Congress in the passage of the Sherman Act. Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 480, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671. I think that a decree should be entered as prayed for, and I therefore dissent from the opinion and judgment of the court.

Mr. Justice PITNEY and Mr. Justice CLARKE concur in this dissent.

Mr. Justice CLARKE, dissenting.

A plain history of just what the parties did at and after the time the United Shoe Machinery Company was organized in February, 1899 compiled, almost exclusively, from the testimony of the two leaders in the organization and from documentary evidence, will be the best statement I can make of the reasons other than those stated in the dissenting opinion by Mr. Justice DAY, which render it impossible for me to concur in the opinion and judgment of the court in this case.

I fully agree with the customary practice of giving great weight to the conclusions of trial judges as to questions of fact involved when the value of the testimony depends upon the appearance and manner of the witnesses when testifying, but the reason for this rule ceases when the evidence is in writing, or consists, chiefly, as it does in this case, of purchases of property, the significance of which lies in the fact of the purchase rather than in the manner of making it.

Obviously, the attaching of the sole of a shoe to the upper is the difficult and dominating operation in the manufacture of shoes by machinery, and early in the trial the charge of the government in the case, by stipulation

in open court, became, that the consolidation was formed for the purpose of monopolizing interstate trade or commerce in machinery adapted to that purpose, the "bottoming of shoes," in violation of both the first and second sections of the Anti-Trust Act of 1890.

Before the merger the Goodyear Shoe Machinery Company (hereinafter designated the Goodyear Company) was engaged in manufacturing and leasing to shoe manufacturers two principal and sixteen auxiliary machines, the latter being used in preparing the materials for the operation of the former. The two principal machines were used for sewing the sole to the upper and were known as the Goodyear welt and turn shoe machine and the Goodyear outsole rapid lock stitch machine. With these machines, the Goodyear welt, a popular and largely used shoe, was manufactured. This company also manufactured a specially designed lasting machine used in making Goodyear welt shoes.

The Consolidated and McKay Lasting Machine Company (hereinafter designated as the Consolidated Company) was engaged in manufacturing and leasing lasting machines of three types.

As the name of the one implies, and as otherwise appears in the record, each of these two companies had resulted from prior consolidations of shoe machine manufacturing companies and they were the largest organizations of their kind in the country.

The controlling spirit of the Consolidated Company was S. W. Winslow, and of the Goodyear Company E. P. Howe, who, the record shows, were keen and masterful men, and they both testify that in July, 1898, they began the negotiations looking to a uniting of the interests of the two companies, which culminated in the organization of the United Shoe Machinery Company in February, 1899. A "harmonious arrangement" or "working agreement" was at first proposed, but Howe, being a lawyer, would not agree to this, "because," he says, "I had a sort of indefinite idea that it might be deemed to be a combination in restraint of trade. * * * I had an indefinite fear that if the two companies remained separate but, for instance, had a joint factory and joint branch offices, there might be something in the way of restraint of trade. I insisted, for that reason, that there should be a complete merger and consolidation."

This idea that the "harmonious arrangement" was unlawful was doubtless inspired in the mind of Howe by the decision in the Trans-Missouri Freight Association Case, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, rendered in 1897, and he probably shared a then not uncommon notion that the holding company and the merger were devices lawfully available for evading the congressional purpose expressed in the Anti-Trust Act. But in the Northern Securities Case, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, this court decided in 1904, that the holding company was a futile device and in the American Tobacco Company Case, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, it was decided in 1911, that the merger was also a mere "subterfuge of form" which the courts would not permit to shield those who violated the act.

Thus rejecting the "harmonious agreement" or "understanding" as unlawful, for the purpose of accomplishing the same end, in what they thought a not illegal way, the defendants resorted to the merger (later on, as we shall see, using also the holding company) and organized the United Shoe Machinery Company, under the laws of New Jersey, with a capital stock of $25,000,000.

The scope of the declaration of the purposes for which this corporation was formed, as stated in its articles of incorporation, is of much significance in determining what the real objective was at which the persons interested were aiming. It is therein declared that the company is formed not only "to manufacture, lease and sell shoe machinery," but also "to manufacture boots, shoes and footwear and all articles of every description that may be produced or manufactured, in whole or in part, from leather, rubber, or any other materials or fabrics, * * * to purchase, lease or otherwise acquire trade-marks, trade-names, copyrights and patent rights * * * and with a view to working and developing the same, to carry on any legal business whatsoever * * * whether manufacturing or otherwise, which the corporation may deem calculated, directly or indirectly, to accomplish these objects or any of them. * * * To hold, purchase or otherwise acquire * * * shares of capital stock * * * of any other corporation or corporations * * * to do any or all of the above things * * * in any part of the world."

As impressive proof of the objects of the incorporators, we print in the margin some extracts from the certificate of incorporation of the holding company, the "United Shoe Machinery Corporation," organized in 1905, by the men controlling the United Shoe Machinery Company, of 1899.[9]

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[9] The following are excerpts from the articles of incorporation of the "United Shoe Machinery Corporation," with a capital stock of $50,000,000, filed May 2, 1905:

"Third. The objects for which the corporation is formed are:

"To manufacture, buy, sell, lease, operate and deal in and with all kinds of machinery, tools, and implements, and mechanical devices and contrivances of every name and nature whatsoever, and especially to manufacture, buy, sell, lease, operate and deal in and with all sorts of boot and shoe machinery, lasts, trees, forms, and every kind of mechanism, contrivance, implement, tool, material, or thing in any way whatsoever connected with, or useful in connection with the manufacture of boots, shoes and footwear, or the manufacture of leather and rubber goods, or goods made from ma-

*And now thus equipped with apparent legal authority, amply sufficient if successfully used, to restrain and monopolize among the several states the branch of trade and commerce involved, let us see what the defendants did.

First of all, $4,918,000 of the stock of the new company was exchanged for all of the capital stock of the Goodyear and International Goodyear Companies, and $4,432,000 of stock plus $432,000 in cash was exchanged for all of the capital stock of the Consolidated Company. By this merger, with fifteen millions of the capital stock of the new company still available for other uses, the two largest manufacturers of lasting machines in the country were combined and Winslow testifies that:

"After the formation of the United Company it was manufacturing every single lasting machine that was being put out in the United States except the Seaver machine; and in 1900 we acquired the Seaver Company."

Next, and immediately, although Winslow testifies that "no word had been spoken to either the McKay people or the Eppler people when the charter for the United Company was obtained," the company purchased the entire capital stock of the McKay Shoe Machinery Company for five and one-half million dollars of stock of the United Company. This company, Winslow testifies, was engaged in manufacturing metallic fastening machines and heeling machines, "was doing a very large business," and through controlled subsidiaries was "putting out nearly all the metallic fastening machines and nearly all the heeling machines that were being made in the United States."

Thus, confessedly, by this union of these three companies there were consolidated substantially all of the manufacturers of lasting machines and of machines for attaching the soles of boots and shoes to uppers with metallic fastenings and with thread, and in addition to this the Davey Pegging Machine Company was owned by the Consolidated Company.

There yet remained only one strong competitor doing business in this country, the Eppler Welt Machine Company, with an international subsidiary. Besides the Eppler there was only one other welt machine company engaged in business, the Globe, an unimportant concern which, however, was acquired by the United Company a little later, in 1901.

Although Winslow and Howe could remember within a small fraction of a cent just what royalties were paid at any time for the use of their machines, neither of them could remember what was paid for the Eppler stock, and both testified that the records of the company did not show the amount. But other testimony shows that payment for it, of between $350,000 and $400,000 in cash, was made within a few weeks after the organization of the United Company, and it was admitted, significantly, that no inventory was taken at the time of the purchase of either the McKay or Eppler stock.

That the Goodyear and Eppler machines were sharply competitive is shown by the testimony of both Winslow and Howe. Winslow testifies that just before the consolida-

terials and fabrics of any description whatsoever, or useful in connection with the manufacture or operation of any of the machinery, mechanical devices or contrivances hereinbefore mentioned; to produce, prepare and manufacture, buy, sell and deal in and with leather and rubber, and materials and fabrics of all sorts, and the raw materials from which said leather, rubber materials or fabrics are produced; to manufacture, buy, sell, and deal in and with boots, shoes and footwear and all articles and things of every description that may be produced or manufactured, in whole or in part, from leather, rubber or any other materials or fabrics; and in general to produce, prepare, manufacture and deal in and with goods, wares, merchandise, property, materials and things of every class and description.

"To carry on the business of manufacturers of and dealers in all kinds of eyelets, hooks, buttons, studs, nails, wires, rivets, tacks, metallic and other plates, metallic, wood and other fastenings, laces, cloth, linen, tape and other fabrics, brushes, abrasive materials, cements, dressings, stains, blackings and other requisites for the improvement and treatment of boots and shoes, threads, elastic material, buttons and inner soles, and other articles or substances for protecting feet from damp or heat, and other articles or substances used in connection with the manufacture of boots and shoes, corsets, stationery, sails, tents, clothing and for analogous purposes, and to carry on the business of manufacturers of and dealers in all kinds of appliances, devices, findings, tools, mechanisms, accessories, processes and things which may be used or useful in connection with the manufacture or treatment of any of the above-named articles or substances. * * *

"To apply for, obtain, register, purchase, lease or otherwise acquire, and to hold, own, use, operate, introduce, sell, assign, or otherwise dispose of any and all trade-marks, trade-names and distinctive marks, copyrights, patents and patent rights, and all inventions, improvements and processes used in connection with or secured under letters patent of the United States or elsewhere, or otherwise, and to use, exercise, develop, grant licenses, in respect of, or otherwise turn to account any such trade-marks, patents, licenses, concessions, processes and the like, or any such property, rights and information so acquired, and, with a view to the working and development of the same, to carry on any legal business whatsoever, whether manufacturing or otherwise, which the corporation may deem calculated, directly or indirectly, to accomplish these objects or any of them. * * *

"To purchase, acquire by subscription or otherwise, and to hold for investment or otherwise, use, sell, assign, transfer, mortgage, pledge, or otherwise dispose of and to guarantee any shares of stock, bonds, securities, or other obligations of any other corporation or association carrying on any business which this corporation is authorized to carry on. * * *

"To enter into partnership or into any arrangement for sharing profits, union of interest, joint adventure or co-operation with any person, partnership, association or corporation carrying on or engaged in any business which this corporation is authorized to carry on or engage in. * * *

"To do all and everything necessary or convenient for the accomplishment of the purposes, objects and powers above-mentioned, or incidental thereto, and to conduct its business, or do anything which it is authorized to do, in every state and in the territories and colonies of the United States of America and in foreign countries. * * *"

tion the Eppler Company was "manufacturing a welting machine, an outsole stitching machine and auxiliary machines" and that the Goodyear Company was making a "welting machine, an outsole stitching machine and auxiliary machines that performed the same function as the auxiliary machines of the Eppler Company, and a number in addition." "Both machines," continues Winslow, "were being used in the manufacture of men's welt shoes," and "the two welting machines that were being specially pressed on the market at that time were the Goodyear machine and the Eppler machine." And Howe testifies:

"Those two types of shoes were well known in the trade. There was the Goodyear welt, which was a recognized class shoe. We didn't know whether the manufacturers would prefer Eppler welts or whether they would prefer Goodyear welts."

What these two dominating spirits of the enterprise thought of their work at the stage of its development which we have thus far described, is interesting and illuminating as to their purpose. Thus, Winslow:

"Immediately after the organization of the company our welting, outsole stitching and lasting machines were doing about all the welting, outsole stitching and lasting that was being done in the United States.

"Q. And so with your heeling and metallic fastening machines?

"A. Not so much the heeling."

And this from Howe:

"When the United was formed I don't remember that any outside concerns were putting out lasting machines."

And he elsewhere says, on cross-examination, that lasting machines of the Goodyear and Consolidated Companies overlapped in the work which was done with them and, if this was true, obviously they must have been competitors in the market.

To this must be added the statements made in circulars sent at this time to the smaller stockholders of the companies to induce them to join in the combination. Thus, to stockholders of the Goodyear Company:

"The great advantages to be secured by the control in one corporation, both in the United States and in foreign countries, of the most efficient types of shoe machinery, have been for several years recognized by the officers of the principal large machinery companies. For more than a year your directors and large shareholders have been in negotiation to accomplish this end. After a thorough investigation of the financial condition of the business of the shoe machinery companies named below the organization of a corporation has been effected under the laws of the state of New Jersey, to be known as the United Shoe Machinery Company. * * * The United Shoe Machinery Company has already contracted for more than a majority of the capital stock of [the companies named other than the Eppler Company and the Davey Pegging Machine Company] besides stocks in other machine companies and letters patent.

"The United Company will from time to time acquire other machinery and property, either by direct ownership or purchase of shares of their stock."

I cannot share in estimating this circular as simply a naive expression of unusual business foresight. It was a confidential circular, boldly phrased, perhaps because its authors thought that their combination had been given a character of merger which could withstand government attack, but which this court has since repeatedly held is a mere subterfuge of form. The circular is an accurate description of what had been accomplished and of what, as we shall see, the evidence in the record shows, was intended to be done in the future.

It would seem that men who were not bent upon complete monopoly and control would have been satisfied with the advantages which, we have thus seen, those in this enterprise clearly held over any competitors who might remain or who might appear in the future. But that the men connected with the United Company were not satisfied, and were determined to make their control as perfect and permanent as possible, is shown by their further conduct during the first year of the existence of that company, as follows:

Within a month of the organization of the United Company, on March 1, 1899, for the sum of $74,800 worth of its capital stock it purchased the control of the Goddu Company, which was manufacturing metallic fastening machines, which competed with those of the absorbed McKay Company, and the six inventors who owned the stock were bound by the contract of purchase to transfer to the United Company all inventions relating to shoe machinery, which they jointly or severally might make or have any interest in for a period of ten years; and they were also bound not to become interested "directly or indirectly" for a like term "in the business of making or selling any inventions or improvements relating in any way to shoe machinery," or relating in any way to the manufacture of boots and shoes or useful in connection therewith "without the consent in writing of the United Company."

On the 16th day of the same month the company purchased from Winkle and Phillips the exclusive license to use the inventions and improvements in sole leveling machines, described in ten letters patent of the United States and in patents of Great Britain, France and Germany, and bound the inventors to communicate to the United Company all inventions "which they, or either of them, shall hereafter make" in sole leveling machines or sole pressing machines. Howe testifies that at the time of this purchase the United Company was making machines of the kind, but of a different type.

On August 26, 1899, for the sum of $72,000 the company purchased the business of Timothy Bresnahan, together with the entire capital stock of the Boston Shoe Tool Company. It employed Bresnahan as manager for two years and bound him by contract not

to thereafter "engage in * * * the manufacture of heel trimmings, edge trimmings or edge setting machines and tools * * * or of any machines, tools or product now [then] made" by him or by the Boston Shoe Tool Company, and that he would not "directly or indirectly aid, assist or encourage any competition with the Boston Shoe Tool Company or its business, but would do everything in his power to promote the interests of the United Company."

On October 11th of the same year, the company purchased from one Brewer, for $250 and $5 royalty on each machine which should be manufactured, his application for letters patent for an improvement in heel breasting machines, the one machine he had manufactured and the tools with which he had made it, and it took an assignment from Brewer "of any and all inventions he may hereafter make, relative to breasting heels on the last."

The attempt made in argument to justify as familiar business practice such contracts as these, binding inventors from whom patents and other property were purchased to surrender to the United Company all of the fruits of their inventive genius for many years after the purchase and often for many years after their employment had ceased, is disingenuous in the extreme. In a single, terse sentence this court has made conclusive answer to such contention, saying:

"Even if separate elements of such a scheme are lawful, when they are bound together by a common interest as parts of an unlawful scheme to monopolize interstate commerce the plan may make the parts unlawful." Swift & Company v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; United States v. Reading Co., 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243.

On January 30, 1900, the company purchased, for the sum of $38,000, the business and assets, including twenty United States and foreign patents and 138 lasting machines, of the Seaver Process Lasting Company. This was the only independent company putting lasting machines on the market after the combination was formed, and it removed the last vestige of competition in the lasting machine business.

This will suffice. They are typical of fifty-seven purchases proved to have been made by the United Company prior to the commencement of this suit; of shoe machinery manufacturing companies; of boot and shoe manufacturing companies; of patent rights or applications for such rights; and of the property and businesses of partnerships and corporations engaged in manufacturing appliances "calculated," in the language of the charter of the company, "directly or indirectly, to accomplish the objects, or any of them, of the corporation," and varying from sewing machine needles and awls, to tacking machines, to buttons, brushes and sandpaper. Brewer's $250 application for a patent was not too small to be overlooked, and we shall see a $6,000,000 purchase was not too great to be made in order to continue, to extend, and to make secure, the complete control over the business involved, which was first attained by the consolidation of the Goodyear and Consolidated Companies and the purchase of the McKay and Eppler Companies in 1899.

The history of the first year of this company would not be complete without reference to the fact that the combinations and purchases made during that year resulted in collecting under one control many hundreds of patents covering every "shadow of a shade" of variation in the parts of the many machines used in the manufacture of shoes, and, it must be noticed, that in the month of December, 1900, the first of the forms of leases were developed and brought into use, which came to be known in the trade as "iron clad," and which have been discussed by Mr. Justice DAY in a dissenting opinion in which I cordially concur.

The boot and shoe trade of the country was so restless under what was regarded and unhesitatingly denounced as a monopoly, strongly entrenched, that although the men engaged in that trade were now utterly dependent upon the United Company for the terms on which they might continue to do business, at least two groups of important manufacturers were formed before the commencement of this suit for the purpose of devising, if possible, some means of freeing themselves from conditions which they regarded, as the record abundantly shows, as oppressive and intolerable.

Under the spur of this incentive it came to pass that a large manufacturer of shoes, one Plant, of Boston, developed a line of shoe manufacturing machinery so complete in character that on May 1, 1910, he canceled the leases which he held on many machines owned by the United Company and removed them from his factory, and advertised his readiness to supply manufacturers with adequate, and what was termed, "wonder working shoe machinery."

By Winslow's own story, negotiations for the purchase of Plant's shoe machinery manufacturing business by the United Company were entered upon on June 16th, within two months of the time that he removed their machines from his factory. These negotiations were interrupted on July 5th, and on the 28th of the same month four suits were commenced by the United Company against Plant, two more were commenced on August 11th, two more on August 13th, and two more on September 3d. These suits were in part to recover royalties claimed for the use of the United machines before they were taken out of Plant's factory and the rest were to enjoin him from using his own machines, on the ground that they infringed patents of the United Company.

Whether as a result of this familiar resort to coercive measures need not be determined, but on September 22d, at 4 o'clock in the morning, possibly to anticipate negotiations which were in progress for the purchase of Plant's property by a group of wealthy shoe manufacturers, the United Company purchased Plant's shoe machinery manufacturing business and patents, and also the control which he owned of the capital stock of a shoe manufacturing company. The United Company paid for these two properties six millions of dollars, plus $122,000 for the Stambon property, which Plant insisted must be purchased as a part of the transaction. This large sum of money, larger than was paid for either of the original constituent companies of the consolidation, was not divided in the contract of sale, but Winslow allots three and one-half millions to the purchase of the shoe manufacturing company stock and two and one-half millions to the purchase of the shoe machinery manufacturing company and patents. Even this division, it will be observed, allows two and one-half millions of dollars to be paid for the Plant machinery company property and patents, which it is now argued were of little value and at best were infringements of patents owned by the United Company. Mr. Winslow, however, thought better of them, for he says they were "almost invaluable" to his company.

* * * It is impossible for me to understand how the transaction, thus described in Winslow's own words, can fail to convince any one who reads or hears the description, that the Plant Company was a formidable competitor, actual and potential, of the United Company, and that the great sum of money paid to control it was paid to stifle and restrict competition. Standing alone it shows the defendant to be an unmistakable offender against the Anti-Trust law, but when taken together with the origin of the company and with the history of the conduct of it, a small but typical part of which we have described, it seems to me a flagrant and an all but confessed offender against that law, as it has been repeatedly interpreted by this court, United States v. American Tobacco Co., 221 U. S. 106, 179, 31 Sup. Ct. 632, 55 L. Ed. 663; United States v. Reading Co., 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243; United States v. Patten, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325; Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788, and against the policy of the law as expressed in the act of Congress.

I shall add only the convincing statement as to the complete ascendancy which the combination has attained over the important branch of the industry of the country selected for its control, which is shown in the following results tabulated in the brief of the government from the testimony, and from which all elements seriously disputed by counsel for defendants have been excluded:

Machines in Use in this Country.	Man'f'd by Defendants	Man'f'd by All Others
Lasting machines	7,496	7
Standard screw machines	409	None
Pegging machines	146	None
Tacking machines	3,488	6
Welt-sewing machines	2,527	142
Outsole stitching machines	2,676	758
Loose-nailing machines	1,835	24
Heeling machines	2,019	17

* * * Further details could not add to the effect of the large outline we have thus presented. This is not a case to be decided upon the detailed statements of individuals as to their intentions or upon refined distinctions as to the application of the patent law. The design was a large one, comprehensively conceived and boldly executed. The dominating spirits of the enterprise, with the advantage of knowing precisely what they wished to accomplish, rejected a "harmonious arrangement" of their interests as unlawful, but to accomplish the same end they adopted the scheme of merger, since condemned by this court as a mere "subterfuge of form."

The trade recognized the combination as a monopoly from the beginning, and for years struggled in vain to free itself by organizing competing interests; the Judiciary Committee of the House of Representatives, when the Clayton bill was under consideration, reported as the result of its investigations that the company appeared to be "a monopoly that owns and controls the entire machinery now being used by all the great shoe manufacturing houses of the United States" and with a record before me such as in outline I have detailed, it is impossible for me to agree that this now securely entrenched monopoly is an innocent result of normal business development.

The difficulties of bringing the defendants within the restraints of the law, which are regarded by the court as all but insurmountable, seem unimpressive in the presence of the resolute manner with which this court dealt with difficulties quite as complex and interests vastly greater, in the Northern Securities, Standard Oil, and Tobacco Company Cases, supra. In the last named of these cases it was found unnecessary "in order to give effect to the requirements of the statute" to apply the remedy of restraining the movement of the products of the combination in interstate commerce, or that of appointing a receiver for the property of the offender, for the simple declaration by the court of its readiness to resort to either or both of these effective remedies, if the conduct of the parties or the exigencies of the situation should require it, served in that case, as it would in this, to open the way for

bringing the powerful interests involved into obedience to the law.

Convinced as I am, by a most careful study of this record, that the United Shoe Machinery Company is a combination in restraint of interstate trade and commerce; that it was designed to and actually does monopolize a large part of that trade and commerce, and that it therefore is a continuing violation of both sections 1 and 2 of the Anti-Trust Act of July 2, 1890, I am obliged to dissent from the opinion and judgment of the court.

I am authorized to say that Mr. Justice DAY and Mr. Justice PITNEY concur in this dissent.

(247 U. S. 350)

SUNDAY LAKE IRON CO. v. WAKEFIELD TP.

(Argued Nov. 9, 1917. Decided June 3, 1918.)

No. 38.

1. CONSTITUTIONAL LAW ⟸211, 229(3) — EQUAL PROTECTION—SCOPE.

The purpose of the equal protection clause of Const. Amend. 14, is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution, through duly constituted agents and an intentional systematic undervaluation by state officials of other taxable property in the same class, contravenes the constitutional right of one assessed upon the full value of his property.

2. TAXATION ⟸319(2) — PRESUMPTIONS — BURDEN OF PROOF.

The good faith of taxing officers and the validity of their actions are presumed, and, when assailed, the burden of proof is upon the complaining party.

3. CONSTITUTIONAL LAW ⟸229(3)—EQUAL PROTECTION OF THE LAWS—DENIAL.

Where the Michigan state board of tax assessors raised the valuation of plaintiff's property, assessed at $65,000 by the county officials, to over $1,000,000, and because of lack of time and inadequate information declined to order a new survey of values of other property in the county, or generally to increase other assessments, though plaintiff represented, and offered to present evidence showing, that they amounted to no more than one-third of true market values, plaintiff cannot be deemed to have been deprived of the equal protection of the laws, where, on the following year, the board made a diligent and successful effort to rectify any inequality, for, to support a claim of discrimination, a mere error is insufficient, and there must be something in effect amounting to an intentional violation of the principle of practical uniformity.

In Error to the Supreme Court of the State of Michigan.

Action by the Sunday Lake Iron Company against the Township of Wakefield. A judgment for defendant was affirmed by the Supreme Court of Michigan (186 Mich. 626, 153 N. W. 14), and plaintiff brings error. Affirmed.

Messrs. Horace Andrews, of Cleveland, Ohio, and William P. Belden, of Ishpeming, Mich., for plaintiff in error.

Mr. James A. O'Neill, of Ironwood, Mich., for defendant in error.

*353 *Mr. Justice McREYNOLDS delivered the opinion of the Court.

This is a writ of error to a state court and the only matter for our consideration is the claim that contrary to the Fourteenth Amendment plaintiff in error was denied equal protection of the laws by the state board of tax assessors which assessed its property for 1911 at full value, whereas other lands throughout the county were generally assessed at not exceeding one-third of their actual worth. Proceeding in entire good faith, an inexperienced local assessor adopted the valuation which his predecessor had placed upon the company's property—sixty-five thousand dollars; the county board of review approved his action. Reviewing this in the light of a subsequent detailed report by experts appointed under a special act of the Legislature passed in April, 1911, to appraise all mining properties, the state board raised the assessment to $1,071,000; but, because of alleged lack of time and inadequate information, it declined to order a new and general survey of values or generally to increase other assessments, notwithstanding plaintiff in error represented and offered to present evidence showing that they amounted to no more than one-third of true market values.

[1, 2] The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials *353 of *other taxable property in the same class* contravenes the constitutional right of one taxed upon the full value of his property. Raymond v. Chicago Union Traction Co., 207 U. S. 20, 35, 37, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757. It is also clear that mere errors of judgment by officials will not support a claim of discrimination. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party. Head Money Cases, 112 U. S. 580, 595, 5 Sup. Ct. 247, 28 L. Ed. 798; Pittsburgh, etc., Railway Co. v. Backus, 154 U. S. 421, 435, 14 Sup. Ct. 1114, 38 L. Ed. 1031; Maish v. Arizona, 164 U. S. 599, 611, 17 Sup. Ct. 193, 41 L. Ed. 567; Adams Express Co. v. Ohio, 165 U. S. 194, 229, 17 Sup. Ct. 305, 41 L. Ed. 683; New York State v. Barker, 179 U. S. 279, 284, 285, 21 Sup. Ct. 121, 45 L. Ed. 190; Coulter v. Louisville & Nashville R. R., 196 U. S. 599, 608, 25 Sup. Ct. 342, 49 L. Ed. 615; Chicago, B. & Q. Ry. Co. v. Babcock, 204 U. S. 585, 597, 27 Sup. Ct. 326, 51 L. Ed. 636.

[3] The record discloses facts which render it more than probable that plaintiff in error's mines were assessed for the year 1911 (but not before or afterwards) relatively higher than other lands within the county although the statute enjoined the same rule for all. But we are unable to conclude that the evidence suffices clearly to establish that the state board entertained or is chargeable with any purpose or design to discriminate. Its action is not incompatible with an honest effort in new and difficult circumstances to

adopt valuations not relatively unjust or unequal. When plaintiff in error first challenged the values placed upon the property of others no adequate time remained for detailed consideration nor was there sufficient evidence before the board to justify immediate and general revaluations. The very next year a diligent and, so far as appears, successful effort was made to rectify any inequality. The judgment of the court below must be

Affirmed.

(247 U. S. 240)

ALICE STATE BANK et al. v. HOUSTON PASTURE CO.

(Argued Jan. 24, 1918. Decided June 3, 1918.)

No. 154.

1. COURTS ⟸383(1)—CIRCUIT COURT OF APPEALS—CERTIORARI—REVIEW.
On certiorari to review a decision of the Circuit Court of Appeals, matters not relied upon as basis for the petition will not be considered.

2. ADVERSE POSSESSION ⟸19—INCLOSURE—SUFFICIENCY OF BARRIER.
Under Rev. St. Tex. 1911, art. 5674, prescribing a five-year period of limitations in favor of persons having peaceable and adverse possession under color of title, etc., when the other elements of adverse possession are present, the land will be deemed sufficiently inclosed when it was fenced on three sides and there was deep water on the fourth.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Action by the Houston Pasture Company against the Alice State Bank and others. A judgment for plaintiff was affirmed by the Circuit Court of Appeals (227 Fed. 1015, 141 C. C. A. 662), and defendants bring certiorari. Judgment reversed.

Messrs. Henry W. Taft, of New York City, and Walter P. Napier, of San Antonio, Tex., for petitioners.

Messrs. Joseph W. Bailey, of Dallas, Tex., and William D. Gordon, of Beaumont, Tex., for respondent.

*241 *Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit to recover 1,280 acres of land in San Patricio County, Texas. There was a trial by jury in which the Court directed a verdict for the plaintiff as to all but certain excepted portions not in controversy here. Exceptions were saved by the defendants, the petitioners, to their not being allowed to go to the jury on the question whether they had a good defence under the Texas statutes of limitation, but they were overruled and the judgment was affirmed by the Circuit Court of Appeals. A petition for certiorari was allowed on the suggestion that there was a manifest conflict between the ruling and the decisions of the State Court.

An Act of July 22, 1870 (Sp. Acts 12th Leg. c. 19), declared that a land certificate for 1,280 acres theretofore issued to General Sam Houston for military services was a "just claim from its original date" and authorized the issue of a "patent on the same, in the name of the heirs of General Sam Houston, deceased." General Houston's will gave discretionary power to his executors to make such disposition of his personal and real estate as might seem to them best for the interests of his family. On July 22, 1871, Houston's surviving executor made an instrument purporting to convey the above mentioned land warrant and the interest of Houston's estate and heirs to Colman, Mathis and Fulton. On December 30, 1872, the warrant was located on land already occupied by those grantees, and the executor's conveyance to them was recorded on July 17, 1873. The defendants held deeds under the successors of Colman, Mathis and Fulton. A patent was issued "to the heirs of Sam Houston, deceased," on June*22, 1874. The* plaintiff derived its title from these heirs under deeds executed in 1914.

*242

[1] A plausible argument can be made that the working of the Act of 1870 and other pertinent facts and statutes which we do not recite was to give to the land warrant the validity and effect that it would have had if lawfully executed in General Houston's life. But as that is not the ground upon which the writ of certiorari was asked or granted we confine our discussion to the matter relied upon in asking the intervention of this Court. Hubbard v. Tod, 171 U. S. 474, 494, 19 Sup. Ct. 14, 43 L. Ed. 246. The defendants alleged that if the deeds did not give them a good title, still they had held peaceable and adverse possession of the land, using and enjoying the same, paying taxes thereon, and claiming under deeds duly registered, for more than five years, and therefore that this suit was too late under Rev. Stat. Texas, art. 5674. They contended that the fact appeared as matter of law, and also that at least the jury might find for them and sufficiently saved the question as against the view taken by the Court below.

[2] There was evidence that the land in question was part of a large pasture fenced on the north along the Chiltipin Creek and on the east and west by fences running from the creek to deep water in Nueces Bay. There was evidence also that the defendants or their predecessors had paid the taxes, had pastured their cattle there, and excluded those of others, and that they claimed under duly registered deeds. The ground in which the Court ruled as it did and refused requests of the petitioners was stated by it to be that the water front on Nueces Bay was not "such a barrier as would put in motion the statutes of limitation." This ruling was in deference to Hyde v. McFaddin, 140 Fed. 433, 442, 72 C. C. A. 655. But that case was

decided on peculiar circumstances, and we do not think an extensive citation from the *243 Texas decisions necessary to show that when the other elements of*adverse occupation are present, deep water upon one side of a parallelogram is as good a barrier as a fence. Evidently that is the law in Texas as well as elsewhere, and an enclosure by fences and the Nueces River has been said to sustain the defence of the statute as well as fences all around. Dunn v. Taylor (Tex. Civ. App.) 107 S. W. 952, 956; Id., 102 Tex. 80, 87, 113 S. W. 265. The arguments of the respondent on this point at the most do no more than offer considerations of fact that possibly it might be entitled to present to the jury when the case next is tried.

Judgment reversed.

(247 U. S. 231)

In re SIMONS.

(Argued Dec. 10, 1918. Decided June 3, 1918.)

No. 26, Original.

1. TRIAL ⟸11(2) — WILLS ⟸67 — CONTRACTS—ACTION FOR BREACH.

It is the rule, both at common law and in New York, that breach of a contract to bequeath a sum certain, gives rise to an action at law for damages; hence it was improper for the federal District Court for New York to transfer to the equity side an action at law for damages for breach of a contract to make a bequest, since plaintiff was thus deprived of a jury trial incident to an action at law.

3. MANDAMUS ⟸31 — COURTS — PROCEEDING WITH CAUSE.

As an order transferring to the equity side of the District Court a count in a complaint seeking damages for breach of a contract to bequeath a sum certain may be regarded as a denial of the court's jurisdiction over the cause of action, mandamus is a proper remedy to require the court to proceed and give plaintiff her right to a trial at common law.

Application by Annie S. Simons for a writ of mandamus against Hon. Charles M. Hough, Circuit Judge of the United States for the Second Circuit, and against the District Court of the United States for the Southern District of New York, sitting at common law, and for other appropriate relief. On rule to show cause why the writ should not be issued. Rule absolute.

Mr. Roger Foster, of New York City, for petitioner.

Mr. Edgar T. Brackett, of Saratoga Springs, N. Y., for respondent.

*238 *Mr. Justice HOLMES delivered the opinion of the Court.

This is a petition for mandamus, or, if that is denied, for prohibition or certiorari, to the District Court for the Southern District of New York upon the following facts: The petitioner brought an action in two counts against the executors of a widow named Frank Leslie. The first count alleged a promise by Mrs. Leslie that if the plaintiff would perform certain personal services of attendance and care to her, she would bequeath to the plaintiff $50,000. It set forth the performance of the services in great detail, alleged the death of Mrs. Leslie and probate of her will, the bequest to the plaintiff of not more than $10,000, and claimed $40,000 with interest from one year after the death of the testatrix, as damages. The second count repeats by reference the averments of the first count, but alleges a promise to pay the reasonable value of the plaintiff's services, set at $50,000 of which $10,000 have been satisfied by legacy, and claims damages as before. On motion of the defendants the judge sitting to hear motions in the District Court ordered the first cause of action to be transferred to the equity side of the Court and docketed as an equity cause, and to be stricken out of the complaint in the action at law, but only for the purpose of transfer, allowing the plaintiff to amend, etc. The ground disclosed was that by the law of *239 New York the*plaintiff could not sustain the first cause of action at law.

[1] We do not find sufficient ground for the opinion of the judge in the New York decisions. No doubt alleged contracts to make a provision by will must be approached with great caution in the matter of proof, but there is no doubt that if proved they are valid so far as no statute intervenes. So much seems to be assumed by the order of the judge, and is the law we believe of New York as well as of other states and England. But if valid we see no reason why a contract to bequeath a certain sum should not give rise to an action for damages if broken, as certainly as a contract to pay the same sum in the contractor's life, or at the moment of the contractor's death. Parker v. Coburn, 10 Allen, 82. In cases of contracts to leave all the testator's property, including land, or a proportion of a residue requiring an account to ascertain it, equitable remedies have been thought proper, and in some such cases it has been assumed for the purposes of argument that an action would not lie at common law. See Winne v. Winne, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647; Phalen v. United States Trust Co., 186 N. Y. 178, 78 N. E. 943, 7 L. R. A. (N. S.) 734, 9 Ann. Cas. 595. But we have seen nothing that suggests an arbitrary departure by the Courts of New York from the common law in cases like the present. See Farmers' Loan & Trust Co. v. Mortimer, 219 N. Y. 290, 295, 114 N. E. 389; De Cicco v. Schweizer, 221 N. Y. 431, 117 N. E. 807; Silvester's Case, Popham, 148, 2 Roll. R. 104; Fenton v. Emblers, 3 Burr. 1279; Van Houten v. Van Houten, 89 N. J. Law, 301, 98 Atl. 251; Krell v. Codman, 154 Mass. 454, 28 N. E. 578, 14 L. R. A. 860, 26 Am. St. Rep. 260.

[2] If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to

the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not*matter very much in what form an extraordinary remedy is afforded in this case. But as the order may be regarded as having repudiated jurisdiction of the first count, mandamus may be adopted to require the District Court to proceed and to give the plaintiff her right to a trial at common law. See Brown v. Circuit Judge of Kalamazoo County, 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 226, 13 Am. St. Rep. 438.

Rule absolute.

(247 U. S. 307)

SAN PEDRO, L. A. & S. L. R. CO. v. UNITED STATES.

(Submitted Nov. 12, 1917. Decided June 3, 1918.)

No. 48.

COURTS ⊂⊃382(1) — CIRCUIT COURT OF APPEALS—WRIT OF ERROR—AMOUNT IN CONTROVERSY.

Under Judicial Code (Act March 3, 1911, c. 231) § 241, 36 Stat. 1157 (Comp. St. 1916, § 1218), giving right of review by the Supreme Court only where the matter in controversy exceeds $1,000, besides costs, a writ of error seeking to have reviewed only so much of a judgment of the Circuit Court of Appeals as affirmed the recovery of six penalties of $150 each for as many separate violations of the Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [Comp. St. 1916, §§ 8677–8680]) must be dismissed.

On Writ of Error and Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Action by the United States against the San Pedro, Los Angeles & Salt Lake Railroad Company to recover penalties for violations of the Hours of Service Act of March 4, 1907. A judgment for plaintiff was affirmed in part and reversed in part by the Circuit Court of Appeals (220 Fed. 737, 136 C. C. A. 343), and defendant brings error and petitions for certiorari. Writ of error dismissed, and petition for certiorari denied.

Messrs. Alexander Britton, Evans Browne, and F. W. Clements, all of Washington, D. C., and A. S. Halsted, of Los Angeles, Cal., for plaintiff in error.

Mr. Assistant Attorney General Frierson, for the United States.

Mr. Justice PITNEY delivered the opinion of the Court.

The judgment of the Circuit Court of Appeals that is sought to be reviewed affirmed in part and reversed in part a judgment of the District Court in an action brought by the United States to recover penalties for certain violations of the Hours of Service Act of March 4, 1907, c. 2939, 34 Stat. 1415, 1416 (Comp. St. 1916, §§ 8677–8680). 220 Fed. 737, 136 C. C. A. 343. Defendant challenges and seeks to have reviewed only so much of the judgment as affirmed the recovery of six penalties of $150 each, for as many separate violations of the act. The employés involved are a conductor and two brakemen on each of two passenger trains, known as Nos. 1 and 7, starting from Las Vegas, Nevada, for*Los Angeles, California, on October 3 and 4, 1912. The cases are so much alike that a reference to train No. 1 will suffice. It occupied 27 hours in a journey from Las Vegas to Los Angeles, 334 miles, although the schedule running time between those points was only 13½ hours. The train left Las Vegas on schedule time and with a fresh crew, but was subsequently detained by an unavoidable and unforeseeable accident (a landslide, requiring a detour over another railroad), so that when it reached Daggett, a point in the route 158.6 miles from Los Angeles, the prescribed 16-hour period had expired by more than an hour. At this point the engine crew was relieved, their places being taken by men sent from Otis, a division point 4 miles distant. The conductor and brakemen were not relieved, but continued on duty to the destination of the train at Los Angeles, passing through San Bernardino, which is a passenger terminal but not for through trains. The conductor and brakemen might have been relieved either at Daggett or at San Bernardino, but no effort to do this was made. The question upon the merits is whether the act of Congress required the company, under the circumstances, to relieve them. The contention of plaintiff in error and petitioner is rested upon conference ruling No. 88 (b) of the Interstate Commerce Commission, published June 25, 1908, which, after quoting the first proviso of section 3 of the act:

"Provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen"

—added the following:

"Any employé so delayed may thereafter continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

* Our jurisdiction by writ of error is governed by section 241, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087, 1157), which gives the right of review only where the matter in controversy exceeds $1,000 besides costs. The amount actually in dispute here being only $900, the writ of error must be dismissed. Export Lumber Co. v. Port Banga Lumber Co., 237 U. S. 388, 35 Sup. Ct. 604, 59 L. Ed. 1009.

There is an application for the allowance of a writ of certiorari under section 240 (Comp. St. 1916, § 1217), consideration of which has been postponed until the hearing

on the writ of error; but, since it was presented, all occasion for granting it has been removed by our decision in Atchison, etc., Ry. Co. v. United States, 244 U. S. 336, 37 Sup. Ct. 635, 61 L. Ed. 1175, which in principle is indistinguishable from the present case, and was decided by the Circuit Court of Appeals (220 Fed. 748, 136 C. C. A. 354) upon the authority of its decision in the present case.

Writ of error dismissed.

Petition for writ of certiorari denied.

Mr. Justice McREYNOLDS took no part in the consideration or decision of this case.

(247 U. S. 321)

UNITED STATES GLUE CO. v. TOWN OF OAK CREEK.

(Argued March 21, 1918. Decided June 3, 1918.)

No. 233.

COMMERCE ⇐72—"DIRECT BURDENS ON INTERSTATE COMMERCE"—STATE INCOME TAX.

The levy and assessment, under Laws Wis. 1911, c. 658, of a general income tax upon the net income of a Wisconsin corporation derived from transactions in interstate commerce, is not such a direct burden on interstate commerce as to contravene the commerce clause of Const. art. 1, § 8.

In Error to the Circuit Court of Milwaukee County, State of Wisconsin.

Action by the United States Glue Company against the Town of Oak Creek to recover a sum paid under protest as part of a tax levied and assessed on plaintiff's income. A judgment for plaintiff was reversed and remanded, with directions to dismiss the complaint, by the Supreme Court of Wisconsin (161 Wis. 211, 153 N. W. 241, Ann. Cas. 1918A, 421), and plaintiff brings error. Affirmed.

Messrs. George Lines, Willet M. Spooner, and Louis Quarles, all of Milwaukee, Wis., for plaintiff in error.

Messrs. H. J. Killilea and Walter Drew, both of Milwaukee, Wis., for defendant in error.

*323 *Mr. Justice PITNEY delivered the opinion of the Court.

The judgment brought up by this writ of error was entered by the circuit court of Milwaukee county upon the mandate of the Supreme Court of the state of Wisconsin issued on reversal of a previous judgment of the circuit court in an action brought by plaintiff in error to recover the sum of $2,835.38, paid under protest as part of a tax assessed and levied by the taxing authorities of the state upon plaintiff's income for the year 1911, under chapter 658, Wisconsin Laws 1911. The Supreme Court overruled plaintiff's contention that the portion of the tax that was in controversy, having been imposed upon income derived by plaintiff from interstate commerce, amounted to a burden upon that commerce, contravening the commerce clause of section 8 of article 1 of the Constitution of the United States. 161 Wis. 211, 153 N. W. 241, Ann. Cas. 1918A, 421. And this is the sole question presented for our consideration.

The act, which was passed under the authority of an amendment to the state Constitution (Income Tax Cases, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164), imposes a tax upon incomes received during the year ending December 31, 1911, and annually thereafter; defines the term "income" as including (a) rent of real estate; (b) interest derived from money loaned or invested in notes, mortgages, bonds, or other evidences of debt; (c) wages, salaries, and the like; (d) dividends or profits derived from stock, or from the purchase and sale of property acquired within three years previous, or from any business whatever; (e) royalties derived from the possession or use of franchises or legalized privileges; and (f) all other income derived from any source, except such as is exempted. There is a provision "that any person engaged in business within and without the state shall, with respect to income other than that *324 *derived from rentals, stocks, bonds, securities* or evidences of indebtedness, be taxed only upon that proportion of such income as is derived from business transacted and property located within the state," which is to be determined in a particular manner specified in section 1770b, as far as applicable.

Corporations are allowed to make certain deductions from gross income, including amounts paid for personal services of officers and employés and other ordinary expenses paid out of income in the maintenance and operation of business and property, including a reasonable allowance for depreciation, losses not compensated for by insurance or otherwise, taxes, etc. These need not be further mentioned, beyond saying that the intent and necessary effect of the act is to tax not gross receipts but net income; that from the stipulated facts it appears that the tax in question was imposed upon plaintiff's net income; and that this is in accord with the construction of the act adopted by the Supreme Court of the state in this and other cases. State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Commission, 161 Wis. 111, 116, 152 N. W. 848; United States Glue Co. v. Oak Creek (the present case) 161 Wis. 211, 221, 153 N. W. 241, Ann. Cas. 1918A, 421; State ex rel. Bundy v. Nygaard, 163 Wis. 307, 310, 158 N. W. 87, L. R. A. 1917E, 563.

In order to determine what part of the income of a corporation engaged in business within and without the state (other than that derived from rentals, stocks, bonds, securities, etc.) is to be taxed as derived from business transacted and property located within the state, reference is had to a for-

mula prescribed by another statute (section 1770b, subsec. 7, par. [e] of Wisconsin Stats.) for apportioning the capital stock of foreign corporations, under which the gross business in dollars of the corporation in the state, added to the value in dollars of its property in the state, is made the numerator of a fraction of which the denominator consists of the total gross business in dollars of the corporation both within and without the state, added to the value in dollars of its property within and without the state. The *325 resulting fraction is taken by the income tax law as representing the proportion of the income which is deemed to be derived from business transacted and property located within the state. This formula was applied in apportioning plaintiff's net "business income" for the year 1911, and upon the portion thus attributed to the state, plus the income from rentals, stocks, bonds, etc., the tax in question was levied.

Plaintiff was and is a corporation organized under the laws of the state of Wisconsin, having its principal office and place of business in the town of Oak Creek, where it conducted an extensive manufacturing plant, selling its products throughout the state and in other states and foreign countries. Its net "business income" in the year 1911, exclusive of that derived from rentals, stocks, bonds, etc., and after making the deductions allowed by the act, amounted to about $124,000, derived from the following sources: (a) About $16,000 from goods sold to customers within the state and delivered from its factory; (b) about $65,000 from goods sold to customers outside of the state and delivered from its factory; (c) about $31,000 from goods sold to customers outside of the state, the sales having been made and goods shipped from plaintiff's branches in other states, and the goods having been manufactured at plaintiff's factory and shipped before sale to said branches; (d) about $7,000 from goods sold to customers outside of the state, the sales having been made and goods shipped from plaintiff's branches without the state, these goods having been purchased by plaintiff outside of the state and shipped to plaintiff's factory in the state, and thence shipped before sale from the factory to the branches; (e) about $5,000 from goods sold outside of the state, the sales having been made and goods shipped from said branches, and the goods having been purchased by plaintiff outside of the state and shipped from the points of purchase to the branches *326 without coming into the state of Wisconsin.

No contention was made as to the taxability of the income designated in item (a). Plaintiff's contention that items (d) and (e) were not taxable because not derived from property located or business transacted within the state was upheld by the state courts. Thus the controversy is narrowed to the contention, overruled by the Supreme Court, that items (b) and (c) were not taxable because derived from interstate commerce.

Stated concisely, the question is whether a state, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause of the Constitution of the United States.

It is settled that a state may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule. Thus, it was declared in Postal Tel. Cable Co. v. Adams, 155 U. S. 688, 695, 696, 15 Sup. Ct. 268, 269 (39 L. Ed. 311):

"It is settled that where, by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the *327 business, but its enforcement left to the ordinary means devised for the collection of taxes."

Again, in Atlantic, etc., Tel. Co. v. Philadelphia, 190 U. S. 160, 163, 23 Sup. Ct. 817, 47 L. Ed. 995, the court upon a review of numerous previous cases laid down certain propositions as established, among them these: (a) That the immunity of an individual or corporation engaged in interstate commerce from state regulation does not prevent a state from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce; and (b) that the franchise of a corporation, although that franchise be the business of interstate commerce, is, as a part of its property, subject to state taxation, provided at least the franchise be not derived from the United States. See, also, St. Louis S. W. Railway v. Arkansas, 235 U. S. 350, 365, 35 Sup. Ct. 99, 59 L. Ed. 265.

Yet it is obvious that taxes imposed upon property or franchises employed in interstate commerce must be paid from the net returns of such commerce, and diminish them in the same sense that they are diminished by a tax imposed upon the net returns themselves.

The distinction between direct and indirect burdens, with particular reference to a comparison between a tax upon the gross returns of carriers in interstate commerce and a general income tax imposed upon all inhabitants

incidentally affecting carriers engaged in such commerce, was the subject of consideration in Phila. Steamship Co. v. Pennsylvania, 122 U. S. 326, 345, 7 Sup. Ct. 1118, 1124 (30 L. Ed. 1200) where the court, by Mr. Justice Bradley, said:

"The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the federal government."

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Many previous cases were referred to.

The correct line of distinction is so well illustrated in two cases decided at the present term that we hardly need go further. In Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 38 Sup. Ct. 126, 62 L. Ed. ——, we held that a state tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross transactions in such commerce, was by its necessary effect a tax upon the commerce, and at the same time a duty upon exports, contrary to sections 8 and 10 of article 1 of the Constitution, since it operated to lay a direct burden upon every transaction by withholding for the use of the state a part of every dollar received. On the other hand, in Peck & Co. v. Lowe, Collector, 38 Sup. Ct. 432, 247 U. S. 165, 62 L. Ed. ——, decided May 20th last, we held that the Income Tax Act of October 3, 1913, c. 16, § 2, 38 Stat. 166, 172, when carried into effect by imposing an assessment upon the entire net income of a corporation, approximately three-fourths of which was derived from the export of goods to foreign countries, did not amount to laying a tax or duty on articles exported within the meaning of article 1, § 9, cl. 5, of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden.

The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the federal Constitution because they happen to be engaged in commerce among the states.

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And so we hold that the Wisconsin income tax law, as applied to the plaintiff in the case before us, cannot be deemed to be so direct a burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the states. It was measured not by the gross receipts, but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, and in the same way that other corporations doing business within the state are taxed upon that proportion of their income derived from business transacted and property located within the state, whatever the nature of their business.

Judgment affirmed.

Mr. Chief Justice WHITE concurs in the result.

(247 U. S. 372)

CHELENTIS v. LUCKENBACH S. S. CO., Inc.

(Argued and Submitted April 18, 1918. Decided June 3, 1918.)

No. 657.

1. SEAMEN ⊂⊃11—INJURY IN SERVICE—MEASURE OF RECOVERY.

A contract of fireman on steamship is maritime in its nature, and under the maritime law his recovery for injuries incurred while in the service of the ship is limited to wages, maintenance, and cure.

2. ADMIRALTY ⊂⊃1 — SEAMEN — INJURY IN SERVICE—MEASURE OF RECOVERY—AUTHORITY OF STATE.

No state has power to abolish the well-recognized maritime rules concerning the measure of recovery by a seaman injured while in service of a vessel, and substitute therefor the full indemnity rule of the common law.

3. ADMIRALTY ⊂⊃2 — SEAMEN — INJURY IN SERVICE—MEASURE OF RECOVERY—"RIGHT" —"REMEDY."

Despite Judiciary Act Sept. 24, 1789, c. 20, § 9, 1 Stat. 76 (Jud. Code, §§ 24, 256 [Act March 3, 1911, c. 231, 36 Stat. 1092, 1160; Comp. St. 1916, §§ 991(9), 1233]), giving district courts exclusive original cognizance of all

civil causes of admiralty and maritime jurisdiction, saving to suitors the right of a common-law remedy, where the common law is competent to give it, the rights of a seaman injured while in service of the ship must be measured according to the rules of the maritime law, and cannot be measured by the common law, for a right is a well founded or acknowledged claim, while a remedy is the means employed to enforce a right, and the statute merely allowed suitors to have recourse to common-law remedies where adequate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Remedy; Right.]

4. SEAMEN ⇐11 — INJURY IN SERVICE — MEASURE OF RECOVERY—STATUTE.

As a shipowner under the maritime law is liable to a member of the crew injured at sea by reason of another member's negligence, regardless of their relation, Seamen's Act March 4, 1915, c. 153, § 20, 38 Stat. 1185 (Comp. St. 1916, § 8337a), declaring that seamen having command shall not be held fellow servants with those under their authority, does not, where a seaman was injured as a result of an alleged negligent order of the master, warrant recovery according to the common-law rules of liability; the section disclosing no intention to impose such rules of liability on shipowners.

Mr. Justice Pitney, Mr. Justice Brandeis, and Mr. Justice Clarke dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Action by Peter Chelentis against the Luckenbach Steamship Company, Incorporated, begun in state court and removed to the federal court. A judgment for defendant was affirmed by the Circuit Court of Appeals (243 Fed. 536, 156 C. C. A. 234), and plaintiff brings certiorari. Affirmed.

Messrs. Silas B. Axtell and Arthur L. Burchell, both of New York City (Fayette B. Dow, of Washington, D. C., of counsel), for petitioner.

Messrs. Peter S. Carter and William H. Carter, both of New York City, for respondent.

*Mr. Justice McREYNOLDS delivered the opinion of the Court.

In December, 1915, petitioner was employed by respondent, a Delaware corporation as fireman on board the steamship J. L. Luckenbach, which it then operated and controlled. While at sea, twenty-four hours out from New York, the port of destination, petitioner undertook to perform certain duties on deck during a heavy wind; a wave came aboard, knocked him down and broke his leg. He received due care immediately; when the vessel arrived at destination he was taken to the marine hospital, where he remained for three months; during that time it became necessary to amputate his leg. After discharge from the hospital, claiming that his injuries resulted from the negligence and an improvident order of a superior officer, he instituted a common-law action in Supreme Court, New York county, demanding full indemnity for damage sustained. The cause was removed to the United States District Court because of diverse citizenship. Counsel did not question seaworthiness of ship or her appliances, and announced that no claim was made for maintenance, cure, or wages. At conclusion of plaintiff's evidence the court directed verdict for respondent, and judgment thereon was affirmed by the Circuit Court of Appeals. 243 Fed. 536, 156 C. C. A. 234. The latter court said:

"The contract of a seaman is maritime, and has written into it those peculiar features of the maritime law that were considered in the case of The Osceola [189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760]; and although, because of these peculiarities, such contracts are almost invariably litigated in admiralty courts, still the contract must be the same in every court, maritime or common law. The only difference between a proceeding in one court or the other would be that the remedy would be regulated by the lex fori. If a seaman, who had been locked up or put in irons for disobedience of orders, were to sue the master for damages in a court of common law, he could not recover like a shore servant, such as a cook or chauffeur, who had received the same treatment. So a seaman, bringing suit in a common-law court for personal injuries, could recover, even if guilty of contributory negligence, although a shore servant suing in the same court could not; and a seaman suing in a common-law court for personal injuries could recover (except in the case of unseaworthiness of the vessel or failure to give proper care and medical attention) only wages to the end of the voyage and the expenses for maintenance and cure for a reasonable time thereafter, whereas in a similar case a shore servant would be entitled to recover full indemnity. Therefore, by virtue of the inherent nature of the seaman's contract, the defendant's negligence and the plaintiff's contributory negligence were totally immaterial considerations in this case; the sole question for the jury to determine being whether the plaintiff was entitled to recover because he had not received from the defendant his wages to the end of the voyage and the expense for his maintenance and cure for a reasonable time thereafter.

"Has Congress changed the situation by section 20 of the Seamen's Act [chapter 153, 38 Stat. 1164, 1185, Comp. St. 1916, § 8337a], as the plaintiff contends? He argues that the act makes the master a fellow servant of the seaman, and therefore that Congress intended to make the relation between the seaman and all the officers throughout the same as at common law. But the Supreme Court, in the case of The Osceola, supra, while reserving the question whether the master and seaman were fellow servants, held that it made no difference whatever in respect to the liability of the shipowners for an improvident order of the master which resulted in personal injuries to the seaman. * * *

"It follows that whether the master and seaman are fellow servants or not is quite immaterial in the case of a suit for injuries resulting from an improvident order of the master. For this reason the court was right in directing a verdict for the defendant, and the judgment is affirmed."

In The Osceola, 189 U. S. 158, 175, 23 Sup. Ct. 483, 487 (47 L. Ed. 760), a libel in rem to recover damages for personal injuries to a seaman while on board and alleged to have resulted from the master's negligence, speaking through Mr. Justice Brown, we held:

"1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

*381 "2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries *received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. Scarff v. Metcalf, 107 N. Y. 211 [13 N. E. 796, 1 Am. St. Rep. 807].

"3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

"4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

After reference to article 1, § 8, and article 3, § 2, of the Constitution, we declared in Southern Pacific Co. v. Jensen, 244 U. S. 205, 215, 216, 37 Sup. Ct. 524, 528 (61 L. Ed. 1086, Ann. Cas. 1917E, 900):

"Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. * * * And further, that in the absence of some controlling statute, the general maritime law, as accepted by the federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction."

Concerning extent to which the general maritime law may be changed, modified or affected by state legislation, this was said:

"No such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the *382 least, is essential to the effective operation of the fundamental purposes for which such *law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from The Lottawanna," 21 Wall. 558, 575 (22 L. Ed. 654).

Among such quotations is the following:

"One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

[1, 2] The work about which petitioner was engaged is maritime in its nature; his employment was a maritime contract; the injuries received were likewise maritime and the parties' rights and liabilities were matters clearly within the admiralty jurisdiction. Atlantic Transportation Co. v. Imbrovek, 234 U. S. 52, 59, 60, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157. And unless in some way there was imposed upon the owners a liability different from that prescribed by maritime law, petitioner could properly demand only wages, maintenance and cure. Under the doctrine approved in Southern Pacific Co. v. Jensen, no state has power to abolish the well-recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

[3] Two acts of Congress are relied upon, and it is said that under each petitioner has *383 the right to recover full *indemnity according to the common law. They are: (1) Section 9, Judiciary Act of 1789, 1 Stat. 76, 77, whereby District Courts of the United States were given exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it" (Judicial Code, §§ 24, 256 [Act March 3, 1911, c. 231, 36 Stat. 1092, 1160; Comp. St. 1916, §§ 991 (9), 1233]); and (2) section 20 of Act to Promote the Welfare of American Seamen, approved March 4, 1915, c. 153, 38 Stat. 1164, 1185, which provides:

"That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority."

The precise effect of the quoted clause of the original Judiciary Act has not been delimited by this court and different views have been entertained concerning it. In Southern Pacific Co. v. Jensen we definitely ruled that it gave no authority to the several states to enact legislation which would work "material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations." In The Moses Taylor, 4 Wall. 411, 431 (18 L. Ed. 397), we said:

"That clause only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding in rem, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law."

And in Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 644, 648, 20 Sup. Ct. 824, 827 (44 L. Ed. 921):

"Some of the cases already cited recognize the distinction between a common-law action and a common-law remedy. Thus in The Moses Taylor, * * * it is said of the saving clause *384 of the Judiciary Act: 'It is not a remedy in the common-law courts which is saved, but a *common-law remedy.'" "If the suit be in personam against an individual defendant, with an auxil-

iary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute * * * of a common-law remedy. The suit in this case being one in equity to enforce a common-law remedy, the state courts were correct in assuming jurisdiction."

The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouvier's Law Dictionary. Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea.

[4] Section 20 of the Seamen's Act declares "seamen having command shall not be held to be fellow servants with those under their authority," and full effect must be given this whenever the relationship between such parties becomes important. But the maritime law imposes upon a shipowner liability to a member of the crew injured at sea by reason of another member's negligence without regard to their relationship; it was of no consequence therefore to petitioner whether or not the alleged negligent order came from a fellow servant; the statute is irrelevant. The language of the section discloses no intention to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employés on shore.

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The judgment of the court below is Affirmed.

Mr. Justice HOLMES concurs in the result.

Mr. Justice PITNEY, Mr. Justice BRANDEIS, and Mr. Justice CLARKE, dissent.

(247 U. S. 354)

McCOY et al. v. UNION ELEVATED R. CO. et al.

(Argued March 14 and 15, 1918. Decided June 3, 1918.)

No. 190.

1. CONSTITUTIONAL LAW ⟸116 — IMPAIRMENT OF OBLIGATION OF CONTRACT—SCOPE OF PROVISION.

Const. art. 1, § 10, declaring that no state shall pass any law impairing the obligation of contracts, applies only to legislative action, and not to the judgment of a court.

2. COURTS ⟸394(10)—QUESTIONS FOR DETERMINATION.

Where a property owner contended that a judgment of the state court allowing benefits to be set off against his claim for damages to realty resulting from the construction and operation of an elevated railroad deprived him of his property without due process of law in violation of the Fourteenth Amendment, the question for the national Supreme Court is not whether the rule adopted by the state was best supported by reason, but whether a fundamental right was denied.

3. CONSTITUTIONAL LAW ⟸280 — DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS —WHAT CONSTITUTES.

The owner of realty injured by the construction and operation of an elevated railroad was not deprived of his property without due process of law in violation of the Fourteenth Amendment because benefits resulting from the increased travel were considered in determining whether the premises had been damaged, though other lands in the neighborhood were similarly benefited, for the right guaranteed is merely that the owner shall not be deprived of the market value of his property under a rule of law making it impossible for him to obtain just compensation, and there is no guaranty that he shall derive a positive pecuniary advantage from a public work whenever a neighbor does.

In error to the Supreme Court of the State of Illinois.

Action by William A. McCoy against the Union Elevated Railroad Company and others. A judgment for defendants was affirmed by the Illinois Supreme Court (271 Ill. 490, 111 N. E. 517) on writ of error sued out by Sernetta J. McCoy and John R. Caverly as executors of the estate of William A. McCoy, and the executors bring error. Affirmed.

Messrs. Harry S. Mecartney and John S. Miller, both of Chicago, Ill., for plaintiffs in error.

Messrs. Francis W. Walker, Roger L. Foote, and Addison L. Gardner, all of Chicago, Ill., for defendants in error.

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* Mr. Justice McREYNOLDS delivered the opinion of the Court.

William A. McCoy, testator of plaintiffs in error, owned a hotel situated at the northwest corner of Clark and Van Buren streets, Chicago. During 1897 defendants constructed along the latter street and in front of the building an elevated passenger railroad of the ordinary type and have continued to maintain and operate it. Charging that construction, maintenance, and operation of the railroad had caused and would continue to cause injury to the property by noise, smoke, dirt, shutting off air and light, disturbing privacy, and impairing the freedom of ingress and egress, and that its market value had been greatly reduced, McCoy brought a common-law action (September, 1902) in a state court to recover the entire damage.

The declaration does not allege plaintiff's ownership of the fee in the street, but asserts his interest in the lot and right to the "easements and privileges which legally ap-

pertain and rightfully belong to property abutting public streets" in Chicago, including the right of light, air, access, privacy, view, etc. Trial to a jury upon plea of not guilty during February, 1914, resulted in verdict for defendants, and judgment thereon was affirmed by the Supreme Court, a writ of error having been sued out by McCoy's executors. 271 Ill. 490, 111 N. E. 517. That court's statement of facts follows:

"During the years 1896 and 1897 what is generally known as the 'loop' was constructed, under authority conferred by ordinances of the city of Chicago, for the joint use of the three systems above mentioned and *another elevated system then in course of construction. The loop consists of an elevated structure in the streets encircling the central portion of the business district of the city, upon which are laid tracks for the passage of the elevated trains of all of the defendant companies completely around the central portion of the business district. Before the construction of the loop the elevated trains of the defendant companies stopped at their respective terminals. The structure forming the south side of the loop was placed in that portion of Van Buren street extending from Wabash avenue on the east to Fifth avenue on the west, Clark street being one of the streets intersecting Van Buren street between these two avenues.

"Stations to permit passengers to board and leave the elevated trains were established at intervals around the loop and stairways were constructed leading from each station to the surface of the street. One of these stations in Van Buren street was established at La Salle street, about 100 feet west from the McCoy Hotel, and another was established at Dearborn street, about 300 feet east from the hotel. The elevated structure in Van Buren street obstructed the passage of light to the storerooms in McCoy's building, and the noise from the passage of trains over the structure and the fact that passing trains were on a level with the windows of the second floor of the building rendered the rooms on the south side of the second and third floors of the building less desirable for hotel purposes. Large upright columns supporting the elevated structure were placed just inside the curb in front of the premises and rendered the premises less accessible from the street.

"There is no material controversy over the facts in the case. The witnesses all agree that the matters above mentioned, when considered by themselves, would be detrimental to the premises. They also agree that there was a steady increase of from 5 to 10 per cent. per year in the value of the premises from the construction of the loop until 1905. It also appears from the evidence that the rents from the storerooms on the ground floor constantly increased after 1897. The plaintiff called but one real estate expert as a witness. He testified that the damages to the property from the construction of the elevated structure, and the operation of the trains thereon, amounted to $81,999, being 15 per cent. of the value which the witness placed upon the interest of McCoy in the premises. He admitted that there had been a continuous increase in the value of the premises since the completion of the loop, and that a portion of that increase, which he said it was impossible to estimate, was due to the increased travel brought to the premises by the elevated railroad, but that he did not take that into consideration in fixing the damages.

"The real estate experts called by the defendants, on the other hand, testified that at least one-half of the increase in the value of the premises was due to the increased travel in front of the premises resulting from the operation of the elevated railroad in Van Buren street as a part of the loop. In support of the testimony of these witnesses defendants proved that the number of persons boarding the elevated trains at the La Salle street station, in Van Buren street, during the three months of the year 1897 in which trains were operated around the loop, was 161,763, and that the number constantly increased, until in 1905 there were 3,659,583 persons who boarded the trains at that station. It was also shown that during the period in 1897 above mentioned 194,904 persons boarded the elevated trains at the Dearborn street station, in Van Buren street, and that the number constantly increased each year until in 1905 there were 2,558,976 persons who boarded the trains at that station."

During the trial, over plaintiff's objections, questions concerning evidence were determined in accordance with repeated rulings by the Illinois Supreme Court that the effect of construction, maintenance, and operation of an elevated road upon market value was the point for determination, and that increase in such value caused by the improvement itself should be considered and treated as a special benefit, although enjoyed by other neighborhood property.

Among others, plaintiff requested the following instructions:

"The jury are instructed that the Constitution of this state provides that 'private property shall not be taken or damaged for public use without just compensation.' This action is brought by plaintiff for an alleged damage to the property of plaintiff arising from the construction [maintenance and operation] of the structure in the abutting street for elevated railroad purposes. Such damages in the eye of the law can only be a loss in the market value of the property arising from the said construction [maintenance and operation] for the purposes aforesaid. Whether the premises in question have in fact been so damaged is for the jury to find from the evidence, according to the method and within the limitations of other instructions given you.

"The court instructs the jury that 'benefits' and 'damages' spoken of in the instruction mean benefits and damages to the market value thereof, and that by the term 'market value' of property, as used in these instructions, is meant the price at which the owner, if desirous of selling, would under ordinary circumstances surrounding the sales of property have sold the property for, and what a person desirous as purchaser would have paid for it under the same circumstances.

"The jury are instructed that, in considering the question of whether the premises in question were or were not damaged by the construction of the structure in the abutting street for elevated railroad purposes, they are to exclude from consideration all benefit which accrued to the said premises or to the owners thereof by reason of improved travel facilities furnished by said elevated railroad."

The words "maintenance and operation" were inserted in the first of these requests and as thus amended it was given; the others were refused.

The following instructions were also given:

"The court instructs the jury that benefits and damages spoken of in these instructions mean benefits and damages to the fair cash market value thereof, and that by the term 'fair cash market value of the property,' as used in these instructions, is meant its value as determined by what it would sell for in the mar-

ket for cash in the due course of business. This does not mean the price at which it would sell under special circumstances, but its value as sold in the market under ordinary circumstances for cash, and not on time, and assuming that the owner is willing and not compelled to sell, and the purchaser is willing and under no compulsion to purchase.

"The jury is instructed that, if you believe from the evidence that plaintiff's premises have been increased in their fair cash market value by the construction, maintenance, and operation of defendants' said railroad, and if you also believe from the evidence that other property in the neighborhood of the plaintiff's premises not abutting upon the defendants' railroad have been likewise increased in their fair cash market value by the construction, maintenance, and operation of said railroad, but to a greater extent than the plaintiff's said premises, you have no right from that fact to find that the plaintiff's premises have been damaged.

"Special benefits are such benefits as are special or peculiar to a particular piece of property, and which beneficially affect its fair cash
*360 market value, as distinguished from those bene-
fits which are common to the* public at large, and which are termed general benefits; and you are instructed that in determining the effect of the construction, maintenance, and operation of defendants' elevated railroad upon the fair cash market value of plaintiff's said premises, you are not to take into consideration any general benefits which you may believe from the evidence to have arisen out of the construction, maintenance, and operation of said elevated railroad, but you should take into consideration special benefits, if any, shown by the evidence to plaintiff's said premises from the construction, maintenance, and operation of defendants' said elevated railroad.

"The jury is instructed that, if you believe from the evidence that the property of the plaintiff described in the declaration of this case was enhanced in its fair cash market value by reason of the construction, maintenance, and operation of the elevated railroad of the defendant, such increase in market value is a special benefit to the property of the plaintiff, and not a general benefit, notwithstanding you may believe from the evidence that the other property in the vicinity of plaintiff's property also was enhanced in fair cash market value to a greater or less degree by reason of the construction, maintenance, and operation of defendants' said elevated railroad.

"The jury is instructed that the measure of damages in a case of this kind is the difference between the fair cash market value of the premises with the elevated railroad constructed, maintained, and operated in the street in front of it and what the fair cash market value of said premises would have been had not said elevated railroad been so constructed, maintained, and operated. If you believe from the evidence that the fair cash market value of the plaintiff's premises with the railroad construct-
ed, maintained, and operated in Van Buren
*361 street has not been diminished below what you
believe* from the evidence the fair cash market value of said premises would have been if the said elevated railroad had not been constructed, maintained, and operated in said street, then said plaintiff's premises have not been damaged by the construction, maintenance, and operation of defendants' elevated railroad."

The Supreme Court said:

"The contention made by plaintiffs in error upon which most of the assignments of error depend is that the benefits to the premises by reason of the increased travel in front of the premises resulting from the operation of the elevated railroad in Van Buren street as a part of the loop cannot be considered in determining whether the premises have been damaged by the construction of the elevated structure and the operation of trains thereon: First, because such benefits are general benefits, common to all the property in the vicinity; and, second, because such benefits are conjectural and speculative. The same contention was made in Brand v. Union Elevated Railroad Co., 258 Ill. 133 [101 N. E. 247, Ann. Cas. 1914B, 473, L. R. A. 1918A, 878] Geohegan v. Union Elevated Railroad Co., 258 Ill. 352 [101 N. E. 577, Ann. Cas. 1914B, 572, 45 L. R. A. (N. S.) 167], and Geohegan v. Union Elevated Railroad Co., 266 Ill. 482 [107 N. E. 786, Ann. Cas. 1916B, 762], and in each of those cases we held that such benefits should be considered in determining whether premises abutting on a public street have been damaged by the construction and operation of an elevated railroad in such street. The reasons for such holding were fully set forth in the opinions filed in the cases above mentioned, and it would serve no useful purpose to repeat them here. It is sufficient to say that we adhere to the views expressed in the former cases involving the same question as is here presented. * * * Complaint is made of the action of the court in giving certain instructions on behalf of defendants in error and in refusing or modifying certain instructions submitted by plaintiff. * * * Moreover, the evidence in this case
*362 would not have sustained a verdict in favor of
the* plaintiff, and any error committed by the*
trial court in giving, refusing, or modifying instructions was therefore harmless."

In their brief here counsel for plaintiffs in error declare:

"Plaintiff presented his case, therefore, upon the basis that his damage was to be estimated:

"(1) By taking the market value of the premises immediately before the advent of the loop; then

"(2) To consider how the structure in question placed in the block upon which his premises abutted (which defined the 'physical' scope of his property or rights), forever dedicated to railroad uses and to be operated therefor, would actually interfere with the actual use and enjoyment of the premises; and then

"(3) To estimate to what extent such structure put or dedicated to such use, would reduce that market value. That is, to capitalize the permanent interference, i. e., damage. (As laid down in Lewis [3d Ed.] § 693).

"In the trial court the main conflict was waged over the question as to whether or not the court should admit on behalf of defendants evidence of 'general' or 'travel' benefits occurring from the establishment of the loop in its entirety, or whether the evidence should be held down to the issue of 'direct, proximate, and physical effect.' Said court, following the late ruling of the Illinois Supreme Court in Brand v. Union Elev. R. R. Co., 258 Ill. 133, 101 N. E. 247, Ann. Cas. 1914B, 473, L. R. A. 1918A, 878 (a review of which was asked in this court in 238 U. S. 586, 35 Sup. Ct. 846, 59 L. Ed. 1471, same title), tried the case upon the basis of allowing this special damage to be offset or reduced by, or considered in connection with, the estimated amount of market benefit that accrued to the premises from 'travel benefits.' "

[1] And they now maintain that the judgment below is erroneous because it: (1) Impairs the contract which their testator made when he purchased the property contrary to
*363 section 10, art. 1, Federal Constitution; (2)
denies to them* the equal protection of the*
law; and (3) deprives them of property without due process of law in violation of the Fourteenth Amendment. The first claim is clearly untenable; the contract clause pro-

hibits legislative, not judicial, action. Ross v. Oregon, 227 U. S. 150, 161, 164, 33 Sup. Ct. 226, 57 L. Ed. 458, Ann. Cas. 1914C, 224; Moore-Mansfield Co. v. Electrical Co., 234 U. S. 619, 623, 624, 34 Sup. Ct. 941, 58 L. Ed. 1503; Frank v. Mangum, 237 U. S. 309, 344, 35 Sup. Ct. 582, 59 L. Ed. 969. Nothing in the record affords support for the second claim. The third demands consideration.

[2, 3] We may examine proceedings in state courts for appropriation of private property to public purposes so far as to inquire whether a rule of law was adopted in absolute disregard of the owner's right to just compensation. If the necessary result was to deprive him of property without such compensation, then due process of law was denied him, contrary to Fourteenth Amendment. Chicago, Burlington, etc., R. R. v. Chicago, 166 U. S. 226, 246, 17 Sup. Ct. 581, 41 L. Ed. 979; Backus v. Fort Street Union Depot Co., 169 U. S. 557, 565, 18 Sup. Ct. 445, 42 L. Ed. 853; Fayerweather v. Ritch, 195 U. S. 276, 298, 25 Sup. Ct. 58, 49 L. Ed. 193. Our concern is not to ascertain whether the rule adopted by the state is the one best supported by reason or authority nor with mere errors in course of trial, but with denial of a fundamental right. Appleby v. Buffalo, 221 U. S. 524, 532, 31 Sup. Ct. 699, 55 L. Ed. 838. And see McGovern v. New York, 229 U. S. 363, 371, 33 Sup. Ct. 876, 57 L. Ed. 1228, 46 L. R. A. (N. S.) 391. And here it must be noted that the claim is for damages to property not actually taken from the owner's dominion.

The Illinois Constitution provides:

"Private property shall not be taken or damaged for public use without just compensation."

In Peoria, Bloomington & Champaign Traction Co. v. Vance et al., 225 Ill. 270, 272, 80 N. E. 134, 135 (9 L. R. A. [N. S.] 781) where the owner sought damages to the balance of his farm resulting from taking a right of way for an electric road, the court pointed out the applicable doctrine long established in the state. It said:

*364 "Since the adoption of the Constitution of 1870 it has been uniformly held by this court, in such cases as this, that the measure of damages to land not taken is 'the difference in the fair cash market value of the land before and after the construction of the railroad,' or 'the amount, if any, which lands not taken will be depreciated in their fair cash market value by the construction and operation of the proposed road.' * * * Under the rule adopted in this state for determining whether or in what amount, property not taken will be damaged by the construction and operation of a railroad, any benefits which are not conjectural or speculative, and which actually enhance the market value of such property, are to be considered as special benefits, and not as general benefits, within the meaning of the rule that general benefits cannot be considered in determining whether, or in what amount, property not taken will be damaged. Special benefits do not become general benefits because the benefits are common to other property in the vicinity. The fact that other property in the vicinity of the proposed railroad will also be increased in value by reason of the construction and operation thereof furnishes no excuse for excluding the consideration of special benefits to the particular property in determining whether it has been damaged, and, if it has, the extent of the depreciation in value."

This doctrine was again expressly affirmed in Brand v. Union Elevated Railroad, 258 Ill. 133, 101 N. E. 247, Ann. Cas. 1914B, 473, L. R. A. 1918A, 878, a proceeding like the present one to recover damages caused by constructing, maintaining, and operating an elevated railroad along the street. The trial court below accepted and applied the approved rule, and we are now asked to declare that it absolutely disregards the owner's fundamental right to just compensation; that it necessarily deprives him of such compensation.

How far benefits must be considered in determining damages to property when claimed on account of a public improvement is a vexed question which has given occasion *365 for numberless decisions in different * states, as well as much legislation. The matter is elaborately treated and the cases collected in Lewis on Eminent Domain and Nichols on Eminent Domain. In the former (section 687, 3d Ed.) it is said:

"The decisions may be divided into five classes, according as they maintain one or the other of the following propositions: First. Benefits cannot be considered at all. Second. Special benefits may be set off against damages to the remainder, but not against the value of the part taken. Third. Benefits, whether general or special, may be set off as in the last proposition. Fourth. Special benefits may be set off against both damages to the remainder or the value of the part taken. Fifth. Both general and special benefits may be set off as in the last proposition."

The latter work, at section 256 (2d Ed.) says:

"It is universally recognized that when there is no taking the damages to a tract of land from the construction of a public work cannot be correctly ascertained without determining whether the tract has been depreciated in value, and to determine this all the effects of the public work, beneficial or injurious, must be considered. Strictly speaking, it is said, it is not a question of benefits at all, except that proof of benefits might be one way of showing that there had been no injury. The real question is, had the property in question been decreased in market value by the construction of the public improvement, and the amount of damage is the decrease in such value. In most states, however, it is only special benefits that can be set off; but in the states which allow the set-off of general benefits to remaining land when part of a tract is taken, the same latitude is given in awarding damages when no land is taken."

The fundamental right guaranteed by the Fourteenth Amendment is that the owner shall not be deprived of the market value of his property under a rule of law which *366 makes it impossible for him to obtain just compensation. * There is no guaranty that he * shall derive a positive pecuniary advantage from a public work whenever a neighbor does. It is almost universally held that in arriving at the amount of damage to proper-

ty not taken allowance should be made for peculiar and individual benefits conferred upon it; compensation to the owner in that form is permissible. And we are unable to say that he suffers deprivation of any fundamental right when a state goes one step further and permits consideration of actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages. In such case the owner really loses nothing which he had before; and it may be said with reason, there has been no real injury.

This subject was much discussed in Bauman v. Ross, 167 U. S. 548, 574, 584, 17 Sup. Ct. 966, 976 (42 L. Ed. 270). Through Mr. Justice Gray we there said:

"The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public. Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition, as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened. * * * The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for *private property taken for the public use; and, for the reasons and upon the authorities above stated, no such prohibition can be implied; and it is therefore within the authority of Congress, in the exercise of the right of eminent domain, to direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, and special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken."

*867

See Martin v. District of Columbia, 205 U. S. 135, 27 Sup. Ct. 440, 51 L. Ed. 743.

The judgment below is

Affirmed.

(247 U. S. 243)

STATE OF MINNESOTA v. LANE, Secretary of Interior, et al.

(Argued April 15, 1918. Decided June 3, 1918.)

No. 20. Original.

PUBLIC LANDS ⇐109—ADVERSE CLAIMANTS—REMEDIES OF.

Where the claim of the state of Minnesota to lands asserted under Act Aug. 3, 1892, c. 362, 27 Stat. 347, granting undisposed of public lands was denied by the Commissioner of the General Land Office and the Secretary of the Interior on the ground that the lands had been disposed of under Act March 3, 1887, c. 376, § 5, 24 Stat. 557 (Comp. St. 1916, § 4899), and so did not pass under the later grant, the state cannot maintain a bill to quiet its title and enjoin the Commissioner and the Secretary of the Interior from issuing patents, but must seek its relief after the patents are issued.

Bill of complaint by the State of Minnesota against Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office. On motion to dismiss. Bill dismissed.

Messrs. Charles R. Pierce, of Washington, D. C., and Lyndon A. Smith and Clifford L. Hilton, both of St. Paul, Minn., for complainant.

Mr. Assistant Attorney General Kearful, for defendants.

*244

*Mr. Justice DAY delivered the opinion of the Court.

This bill of complaint is filed by the state of Minnesota to quiet title to certain lands in that state, and to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from issuing patents for the lands to the Immigration Land Company, a corporation of the state of Minnesota. The government filed a motion to dismiss the bill upon the following grounds:

"1. The court is without jurisdiction to entertain this suit because it is in substance and effect against the United States, which has not consented to be sued or waived its immunity from suit.

"2. There is a defect of parties defendant which cannot be cured without depriving the court of jurisdiction.

"3. The relief prayed for would be an invasion of the lawful jurisdiction of the defendants as officers of the Land Department.

"4. The bill of complaint does not state facts sufficient to entitle the state of Minnesota to any relief."

From the allegations of the bill it appears that the state claims title to the lands under Act of August 3, 1892, c. 362, 27 Stat. 347.[1]

[1] "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all undisposed lands of the United States situated in the following subdivisions, according to the public surveys thereof, to wit: Section six of township one hundred and forty-two; sections six, seven, eighteen, nineteen, thirty, and thirty-one of township one hundred and forty-three, all in range thirty-five; sections one, two, three and four of township one hundred and forty-two; and sections one, two, three, four, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, thirty-three, thirty-four, thirty-five and thirty-six of township one hundred and forty-three, all in range thirty-six, situate in the district of lands subject to sale at Saint Cloud and Crookston, Minnesota, is hereby forever granted to the state of Minnesota, to be perpetually used by said state as and for a public state park: Provided, that the land hereby granted shall revert to the United States, together with all improvements thereon, if at any time it shall cease to be exclusively used for a

*246 *245 *The Immigration Land Company claims title under section 5 of the Act of March 3, 1887, c. 376, 24 Stat. 556,[2]* relating to the adjustment of land grants to railroad companies.

The last-named statute provides that where the railroad company shall have sold to citizens of the United States as a part of its grant lands not conveyed to or for the use of the company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructive parts of the road, and where the lands so sold are for any reason excepted from the operation of the grant, it shall be lawful for a bona fide purchaser thereof from said company, to make payment to the United States for the lands at the ordinary government price for like lands, and thereupon patents shall issue to the bona fide purchaser, his heirs or assigns.

Under this act, on February 9, 1907, the Land Company made application in the Land Department to purchase the land, claiming to be the assignee of a bona fide purchaser of the lands from the railroad company. The state of Minnesota protested against the issuance of a patent to the Immigration Land Company, and claimed the land under the act of August 3, 1892, under which undisposed-of lands of the United States, situated in certain sections and townships, were granted to the state for a public park. The act of 1892 also provides that it shall not in any manner interfere with, supersede, suspend, modify or annul the vested right of any person, company, or corporation in respect to any of the land existing at the date of the passage of the act.

A hearing was had before the commissioner of the General Land Office upon the issue made between the *state of Minnesota and the *247 Immigration Land Company, wherein the Commissioner held:

"These tracts of land are within the second indemnity limits of the grant to the Northern Pacific Railroad (now Railway) Company, under act of July 2, 1864 (13 Stat. 365), as amended by joint resolution of May 31, 1870 (16 Stat. 378). On October 15, 1883, said railway company selected all of the above-described tracts of land per list No. 12, Crookston rearranged list No. 12, filed April 19, 1893. The bases given in support of the selections covered by such rearranged list were lands claimed to have been excepted from the company's grant of July 2, 1864, supra, by reason of the reservation subsisting at the date thereof on account of the grant made by the act of May 5, 1864 (13 Stat. 64), to aid in the construction of the Lake Superior & Mississippi Railroad.

"Said list of selections No. 12 was canceled as to these and other tracts of land by letter 'F' of March 20, 1907, upon authority of the decision of the Supreme Court of the United States in the case of the Northern Lumber Co. v. O'Brien, 204 U. S. 190, 27 Sup. Ct. 249, 51 L. Ed. 438, but the cancellation was suspended by the order of the Secretary of the Interior on April 1, 1907, and remained in that status until October 30, 1909, when said list of selections No. 12 was canceled as to these and other tracts of land.

* * * * * * *

"The lands above described, with others were sold and conveyed by the Northern Pacific Railway Company by warranty deed for a valuable consideration, January 14, 1891, to Frederick Weyerhaeuser, Peter Musser and M. G. Norton, whose title was afterwards conveyed by certain mesne conveyances to the applicant Immigration Land Company as set forth in its application to purchase dated February 2, 1907, and filed in your office February 9, 1907."

Of the issues involved the Commissioner said:

"The attorneys on behalf of the state of Minnesota *contend that the lands herein involved, *248 which are situated within the limits of the Itasca State Park, were granted to the state by act of August 3, 1892 (27 Stat. 347), and it is urged on the part of the state that the grant took effect immediately, the land being 'undisposed of' on that date, and that the claim asserted by the Immigration Land Company does not have the dignity of the 'vested right,' protected in section 2 of said act.

"On behalf of the Immigration Land Company it is contended that these lands were segregated from the mass of public lands by Crookston indemnity list of selections No. 12, made October 15, 1883, which was not canceled from the records until October 30, 1909; that the sale of the lands covered by cash entry No. 05008, in the name of the Immigration Land Company, by said railway company on January 14, 1891, was bona fide and for a valuable consideration, and it is urged that the Immigration Land Company should have its purchase of said lands protected under section 5 of the act of March 3, 1887 (24 Stat. 556), and receive patent therefor; the attorneys for the Land Company contending that the lands involved were not 'undisposed of lands' on August 3, 1892, the date of the grant to the state."

After an opinion, in which the issues were considered, the Commissioner reached the conclusion:

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public state park; or if the state shall not pass a law or laws to protect the timber thereon.

"Sec. 2. That this act shall not in any manner whatsoever interfere with, supersede, suspend, modify, or annul the vested rights of any person, company, or corporation, in respect to any of said lands existing at the date of the passage of this act."

[2] "That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being co-terminous with the constructive parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: Provided, that all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the Pre-emption or Homestead Laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: Provided further, that this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the Settlement Laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases."

"Accordingly, it is held that under section 5 of the act of March 3, 1887, the rights of the Immigration Land Company under the facts and laws above cited are superior to the claim of the state under the act of August 3, 1892, that cash entry 05008 by said Immigration Land Company should remain intact.

"The protest of the state is hereby dismissed subject to the usual right of appeal within thirty days after notice to the Secretary of the Interior."

*245 The decision of the Commissioner of the General Land Office was affirmed by the Secretary of the Interior, and a rehearing denied. State of Minnesota v. Immigration Land Co., 46 Land Dec. 14.

The purpose of the bill filed in this case is to quiet title to the lands in controversy by a decree in favor of the state of Minnesota notwithstanding the decision of the Secretary of the Interior, and to enjoin that officer from issuing patents for the lands to the Immigration Land Company.

We are of opinion that the state has mistaken its remedy, and if it be true that the secretary has made a mistake in overruling the contention of the state that the title passed to it under the act of August 3, 1892, relief must be sought in the courts after the issuance of patent.

The grant to the state of August 3, 1892, was of all undisposed-of lands in certain townships, and section 2 specifically provided that it should not interfere with, supersede, suspend, modify or annul the vested rights of any person, company, or corporation in respect to any of said lands existing at the date of the passage of the act. The act of March 3, 1887, permitting bona fide purchasers of certain lands, in the manner which we have stated, to make payment and acquire title to the lands excepted from the operation of the railroad grant, was then in full force. A part of these lands had been purchased before the act granting them to the state, by the Immigration Land Company, and the Secretary of the Interior held that the title thus acquired was superior to that of the state, and patents were about to be issued, in accordance with the decision of the Secretary, to such bona fide purchaser. This decision is not of an arbitrary character, and was made upon full hearing before the department of the government intrusted with the administration of the public land laws, and the patents were still unissued when this suit was brought.

This is not a case where the title had passed absolutely in favor of the claimant, as was *234 the fact in Lane v. Watts, *234 U. S. 525, 34 Sup. Ct. 965, 58 L. Ed. 1440; Id., 235 U. S. 17, 35 Sup. Ct. 3, 59 L. Ed. 104. It is a case where the grant was in terms of "undisposed-of lands," and subject to the vested rights of others. As against those holding such lands the title was not intended to pass.

The act of 1887, under which the Immigration Land Company claims title, specifically provides that patents shall be issued for lands to which the purchaser is entitled. The patents not having issued, the lands in controversy were still in course of administration in that department of the government which, until patent issues, has exclusive control of proceedings to acquire the title.

As we have said, the remedy must be sought in the courts after the issuance of patent. Under such circumstances as are here disclosed this court has uniformly so held. Litchfield v. The Register et al., 9 Wall. 575, 577, 19 L. Ed. 681; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592, 593, 18 Sup. Ct. 208, 42 L. Ed. 591; Brown v. Hitchcock, 173 U. S. 473, 19 Sup. Ct. 485, 43 L. Ed. 772; Kirwan v. Murphy, 189 U. S. 35, 23 Sup. Ct. 599, 47 L. Ed. 698; Lane v. Mickadiet, 241 U. S. 201, 208, 209, 36 Sup. Ct. 599, 60 L. Ed. 956.

It follows that the bill of the state must be dismissed, and it is so ordered.

Mr. Justice McREYNOLDS took no part in the consideration or decision of this case.

(247 U. S. 282)

UNION PAC. R. CO. v. BOARD OF COM'RS OF WELD COUNTY, COLORADO, et al.

(Argued Nov. 15, 1916. Decided June 3, 1918.)

No. 22.

1. COURTS ⇐382(1) — UNITED STATES SUPREME COURT—JURISDICTION—APPEALS.

The Supreme Court has no jurisdiction to entertain an appeal from a decree of the Circuit Court of Appeals affirming an interlocutory order denying a temporary injunction.

2. COURTS ⇐383(1) — UNITED STATES SUPREME COURT—JURISDICTION—ISSUANCE OF CERTIORARI.

Where an application for a temporary injunction was denied on the ground there was an adequate remedy at law, but the bill was not dismissed and complainant appealed from a decree of affirmance rendered by the Circuit Court of Appeals, the Supreme Court may grant complainant's petition for certiorari, and, though without jurisdiction to entertain the appeal, treat the record on appeal as a return to the writ.

3. TAXATION ⇐608(9)—REFUND OF ILLEGAL TAXES—ADEQUATE REMEDY AT LAW—JURISDICTION OF EQUITY.

If Rev. St. Colo. 1908, § 5750, declaring that where any person had paid a tax found to be erroneous or illegal the county commissioners should refund the same without abatement or discount, is still in force unmodified by subsequent acts, the taxpayer would have an adequate remedy at law, and would not be entitled to federal court aid to enjoin collection of taxes asserted to be illegal.

4. TAXATION ⇐608(9)—REFUND OF ILLEGAL TAXES—ADEQUATE REMEDY AT LAW—JURISDICTION OF EQUITY.

In such case, it was immaterial that the taxes were made a lien upon the taxpayer's property, for the lien would be effectually removed by payment and suing to recover the money.

5. EQUITY ⟸46—JURISDICTION—ADEQUATE REMEDY AT LAW.

If the remedy at law be doubtful, a court of equity will not decline cognizance of the suit on account of the existence of a legal remedy.

6. TAXATION ⟸608(9)—REFUND OF ILLEGAL TAXES—ADEQUATE REMEDY AT LAW—STATUTES—CONSTRUCTION.

The federal courts should not decline cognizance of a suit by a taxpayer to enjoin the collection of alleged illegal state taxes, on the ground there was an adequate remedy at law, where the question whether Rev. St. Colo. 1908, § 5750, which gave the remedy, had been so modified by Laws Colo. 1913, p. 527, as to no longer afford an adequate remedy at law is not free from difficulty, for a construction of the state statutes by the federal courts would not be binding on state courts.

7. COURTS ⟸97(6) — PRECEDENTS — STATE COURTS.

The construction of state statutes relating to taxes being purely one of state law, a construction by the national courts is not binding on state courts.

Appeal from and Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the Union Pacific Railroad Company against the Board of County Commissioners of Weld County, State of Colorado, and others. A decree denying a temporary injunction was affirmed by the Circuit Court of Appeals (217 Fed. 540, 133 C. C. A. 392; 222 Fed. 651, 138 C. C. A. 175), and complainant appeals and petitions for certiorari. Appeal dismissed, certiorari granted, record on appeal to stand as returned to writ, and decrees reversed and cause remanded for further proceedings.

Messrs. Clayton C. Dorsey, of Denver, Colo., and N. H. Loomis, of Omaha, Neb., for appellant.

Mr. Charles F. Tew, of Greeley, Colo., for appellees.

*283 *Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit by the Union Pacific Railroad Company to enjoin the collection of a portion of the taxes levied on its property in Weld county, Colorado, in a particular year, the gravamen of the complaint being that the company's property was assessed at one-third of its value, while most of the other property was assessed at one-fifth and some not at all, and that this operated to place an undue burden of taxation on the company contrary to the Constitution and laws of the state and to the due process and equal protection clauses of the Fourteenth Amendment. A portion of the taxes was conceded to be valid and was paid. The portion in dispute amounts to $31,127.37. An application for a temporary injunction, submitted on affidavits and other proofs, was denied by the District Court, and that interlocutory order was affirmed by the Circuit Court of Appeals (217 Fed. 540, 133 C. C. A. 392; 222 Fed. 651, 138 C. C. A. 175), both courts being of opinion that relief by injunction was not admissible because there was a plain, adequate and complete remedy at law. While that view might have resulted in a final decree dismissing the bill, such a decree was neither entered in the District Court nor directed by the Circuit Court of Appeals. In other words, an amendment of the bill and further proceedings were not precluded.

*284

[1, 2] An appeal to this court from the affirmance of the District Court's interlocutory order was allowed, but the appeal is without statutory sanction and must be dismissed. Anticipating that this might be so, the company presented a petition for a writ of certiorari under section 262 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, § 1239])—see McClellan v. Carland, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762; United States v. Beatty, 232 U. S. 463, 467, 34 Sup. Ct. 392, 58 L. Ed. 686; Meeker v. Lehigh Valley R. R. Co., 234 U. S. 749, 34 Sup. Ct. 674, 58 L. Ed. 1576—consideration of which was postponed to the hearing on the appeal. We now grant the petition and treat the record on the appeal as the return to the writ. See Farrell v. O'Brien, 199 U. S. 89, 101, 25 Sup. Ct. 727, 50 L. Ed. 101; White-Smith Music Co. v. Apollo Co., 209 U. S. 1, 8, 28 Sup. Ct. 319, 52 L. Ed. 655, 14 Ann. Cas. 628.

[3, 4] For many years the revenue laws of Colorado have contained a section[1] imposing on the board of county commissioners "in all cases" the duty of refunding to the taxpayer "without abatement or discount" "any tax, interest or costs, or any part thereof," which is found to have been "erroneous or illegal," and by a necessary implication conferring on him a correlative and substantive right to have the same so refunded. Laws 1870, p. 123, § 106; 2 Mills Ann. Stat. § 3777; Laws 1902, c. 3, § 202; Rev. Stat. 1908, § 5750; Price v. Kramer, 4 Colo. 546, 555; Woodward v. Ellsworth, 4 Colo. 580, 581; Hallett v. Arapahoe County, 40 Colo. 308, 318, 90 Pac. 678; County Commissioners of Bent County v. Atchison, etc., Ry. Co., 52 Colo. 609, 612–614, 125 Pac. 528. If that section is still in force, unqualified and unmodified, the conclusion below that in this case there is a plain, adequate and complete remedy at law, and therefore that relief by injunction is not admissible, is fully sustained by our decisions. Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288, and cases there cited;

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[1] "* * * And in all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, or clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer."

Pittsburg, etc., Ry. Co. v. Board of Public Works, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354; Arkansas Building and Loan Ass'n v. Madden, 175 U. S. 269, 20 Sup. Ct. 119, 44 L. Ed. 159; Raymond v. Chicago Union Traction Co., 207 U. S. 20, 38, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757; Johnson v. Wells Fargo & Co., 239 U. S. 234, 243, 36 Sup. Ct. 62, 60 L. Ed. 243; Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499, 519, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

That the taxes were levied for state, school district and town, as well as for county, purposes is not material; for it is apparent from the Colorado statutes and decisions that the section covers broadly the whole of the tax that is found to have been erroneous or illegal, regardless of the purpose for which it was levied and placed on the county tax roll. And it also is immaterial that the taxes were made a lien on the company's real property, for the lien would be effectually removed by paying them and suing to recover back the money. Allen v. Pullman's Palace Car Co., 139 U. S. 658, 661, 11 Sup. Ct. 682, 35 L. Ed. 303; Arkansas Building and Loan Ass'n v. Madden, supra, 175 U. S. 273, 20 Sup. Ct. 119, 44 L. Ed. 159.

[5-7] Whether the section named is still in force, unqualified and unmodified, is the important question. If not in force, a single action at law would not suffice, for then it would be necessary to bring a separate action against each of several school districts and towns for its part of the tax. See Raymond v. Chicago Union Traction Co., supra, 207 U. S. 39, 40, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757. And if the section has been so qualified and modified that the continued existence of the right originally conferred on the taxpayer is involved in uncertainty, an essential element of the requisite remedy at law is wanting; for, as this court has said:

*286 "It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. * * * Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law." Davis v. Wakelee, 156 U. S. 680, 688, 15 Sup. Ct. 555, 39 L. Ed. 578.

In 1911 Colorado established a state tax commission and conferred on it extensive supervisory powers over the administration of the revenue laws of the state, including the acts of assessors and boards of county commissioners. Laws 1911, c. 216. And in 1913, before the present suit was begun, the state adopted a statute extending the powers of the commission and repealing "all acts or parts of acts in conflict" therewith. Laws 1913, c. 134. The fifth section of that act says:

"No abatement, rebate or refund of taxes shall be allowed by the county commissioners, unless a hearing shall be had thereon and a notice of such hearing and an opportunity to be present being [be] first given to the assessor, and in case any abatement, rebate or refund of taxes shall be recommended by said county commissioners, they shall certify to the Colorado tax commission their findings, giving the amount of such abatement, rebate or refund, and their reasons therefor, and such abatement, rebate or refund shall become effective upon the indorsement thereon of the approval of the Colorado tax commission and in case the said Colorado tax commission shall disapprove the recommendation of the county commissioners, they shall indorse their disapproval thereon and return it to the county commissioners with a statement of their reasons therefor and no abatement, rebate or refund of taxes shall be allowed by the said board of county commissioners if the application is disapproved by the said Colorado tax commission."

Counsel differ widely respecting the effect of this statute on the earlier section (section 5750, Rev. Stat. 1908) and on the substantive right given by it to have an erroneous or illegal tax refunded. On the one hand it is said that neither the earlier section nor the right thereby conferred is in any wise affected, and that one paying an erroneous or illegal tax still may call on the county board to refund it and, if the application be refused, has a right of action to compel the board to refund. On the other hand, it is said that the new statute qualifies and modifies the earlier section by restricting the power and duty of the county board to refund to instances in which the state tax commission approves the application, and that the correlative right of the taxpayer under the earlier section—the right impliedly arising out of the duty imposed on the county board—is qualified and modified accordingly; in other words, that the new statute prohibits any refunding of taxes by the county board save in instances having the approval of the state commission and that in other instances it operates to withdraw from the taxpayer all right of action against the county board under the earlier section.

An examination of the new statute shows that the controversy just outlined is not without some real basis and that its solution is not free from difficulty. The question is purely one of state law, and, so far as we are advised, the Supreme Court of the state has not passed on or considered it. A ruling by us on the question would neither settle it for that court nor be binding in an action to recover the tax if paid. In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law. On the contrary, the existence of such a remedy is debatable and uncertain. And this being so, the situation is not one in which cognizance of the present suit properly can be declined.

With the question of equitable jurisdiction out of the way, the District Court should dispose of the application for a temporary injunction on the merits and otherwise proceed with the suit in regular course. The controverted questions of fact arising on that application have not been considered by us and we intimate no opinion respecting them.

Such questions are rarely, if ever, regarded as properly subject to examination here on writ of certiorari.

Appeal dismissed; certiorari granted, record on appeal to stand as return to writ; decrees below reversed and cause remanded to the District Court for further proceedings in conformity with this opinion.

(247 U. S. 385)

PHILIPPINE SUGAR ESTATES DEVELOPMENT CO., Limited, v. GOVERNMENT OF PHILIPPINE ISLANDS.

(Argued March 13, 1918. Decided June 3, 1918.)

No. 189.

1. APPEAL AND ERROR ⟸5—MODE OF REVIEW—EQUITABLE DEFENSE.

Where the answer to an action at law on a contract was in effect a bill in equity, seeking reformation and incidentally to enjoin the action at law, the proceeding was converted into an equitable one, and hence appeal, instead of writ of error, was the appropriate method for review.

2. REFORMATION OF INSTRUMENTS ⟸18 — MISTAKE OF LAW—REMEDY—SCOPE.

Courts of equity will reform a written contract, where, owing to mutual mistake, the language used did not fully or accurately express the agreement or intention of the parties, and the fact that the interpretation or construction of a contract presents a question of law, and therefore the mistake was one of law, is no bar to relief.

3. REFORMATION OF INSTRUMENTS ⟸18—MUTUAL MISTAKE OF LAW.

Code Civ. Proc. Philippine Islands, § 285, permitting evidence of the terms of agreement, other than the contents of the writing, where a mistake or imperfection of the writing, or its failure to express the true intent of the parties, is put in issue by the pleadings, is sufficiently broad to warrant relief, where the mutual mistake was one of law as to the legal interpretation of the contract.

4. COURTS ⟸387(1) — REVIEW OF DECISION OF STATE COURT—CONSTRUCTION OF LOCAL LAW.

While the Supreme Court is always disposed to accept the construction which the highest court of a territory or possession has placed upon a local statute, the construction will not be deferred to, where clearly erroneous.

5. COURTS ⟸387(4)—REVIEW OF DECISION OF DETERMINATION.

Where the Supreme Court of the Philippine Islands reversed a judgment on a question of law, but did not dispose of the contention, made under Code Civ. Proc. Philippine Islands, § 497, par. 2, that the denial of a new trial, prayed on the ground of the insufficiency of the evidence to support the findings, was error, the Supreme Court of the United States may, on appeal, review the evidence and finally dispose of the case, where the bill of exceptions for the Philippine Supreme Court contained the whole record in the trial court including the evidence.

6. REFORMATION OF INSTRUMENTS ⟸45(1)—DEGREE OF PROOF—MISTAKE.

Reformation of a written instrument will not be granted, unless the proof of mutual mistake be of the clearest and most satisfactory.

7. REFORMATION OF INSTRUMENTS ⟸45(5) — EVIDENCE—SUFFICIENCY.

In a suit by the government of the Philippine Islands to recover from the grantor of lands the value of certain machinery and other property removed therefrom, in which defendant sought reformation of the conveyance, evidence *held* to show that it was not the intention of the parties to include the property removed, and that the use of words including them was the result of mutual mistake.

In Error to and Appeal from the Supreme Court of the Philippine Islands.

Action by the Government of the Philippine Islands against the Philippine Sugar Estates Development Company, Limited. A judgment for defendant was reversed by the Supreme Court of the Philippine Islands, and defendant appeals and brings error. Writ of error dismissed, and judgment of Supreme Court of Philippine Islands reversed on appeal, and that entered by the Court of the First Instance of Manila affirmed.

Mr. Antonio M. Opisso, of Manila, P. I., for plaintiff in error and appellant.

Messrs. Edward S. Bailey and Samuel T. Ansell, both of Washington, D. C., for defendant in error and appellee.

*386 *Mr. Justice BRANDEIS delivered the opinion of the Court.

When Spain ceded the Philippine Islands to the United States large tracts of agricultural lands were owned by the great religious orders. For political reasons it was deemed advisable that our government should acquire the Friar lands and sell them to tenants in small holdings on easy terms. Lengthy negotiations conducted to that end by the Civil Governor were concluded in 1903. Most of the lands owned by the Dominicans, amounting to 60,461 hectares, had been conveyed to the Philippine Sugar Estates Development Company, Limited; and with that corporation a contract of sale and purchase was executed by the Government of the Philippine Islands under date of December 22, 1903. The agreement covered eight haciendas including that of Calamba in the *province of Laguna, said to contain 16,424 hectares and 14 ares. Owing to delays incident to resurveys and perfecting of titles, the deed of the Calamba estate was not delivered until October, 1905, when the purchase price, 1,385,443.29 pesos, was paid and possession taken by the grantee.[1] Later the Philippine Government learned that the grantor had removed certain sugar mill machinery and the rails of a light railroad which had formerly been upon the estate. The contract made no mention of sugar mills, machinery, or railroad; but it contained, after the description of the estates and specified properties to be conveyed, the words, "and all other improvements"; and these words were also in the deed. The

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[1] U. S. Philippine Commission Reports (1901) vol. 2, part 1, p. 24; (1902) part 1, p. 24; (1903) part 1, pp. 38-44; (1904) part 1, p. 16; part 2, p. 477; (1905) part 1, p. 65; (1906) part 1, p. 58. A hectare equals 2.471 acres; two pesos equal one dollar, gold.

government, claiming that the machinery and railroad were covered by this and other clauses and passed as part of the realty, brought suit, in 1906, against the company [2] in the Court of First Instance of Manila for their value, alleged to be 50,000 pesos.

The Code of Civil Procedure of the Philippine Islands (section 285) permits to be introduced, in case of written contracts, "evidence of the terms of agreement other than the contents of the writing," "where a mistake or imperfection of the writing, or its failure to express the true intent and agreement of the parties is put in issue by the pleadings."[3] The defense was rested, under *388 appropriate*pleadings, on the ground, among others, that the contracting parties understood that the sugar mills or machinery and the railroad were not to be included as a part of the real estate and that they did not come under any of the terms used in the contract or the deed, and that, for this reason, the instrument did not express the intention and actual agreement of the parties. The trial court held this defense good in law and sustained by the evidence; and entered judgment for the defendant. The Supreme Court of the Philippine Islands reversed the judgment of the trial court solely on the ground that, where parties to a written contract have deliberately adopted the language therein used, a court of equity will not reform the instrument because the parties were "mistaken as to its legal interpretation and effect, nor will such a mistake be recognized as any defense to a suit upon the contract or instrument," and that relief against such a mistake cannot be afforded under section 285 of the Code. Upon the evidence which had been introduced below the Supreme Court also entered a judgment of 50,000 pesos for the government. 30 Phil. Rep. 27. The case comes here under section 248 of the Judicial Code (Comp. St. 1916, §§ 1225, 1225a).

[2] The Dominican Order of Friars was joined in the complaint as a party defendant; but it was not mentioned in the judgments entered in either of the lower courts; and it did not become a party to the proceedings in this court.

[3] *"Written Agreement Presumed to Contain All the Terms of the Agreement.* When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of agreement other than the contents of the writing, except in the following cases:

"(1) Where a mistake or imperfection of the writing, or its failure to express the true intent and agreement of the parties, is put in issue by the pleadings;

"(2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, or to explain an intrinsic ambiguity, or to establish its illegality or fraud. The term 'agreement' includes deeds and instruments conveying real estate, and wills as well as contracts between parties."

[1] The case is brought here both by writ of error and by appeal. The complaint set forth a cause of action at law on the contract. The answer was, in effect, a bill in equity for reformation and incidentally to enjoin the action at law. Compare Bradbury v. Higginson, 167 Cal. 553, 140 Pac. 254. The proceeding became thus an equitable one. See Surgett v. Lapice, 8 How. 48, 64, 65, 12 L. Ed. 982; Clark v. Mosher, 107 N. Y. 118, 14 N. E. 96, 1 Am. St. Rep. 798; Turner v. Johnson, 93 S. W. 1038, 29 Ky. Law Rep. 543. The proper method of review by this court is therefore by appeal, and the writ of error is dismissed. Gsell v. Insular Collector of Customs, 239 U. S. 93, 36 Sup. Ct. 39, 60 L. Ed. 163; Montelibanoy Ramos v. La Compania General de Tabacos de Filipinas, 241 U. S. 455, 461, 36 Sup. Ct. 617, 60 L. Ed. 1099.

[2-4] It is well settled that courts of equity will reform a written contract where, owing to mutual mistake, the language used therein did not fully or accurately express the agreement and intention of the parties. The fact that interpretation or construction of a contract presents a question of law and that, therefore, the mistake was one of law is not a bar to granting relief. Snell v. Insurance Co., 98 U. S. 85, 88–91, 25 L. Ed. 52; Griswold v. Hazard, 141 U. S. 260, 283, 284, 11 Sup. Ct. 972, 999, 35 L. Ed. 678[4]. This rule of equity was adopted in the Philippine Code without restriction; and the relief is afforded, under appropriate pleadings, without resort to an independent suit for reformation of the contract. The language of section 285 is clearly broad enough to include relief for such mistakes of law; and the earlier decisions of the Supreme Court of the Philippine Islands to which that court refers in its opinion, are not inconsistent with this conclusion. Some of them are instances of the futile attempt to vary, supplement, or contradict a written contract by parol evidence. In none of them was evidence offered under appropriate pleadings with a view to reforming the instrument.[5] 390 It is urged that section 285 was*borrowed* from section 1856 of the Code of Civil Procedure of California, and that the courts of that state deny relief under circumstances like those here under consideration. No case sustaining this assertion was cited by counsel and none has been found by us.

[4] See, also, Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290, 319, 320; Maher v. Hibernia Insurance Co., 67 N. Y. 283, 291; Wisconsin Marine & Fire Ins. Co. Bank v. Mann, 100 Wis. 596, 617-620, 76 N. W. 777.

[5] Pastor v. Gaspar, 2 Phil. Rep. 592; Icaza v. Ortega, 5 Phil. Rep. 166; Sanz v. Lavin & Brothers, 6 Phil. Rep. 299; Testagorda v. Commanding General, 6 Phil. Rep. 573; Muguruza v. International Banking Corp., 10 Phil. Rep. 346; De Guzman v. Balarag, 11 Phil. Rep. 503; United States v. Macaspac, 12 Phil. Rep. 26; Jose v. Damian, 14 Phil. Rep. 104; Sy Joc Lieng v. Sy Quia, 16 Phil. Rep. 137; Lozano v. Tan Suico, 23 Phil. Rep. 16.

Furthermore the provisions of the two sections differ materially; the significant clause of section 285, namely, "or its failure to express the true intent and agreement of the parties," is not contained in section 1856 of the California Code. It is also urged that, since the construction of section 285 is a matter of purely local concern, we should not disturb the decision of the Supreme Court of the Philippine Islands. This court is always disposed to accept the construction which the highest court of a territory or possession has placed upon a local statute. Phœnix Railway Co. v. Landis, 231 U. S. 578, 34 Sup. Ct. 179, 58 L. Ed. 377. But that disposition may not be yielded to, where the lower court has clearly erred. Carrington v. United States, 208 U. S. 1, 28 Sup. Ct. 203, 52 L. Ed. 367. Here the construction adopted was rested upon a clearly erroneous assumption as to an established rule of equity. The Supreme Court erred in refusing to consider the evidence of mutual mistake; and its judgment must be reversed.

[5] It remains to consider the further proceedings which should be taken. The judgment of the trial court was reversed by the Supreme Court solely on the ground that the defense of mutual mistake relied upon was not good in law; but the case had been taken to that court on a bill of exceptions which contained the whole record in the trial court, including all the evidence introduced; and the refusal of the trial judge to grant a new trial on the ground that the evidence did not justify the findings of the court had *391 been duly excepted to. This exception *was apparently insisted upon before the Philippine Supreme Court, and the same contention is made by the government here. Its purpose was obviously to seek a review of those findings under section 497, par. 2, of the Code of Civil Procedure, which provides that where a motion was made in the trial court for a new trial "upon the ground that the evidence was insufficient to justify the decision, and the judge overruled said motion, and due exception was taken to his overruling the same, the Supreme Court may review the evidence and make such findings upon the facts by a preponderance of the evidence, and render such final judgment, as justice and equity may require." We might require that the review of the evidence to which the government is entitled should be made by that court. But, as the case is here on appeal and all proffered evidence was admitted below and is in the record before us, we may now finally dispose of the case.

[6] The burden of proof resting upon the appellant cannot be satisfied by mere preponderance of the evidence. It is settled that relief by way of reformation will not be granted, unless the proof of mutual mistake be "of the clearest and most satisfactory character." Snell v. Insurance Co., 98 U. S. 85, 89, 90, 25 L. Ed. 52; Baltzer v. Raleigh & Augusta Railroad, 115 U. S. 634, 645, 6 Sup. Ct. 216, 29 L. Ed. 505; Maxwell Land-Grant Case, 121 U. S. 325, 381, 7 Sup. Ct. 1015, 30 L. Ed. 949; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 435, 12 Sup. Ct. 239, 35 L. Ed. 1063; Campbell v. Northwest Eckington Co., 229 U. S. 561, 584, 33 Sup. Ct. 796, 57 L. Ed. 1330. The evidence introduced by appellant meets this stringent requirement.

[7] The following, among other facts, were established by uncontradicted evidence: Prior to May, 1903, the sugar mills had been in part destroyed by revolutionists, and the mills and machinery had fallen into disrepair. In that month the company gave orders to remove the machinery and the rails from the hacienda and store them elsewhere. In October, 1903, the company contracted to sell all the *machinery and rails to one Rueda. *392 They were not included in the detailed appraisal of the property which the government caused to be made. Before the contract with the government was executed all the rails and a part of the machinery had been removed from the hacienda. In the typewritten draft of this contract with the government which its counsel prepared and which was submitted by Governor Taft to the company's representative for consideration, it was expressly stated that "sugar and rice mills and machinery" together with "irrigation work, dams, tunnels, ditches, and all other improvements thereon" should be included in the "sale and conveyance." The company's representative corrected the draft of agreement by striking out with a pen the words "sugar and rice mills and machinery." This correction was acquiesced in by the government's representatives; and in the final draft of the contract which was executed December 22, 1903, there was no reference to sugar mills, machinery, or tramway, although the paragraph, as modified, contained the following explicit and detailed provision:

"This sale and conveyance shall include all the dwelling houses, farm houses, warehouses, camarines and other buildings, irrigation works, dams, tunnels, ditches, and all other improvements, together with all water and other rights and all hereditaments belonging to the company on every part of the estates hereby agreed to be conveyed."

The words "sugar mills" were also included in the draft of the final deed of conveyance, but they were stricken out after a conference between the company's representative and the Civil Governor, so that the words do not appear in the final deed of conveyance.

This clear and uncontradicted testimony as to the agreement actually made is supported by the production of the original draft of the agreement in which the words *"sugar *393 and rice mills and machinery" were stricken out in ink, and also by production from the files of the Executive Bureau of the stenographic report of the interview with Governor Wright, above referred to. As against

this strong evidence the government can point only to the fact that in the deed, the hacienda is first described as "the description, area and boundaries" thereof "appear in the title deeds," then as it appears from the recent government surveys, and that in the description according to the title deeds, the several sugar mills are named, and following them is the clause, "though it is believed that these mills were destroyed in part at least, by the revolutionists." This recital, itself of ambiguous import, is of no significance. This description was in no way relied upon by the Supreme Court of the Philippine Islands. Their decision was based entirely upon the alleged inclusion of sugar mills and machinery in the phrase, "improvements and accessories." As found by the trial judge, the evidence "shows, without the slightest doubt, that the parties, on striking out said words [the sugar mills] from the document, agreed not to include them in the sale, as demanded by the representative of the vendor, because they were not legally part of the hacienda, for the reason that they had already been sold to Enrique Rueda prior to the preliminary agreement."

The judgment entered in the Supreme Court of the Philippine Islands is reversed and that entered by the Court of First Instance of Manila is affirmed.

Reversed.

(247 U. S. 288)

JEFFERSON et al. v. FINK et al.

(Argued March 22 and 25, 1918. Decided June 3, 1918.)

No. 242.

1. INDIANS ⟸18—CHANGE IN RULES OF DESCENT.

As Congress had previously made the Arkansas statutes relating to descent and distribution applicable to the Indian Territory, the provision of Act June 30, 1902, c. 1323, 32 Stat. 500, that descent and distribution of allotments made under Act March 1, 1901, c. 676, 31 Stat. 861, known as the Original Creek Agreement, providing for descent according to tribal law, should be governed by the Arkansas statutes, was equivalent to a declaration that descent should be in accordance with the local law, and hence the rules of descent were subject to change except as to lands which already had passed by the death of the owner.

2. CONSTITUTIONAL LAW ⟸94 — VESTED RIGHTS — DEATH OF ANCESTOR — RULES OF DESCENT.

Until the ancestor dies, there is no vested right in the heir, and rules of descent may be changed by the law-making power.

3. STATES ⟸9—INDIANS—DESCENT AND DISTRIBUTION—STATUTES.

The Arkansas statutes of descent and distribution were made applicable to the Indian Territory by various congressional acts and were extended by Act June 30, 1902, c. 1323, 32 Stat. 500, to allotments made to Creek Indians under Act March 1, 1901, c. 676, 31 Stat. 861. The Enabling Act June 16, 1906, c. 3335, 34 Stat. 267, providing for admission into the Union of the territory of Oklahoma and the Indian Territory as the state of Oklahoma, declared that the laws in force in the territory of Oklahoma so far as applicable should extend over and apply to the state. Const. Okl. art. 25, § 2, makes similar provision. *Held* that, on admission, the Oklahoma statutes of descent supplanted the Arkansas statutes and governed the descent of Creek allotments.

In Error to the Supreme Court of the State of Oklahoma.

Action by Grant N. Jefferson and others against D. N. Fink and Ed Hart as administrators, etc., and others. A judgment for defendants was affirmed by the Oklahoma Supreme Court (155 Pac. 852), and plaintiffs bring error. Affirmed.

Messrs. John T. Hays, of Hobart, Okl., James M. Hays, of Okmulgee, Okl., and Lewis C. Lawson, of Holdenville, Okl., for plaintiffs in error.

Mr. George S. Ramsey, of Muskogee, Okl., for defendants in error.

*289 *Mr. Justice VAN DEVANTER delivered* the opinion of the Court.

The title to a Creek allotment is here in controversy. The allotment was made under the Act of March 1, 1901, c. 676, 31 Stat. 861, known as the Original Creek Agreement, and the modifying act of June 30, 1902, c. 1323, 32 Stat. 500, known as the Supplemental Creek Agreement. In 1903 the usual tribal deeds, approved by the Secretary of the Interior and passing the full title, were issued to the allottee. In June, 1908, she died intestate, leaving her surviving a father, brothers and sisters, but no mother, husband or issue. The survivors, like the allottee, were enrolled members of the tribe, and all were freedmen. In determining who inherited the land the courts below applied the Oklahoma law of descent existing at the time of the allottee's death (Jefferson v. Cook, 155 Pac. 852); and the question for decision here is whether under the legislation of Congress an Arkansas law, theretofore put in force in the Indian Territory, should have been applied.

290 When the allotment was made and the tribal deeds issued the land was in the Indian Territory, but before the allottee died that territory and the territory of Oklahoma had become the state of Oklahoma.

In early times, when allotments in fee simple to individual Indians were made only occasionally, there was no congressional enactment prescribing who should inherit allotted land on the death of the allottee, and in such cases it was held that while the tribal relation continued the applicable rule of descent was to be found in the laws and usages of the tribe, and not in the laws of the state or territory in which the land lay. Jones v. Meehan, 175 U. S. 1, 29–32.[1] In actual practice this rule proved unsatisfactory, because the tribal laws and usages were generally crude and often difficult of ascertainment; and so in later allotment acts Congress pro-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] 20 Sup. Ct. 1, 44 L. Ed. 49.

vided that the descent should be according to the state or territorial law. A notable illustration of what came to be the policy of Congress on the subject is found in the general Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, the fifth section (Comp. St. 1916, § 4201) of which says that for a designated period the United States will hold the land in trust for the allottee, "or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located," and at the expiration of that period will convey the same in fee to the allottee, "or his heirs as aforesaid," and also "that the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered." True, that act has no direct application to the lands of the Five Civilized Tribes, of which the Creek tribe is one, but it does throw much light on what was intended by the subsequent legislation relating to the descent of those lands when allotted.

A territorial government never was established in the Indian Territory and it never had a territorial Legislature. Apart from the tribal laws of the Indians, among which *291 were laws relating to descent and distribution, the only *laws which became operative there were such as Congress enacted or put in force.

[1, 2] By acts passed in 1890, 1893, 1897 and 1898, Congress manifested its purpose to allot or divide in severalty the lands of the Five Civilized Tribes with a view to the ultimate creation of a state embracing the Indian Territory; put in force in the territory several statutes of Arkansas, including chapter 49 of Mansfield's Digest relating to descent and distribution; provided that those statutes should apply to all persons in the territory, irrespective of race; and substantially abrogated the laws of the several tribes, including those relating to descent and distribution. Acts May 2, 1890, c. 182, 26 Stat. 81, § 31; March 3, 1893, c. 209, 27 Stat. 645, § 16; June 7, 1897, c. 3, 30 Stat. 83; June 28, 1898, c. 517, 30 Stat. 495, §§ 11 and 26. This was the situation when the act of 1901, known as the Original Creek Agreement, was adopted. That act in the course of providing for the allotment in severalty of the lands of the Creeks revived their tribal law of descent and distribution by making it applicable to their allotments (sections 7 and 28). But the revival was only temporary, for the act of 1902, known as the Supplemental Creek Agreement, not only repealed so much of the act of 1901 as gave effect to the tribal law but reinstated the Arkansas law with the qualification that Creek heirs, if there were such, should take to the exclusion of others.[1] Washington v. Miller, 235 U. S. 422, 425–426, 35 Sup. Ct. 119, 59 L. Ed. 295. The allotment in question was made and the tribal deeds issued shortly after the act of 1902 became effective. And this was followed by the Act of April 28, 1904, c. 1824, 33 Stat. 573, § 2, declaring that all statutes of Arkansas theretofore put in force in the Indian Territory should be taken "to embrace all persons and estates in said territory whether Indian, freedmen, or otherwise."

Referring to the purpose with which the Arkansas statutes were put in force in that territory and to their status there, this court said in Shulthis v. McDougal, 225 U. S. 561, 571, 32 Sup. Ct. 704, 707 (56 L. Ed. 1205):

"Congress was then contemplating the early inclusion of that territory in a new state, and the purpose of those acts was to provide, for the time being, a body of laws adapted to the needs of the locality and its people in respect of matters of local or domestic concern. There being no local Legislature, Congress alone could act. Plainly, its action was intended to be merely provisional. * * *"

By the Enabling Act of June 16, 1906, c. 3335, 34 Stat. 267, provision was made for admitting into the Union both the territory of Oklahoma and the Indian Territory as the state of Oklahoma. Each territory had a distinct body of local laws. Those in the Indian Territory, as we have seen, had been put in force there by Congress. Those in the territory of Oklahoma had been enacted by the territorial Legislature. Deeming it better that the new state should come into the Union with a body of laws applying with practical uniformity throughout the state, Congress provided in the Enabling Act (section 13) that "the laws in force in the territory of Oklahoma, as far as*applicable, shall *293 extend over and apply to said state until changed by the Legislature thereof," and also (section 21) that "all laws in force in the territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act or by the Constitution of the state." The people of the state, taking the same view, provided in their Constitution (article 25, § 2) that "all laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this

[1] The repealing and reinstating portion of the act was as follows:

"6. The provisions of the act of Congress approved March 1, 1901, * * * in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: Provided, that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation; and provided further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49."

There was a like provision, but without the provisos, in the Act of May 27, 1902, c. 888, 32 Stat. 258.

Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law."

The state was admitted into the Union November 16, 1907; and thereupon the laws of the territory of Oklahoma relating to descent and distribution (Rev. Stat. Okl. 1903, c. 86, art. 4) became laws of the state. Thereafter Congress, by the Act of May 27, 1908, c. 199, 35 Stat. 312, § 9, recognized and treated "the laws of descent and distribution of the state of Oklahoma" as applicable to the lands allotted to members of the Five Civilized Tribes.

As before indicated, the allottee died in June, 1908, and the courts below in determining who inherited the land from her gave effect to the state law of Oklahoma existing at the time of her death.

Two objections to that ruling are pressed on our attention: One that the allotment was made and the tribal deeds issued under the act of 1902, which contained a provision that the descent should be according to the Arkansas law, and that thereby those who would be heirs under that law became invested with a right to inherit which could not be taken away or impaired by subsequent legislation, either federal or state; and the other that, even if Congress possessed the power to substitute *some other law of descent, that power was not exercised. Both objections are untenable.

Through congressional action the Arkansas law found in chapter 49 of Mansfield's Digest had become the local law of descent in the Indian Territory, and when the act of 1902 provided that the descent of Creek allotments should be in accordance with that chapter, it was but another way of saying that the descent should be in accordance with the local law. In other words, that act was made to conform to the general policy of Congress in respect of the descent of Indian allotments. Other provisions dealt with the estate which the allottee was to receive and showed that it was to be a fee simple. What was said about the rules of descent was purely legislative, not contractual; and its presence in the act gave it no effect that it would not have had as a separate enactment. Like other rules of descent it was subject to change by the law-making power as to any land not already passed to the heir by the death of the owner. Not until the ancestor dies is there any vested right in the heir. Cooley's Constitutional Limitations (7th Ed.) 512.

[3] We have seen that Congress was accustomed to subjecting allotted Indian lands to the local laws of descent, and also that its action in putting the Arkansas law in force in the Indian Territory was intended to be merely provisional. With this in mind it seems very plain that the provisions before quoted from the Enabling Act were intended to result, at the time of the admission of the new state, in the substitution of the Oklahoma law of descent for that of Arkansas theretofore put in force in the Indian Territory. The recognition given to the Oklahoma law by Congress in the act of 1908 hardly can be explained on any other theory.

It well may be, as held below, that the qualification which Congress placed on the application of the local *law—then the Arkansas law—by the act of 1902 equally qualifies the application of the Oklahoma law (Washington v. Miller, 235 U. S. 422, 35 Sup. Ct. 119, 59 L. Ed. 295), but that question is not here, for the survivors of the allottee are all Creek citizens.

Judgment affirmed.

(247 U. S. 295)

HARTRANFT v. MULLOWNY, Judge of Police Court of District of Columbia.

(Argued Feb. 23, 1916. Reargued Nov. 7 and 8, 1917. Decided June 3, 1918.)

No. 19.

1. COURTS ⟸388 — UNITED STATES SUPREME COURT—JURISDICTION — ERROR TO COURT OF APPEALS OF DISTRICT OF COLUMBIA.

Under Judicial Code (Act March 3, 1911, c. 231) § 250, 36 Stat. 1159 (Comp. St. 1916, § 1227), authorizing appeals and writs of error to review final judgments of the Court of Appeals of the District of Columbia, where the jurisdiction of the trial court or a law of the United States is drawn in question, but declaring judgments of said court in cases arising under the criminal laws to be final save for the discretionary power of the United States Supreme Court to review the same by certiorari or otherwise, the Supreme Court has no jurisdiction to review on writ of error a judgment of the Court of Appeals of the District of Columbia, which was not final and was rendered in a case arising under the criminal laws, though the construction of a federal law was drawn in question, as was the jurisdiction of the court wherein the proceedings were begun.

2. COURTS ⟸388 — DISTRICT OF COLUMBIA — WRITS—SCOPE.

As Code of Law D. C. 1901, § 68, providing for writs of certiorari, refers to the common-law practice, and the writ has always been recognized as an appropriate process for reviewing the proceedings of a subordinate tribunal, which has proceeded or is proceeding to judgment without lawful jurisdiction, a writ of certiorari, directed to the judge of the police court of the District, to bring up the record and proceedings in a prosecution under Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (Comp. St. 1916, §§ 8717–8728), on the ground the court was without jurisdiction, etc., is not a separate proceeding, but, in view of the common-law use of the writ, should be treated as a step in the prosecution, for, while the writ ran to the police judge by name, it was directed to him in his official capacity as custodian of the record; hence, under Judicial Code, § 250, a judgment of the Court of Appeals of the District, affirming a judgment quashing the writ,

could not be reviewed by the United States Supreme Court on writ of error.

3. COURTS ⊂⊃388 — DISTRICT OF COLUMBIA — PROCEEDINGS—FINAL JUDGMENTS.

As the case was remanded to the police court for further proceedings when the writ of certiorari was quashed, the judgment of the Court of Appeals, affirming that determination, was not a final one, reviewable by United States Supreme Court on writ of error, regardless of Code of Law D. C. 1901, § 226, allowing the Court of Appeals to review interlocutory orders, for further proceedings were necessary to a determination of the case on the merits.

In Error to the Court of Appeals of the District of Columbia.

An information having been filed in the police court of the District of Columbia against William A. Hartranft, charging violation of the Food and Drugs Act of June 30, 1906, he petitioned for a writ of certiorari against Alexander R. Mullowny, Judge of the Police Court. A judgment quashing the writ was affirmed by the Court of Appeals of the District of Columbia (43 App. D. C. 44), and petitioner brings error. Writ dismissed.

Messrs. Matthew E. O'Brien and Henry E. Davis, both of Washington, D. C., for plaintiff in error.

Mr. Assistant Attorney General Frierson, for defendant in error.

*296 *Mr. Justice PITNEY delivered the opinion of the Court.

On April 17, 1914, an information in behalf of the United States was filed by the United States Attorney in the police court of the District of Columbia against the plaintiff in error (who will be called the petitioner) charging violations of the Food and Drugs Act of June 30, 1906 (34 Stat. 768, c. 3915, Comp. St. 1916, §§ 8717–8728). Having first objected to the jurisdiction of the police court by motion to quash, by demurrer, and by special plea in bar, all of which were overruled by that court, petitioner was arraigned upon the information and pleaded not guilty, after which, and before trial on the merits, he filed in the Supreme Court of the District a petition praying that a writ of certiorari might issue from that court to the present defendant in error as judge of the police court to bring up the record and proceedings, upon the grounds (1) that the police court was without jurisdiction to try petitioner upon the *information, for several reasons specified, and (2) that the information did not sufficiently inform petitioner of the nature and cause of the accusation against him, and his trial thereon would deprive him of his constitutional right in that behalf. The writ of certiorari was issued as prayed, return was made setting forth the information and a memorandum of the proceedings thereon, and afterwards a motion was made in the Supreme Court by the United States Attorney, in the name of the respondent, to quash the writ because the police court had jurisdiction and had assumed jurisdiction of the cause of action involved in the information. Upon consideration the Supreme Court granted this motion, petitioner appealed to the Court of Appeals of the District, that court affirmed the judgment of the Supreme Court (43 App. D. C. 44), and to review the judgment of affirmance the present writ of error was sued out.

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[1-3] At the threshold we are confronted with the question whether we have jurisdiction to proceed under the latter writ. If we have, it must arise under section 250, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087, 1159, Comp. St. 1916, § 1227), which, so far as need be quoted, runs as follows: "Any final judgment or decree of the Court of Appeals of the District of Columbia may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases"—specifying, among others, "cases in which the jurisdiction of the trial court is in issue," and "cases in which the construction of any law of the United States is drawn in question by the defendant," and then proceeding: "Except as provided in the next succeeding section, the judgments and decrees of said Court of Appeals shall be final in all cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases." The succeeding section confers upon this court the discretionary power to review, by certiorari *or otherwise, judgments and de- *298 crees of the Court of Appeals otherwise made final by section 250.

Our jurisdiction is invoked upon the ground that the police court has not jurisdiction to try the information, and that the construction of the Food and Drugs Act, a law of the United States, is drawn in question by plaintiff in error, who was defendant below. The motion to dismiss is based upon the twofold ground that the case is one arising under the criminal laws, and that the judgment of the court of appeals is not a final judgment within the meaning of the opening words of section 250. If the case is one so arising, or if the judgment is not final, the fact that the jurisdiction of the police court, or the construction of a law of the United States, is in question, will not give us jurisdiction. Chott v. Ewing, 237 U. S. 197, 201, 35 Sup. Ct. 571, 59 L. Ed. 913; see McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. Ed. 893. It is conceded by petitioner that the information in the police court presents a case arising under the criminal laws within the meaning of the section, and that this has not proceeded to final judgment; the response to the motion to dismiss being that the proceeding by certiorari in the Su-

preme Court of the District was a separate and independent proceeding, not arising under the criminal laws, and that this has been finally concluded by the affirmance in the Court of Appeals of the judgment of the Supreme Court, leaving nothing to be done except the issuing of execution for costs.

Whether it was a separate and independent proceeding must be determined by a consideration of the nature and office of the writ of certiorari, as employed in this case, and its relation to the criminal proceeding.

The only provision of the District of Columbia Code respecting this form of writ is in section 68 (Act March 3, 1901, c. 854, 31 Stat. 1189, 1200), which provides:

"The said Supreme Court may, in its appropriate special terms, issue writs of quo warranto, mandamus, prohibition, scire facias, certiorari, injunction, prohibitory and mandatory, *299 ne exeat, and all other writs known in common law and equity practice that may be necessary to the effective exercise of its jurisdiction." Act March 3, 1901, c. 854, 31 Stat. 1189, 1200.

Certiorari always has been recognized in the District as an appropriate process for reviewing the proceedings of a subordinate tribunal when it has proceeded, or is proceeding, to judgment without lawful jurisdiction. Kennedy v. Gorman, 4 Cranch, C. C. 347, Fed. Cas. No. 7702; Bates v. District of Columbia, 1 MacArthur (D. C.) 433, 449. And the power to employ the writ inheres in the Supreme Court of the District as possessing a general common-law jurisdiction and supervisory control over inferior tribunals, analogous to that of the King's Bench. United States v. West, 34 App. D. C. 12, 17. The Court of Appeals, in a recent case, declared:

"There is no statute prescribing the function of, or regulating the procedure by, certiorari in the District of Columbia, hence we must look therefor to the common law. The writ lies to inferior courts and to special tribunals exercising judicial or quasi judicial functions, to bring their proceedings into the superior court, where they may be reviewed and quashed if it be made plainly to appear that such inferior court or special tribunal had no jurisdiction of the subject-matter, or had exceeded its jurisdiction, or had deprived a party of a right or imposed a burden upon him or his property, without due process of law." Degge v. Hitchcock, 35 App. D. C. 218, 226, affirmed 229 U. S. 162, 170, 33 Sup. Ct. 639, 57 L. Ed. 1135.

At the common law certiorari was one of the prerogative or discretionary writs by which the Court of King's Bench exercised its supervisory authority over inferior tribunals, and it was employed in three classes of cases, among others, viz.: (1) To bring up an indictment or presentment before trial in order to pass upon its validity, to take cog- *300 nizance of special matters, bearing upon it, or to assure an impartial trial; if the ac- *cused was in custody, it was usual to employ a habeas corpus as a companion writ; (2) as a quasi writ of error to review judgments of inferior courts of civil or of criminal jurisdiction, especially those proceeding otherwise than according to the course of the common law and therefore not subject to review by the ordinary writ of error; and (3) as an auxiliary writ, in aid of a writ of error, to bring up outbranches of the record or other matters omitted from the return.

The first of these functions is the one that now concerns us. Blackstone refers to it in these terms:

"Thus much for process to bring in the offender after indictment found, during which stage of the prosecution it is, that writs of certiorari facias are usually had, though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the Court of King's Bench, which is the sovereign ordinary court of justice in causes criminal. And this is frequently done for one of these four purposes; either (1) to consider and determine the validity of appeals or indictments and the proceedings thereon, and to quash or confirm them as there is cause; or (2) where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the Court of King's Bench, or before the justices of nisi prius; or (3) it is so removed, in order to plead the king's pardon there; or (4) to issue process of outlawry against the offender, in those counties or places where the process of the inferior judges will not reach him. Such writ of certiorari, when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal, *301 unless the Court of King's Bench remands the record to *the court below, to be there tried and determined." 4 Black. Com. 320, 321.

To the same effect is 2 Hale, P. C. 210, where the learned commentator further says:

"If there be an indictment to be removed and the party be in custody, it is usual to have an habeas corpus to remove the prisoner, and a certiorari to remove the record, for as the certiorari alone removes not the body, so the habeas corpus alone removes not the record itself, but only the prisoner, with the cause of his commitment," etc.

See, also, Fitz. Nat. Brev. 245; Bacon's Abr. tit. Certiorari (A); Harris v. Barber, 129 U. S. 366, 369, 9 Sup. Ct. 314, 32 L. Ed. 697.[1]

[1] The use of the writ of certiorari, in conjunction with that of habeas corpus, has been a familiar part of the appellate procedure of this court from an early period, under section 14 of the Judiciary Act of 1789 (1 Stat. 73, 81, c. 20; section 716, Rev. Stat.; section 262, Judicial Code [Comp. St. 1916, § 1239]). Ex parte Burford, 3 Cranch, 448, 2 L. Ed. 495; Ex parte Bollman & Swartwout, 4 Cranch, 75, 101, 2 L. Ed. 554; Ex parte Yerger, 8 Wall. 85, 103, 19 L. Ed. 332; Ex parte Lange, 18 Wall. 163, 166, 21 L. Ed. 872; Hyde v. Shine, 199 U. S. 62, 85, 25 Sup. Ct. 760, 50 L. Ed. 90. It is obvious that this use of the certiorari is available before conviction, in a proper case.

An analogous use of the writ, before judgment in the court to which it is addressed, arises under section 239 or section 251, Judicial Code (36 Stat. 1157, 1159, Comp. St. 1916, §§ 1216, 1228), where, upon questions of law being certified to us in any case pending in a Circuit Court of Appeals or in the Court of Appeals of the District of Columbia, this court may require that the whole record and cause be sent up to it, and thereupon decide the whole matter in controversy as if it had been brought here by writ of error or appeal.

The function of the writ of certiorari, when thus issued prior to judgment, being simply to remove the record and proceedings into the superior court, to the end that justice may there be done, by quashing the indictment or information, by proceeding to trial upon it, or otherwise as the circumstances of the case may require, it is obvious that it merely brings into play a supervisory jurisdiction, without changing the nature of the case that is to be heard and determined; *302 that a decision by the reviewing court adverse to the accused upon any preliminary matter, and without trial upon the merits, followed by a remittitur to the court below, necessitates further proceedings before that court from the point at which they were interrupted by the allowance of the writ; and that a judgment quashing the writ of certiorari simply removes the obstacle that the writ interposed in the way of further proceedings in the court of first instance, so that a procedendo follows as a matter of course. And so are the authorities. "If an indictment be removed after issue joined and remanded, the inferior court shall proceed as if no certiorari had been granted. * * * (It is true, that while it continues on the file, the court cannot award a procedendo. But it may be taken off the file, if it have issued improvidé; and when that is done, a procedendo will be granted.)" Bac. Abr. tit. Certiorari (K), citing Rex v. Wakefield, 1 Burr. 485, 488; Rex v. Clace, 4 Burr. 2456, 2459; Rex v. Micklethwayte, 4 Burr. 2522. And see Com. Dig., tit. Certiorari (G), citing Anonymous, 1 Salk. 144, to the effect that, if a certiorari be granted to remove an indictment and the cause suggested should afterwards appear false, a procedendo should be awarded. See, also, Kennedy v. Gorman, 4 Cranch, C. C. 347, 348, Fed. Cas. No. 7702.

The record in the present case shows that from beginning to end it was recognized that the writ of certiorari was a mere method of removing the information and the proceedings thereon from the police court into the Supreme Court, for purposes of review; that it was not a new or independent cause, but a mere step in the pending criminal case, so that when the Supreme Court reached the conclusion that the writ ought to be quashed, the result was merely to remove this obstacle in the way of the exercise by the police court of its jurisdiction, and that the record ought to be remanded for further proceedings in *303 that court. The prayer of the petitioner was:

"That the writ of certiorari may issue from this court to the respondent commanding him to certify to this court the record and proceedings in the said cause so as aforesaid instituted and pending against the petitioner, to the end that the same may be considered by this court, and that there may be done in behalf thereof what of law and right ought to be done in the premises."

The writ issued in pursuance of this petition and addressed to the judge of the police court, after reciting that there was "now pending before you a suit between the United States and the above-named petitioner, William A. Hartranft," commanded the judge to send to the Supreme Court "the record and proceedings in the said cause, so that the said Supreme Court may act therein as of right and according to the laws and customs of the United States should be done." And the judgment of the Supreme Court was that the writ of certiorari be quashed, and the petition dismissed, and that the record be "remanded to the police court of the District of Columbia, whence it came." Clearly, this was an implied mandate for further proceedings in the police court. The judgment for costs was but incidental.

The contention that the certiorari case in the Supreme Court was independent of the proceeding in the police court because the two cases bore different titles is without weight. The writ ran from the President of the United States to the judge by name, not in his personal, but in his official, capacity, as being in contemplation of law the custodian of the record (see State v. Howell, 24 N. J. Law, 519; Kirkpatrick v. Commissioners, 42 N. J. Law, 510; Hutchinson v. Rowan, 57 N. J. Law, 530, 31 Atl. 224); but the substance of it was a command that the record of the cause pending in the police court be removed into the Supreme Court for its consideration, and the execution of the writ did not change the nature of the cause but merely transferred it to a different court.

There is a singular and fatal inconsistency *304 between the grounds on which plaintiff in error invokes our jurisdiction and the ground on which he endeavors to maintain it. He comes saying, in order to bring himself within section 250, Judicial Code, that in this case (a) the jurisdiction of the trial court is in issue, and (b) the construction of a law of the United States was drawn in question by himself as defendant. But, in resisting the objection that the case is one arising under the criminal laws and the judgment is not final, he is obliged to take refuge in the theory that the certiorari proceeding was separate and independent from the police court proceeding. This, if granted, would leave him without a footing here, because in the certiorari proceeding the Supreme Court was the "trial court," and its jurisdiction was not and is not in issue; and in that proceeding he was prosecutor or plaintiff, not defendant, and it does not appear that the construction of any law of the United States was there drawn in question by defendant in error, who was defendant if the proceeding was an independent one. There is no escape from the dilemma.

From what has been said it results that the decision of the Supreme Court was a decision in a case arising under the criminal laws; and, since it required further proceed-

In such a case the record is brought here by writ of certiorari, with the effect of submitting the cause to this court for decision instead of to the Court of Appeals.

lngs in the police court before the merits of the case could be determined, it was not a final judgment within the meaning of the opening words of section 250, Judicial Code. By section 226 of the District of Columbia Code, the Court of Appeals may review interlocutory orders of the Supreme Court, as well as final judgments; but it is unnecessary to say that, if the judgment reviewed was interlocutory, so is the judgment affirming it. Were we to review and affirm the latter judgment, a trial upon the merits in the police court would still be necessary. The bearing of this is manifest. Macfarland v. Brown, 187 U. S. 239, 246, 23 Sup. Ct. 105, 47 L. Ed. 159.

*305 Two cases very much in point are to be found in the reports of New Jersey; both being decisions of the court of last resort. To show their pertinency, it should be premised that in that state the jurisdiction and practice of the Supreme Court are modeled after those of the King's Bench, and there is a review of its decisions by the Court of Errors and Appeals (as in the House of Lords), but only after final judgment. The practice of employing the writ of certiorari for the removal of an indictment or presentment before trial from the court of first instance into the Supreme Court has been recognized from the beginning, and regulated by statutes not departing essentially from the common-law practice. Act Feb. 6, 1799; Paterson's Laws, p. 350; Rev. Stat. 1847, p. 983; Gen. Stat. 1895, p. 367; P. L. 1903, p. 343; 1 Comp. Stat. (1910) p. 402. Upon the removal of an indictment into the Supreme Court by this process, if that court determines that the indictment is not sufficient in law, the person indicted is discharged; but, if it is found sufficient, the court may in its discretion retain it to be carried down for trial before the proper Circuit Court, or may order it returned to the court from which it was removed, there to be proceeded with in the same manner as if the writ had not been allowed. It is a common practice to use this writ in order to obtain the judgment of the Supreme Court upon the validity of an indictment, before trial. State v. Sailer, 16 N. J. Law, 357; State v. Powder Mfg. Co., 50 N. J. Law, 75, 11 Atl. 127; State v. New Jersey Jockey Club, 52 N. J. Law, 493, 19 Atl. 976; State v. Nugent, 77 N. J. Law, 157, 71 Atl. 481; State v. Kelsey, 80 N. J. Law, 641, 77 Atl. 1028. Such being the practice, in Parks v. State, 62 N. J. Law, 664, 43 Atl. 52, the return to a writ of error issued out of the Court of Errors and Appeals to the Supreme Court disclosed that the latter court, by certiorari to the sessions, had removed an indictment and entertained and denied a motion to quash it, and ordered the record to be remitted to the sessions to be proceeded in according to law. A motion having been made to dismiss the writ of error, the court, speaking by *Chief Justice Ma- *306 gie, said:

"When the Supreme Court, by virtue of its superintending power over inferior courts, brings, by certiorari, into it the proceedings of an inferior court upon an indictment, it has the option, at its discretion, to retain the cause and proceed to a final disposition of the issues presented, or to remit the proceedings to the inferior court. Gen. Stat. 368. Had the Supreme Court retained the cause now before us, it is obvious that no final judgment could have been reached until the accused had been convicted and sentenced or acquitted and discharged by that court. It is equally plain that, after the exercise of its option of remitting the proceedings to the sessions, no final judgment in the cause could have been reached until a similar result had been reached in that court. A certiorari in such cases is not the institution of a new suit, nor does it bring in question any final judgment. The result is that this writ was prematurely issued and must be dismissed."

To the same effect is State v. Kelsey, 82 N. J. Law, 542, 82 Atl. 13.

For both reasons, that the case is one arising under the criminal laws and that the judgment is not final, we have no jurisdiction under section 250, Judicial Code, and the writ of error must be and is

Dismissed.

Mr. Justice McREYNOLDS took no part in the consideration or decision of this case.

(247 U. S. 394)

SUPREME COUNCIL OF ROYAL ARCANUM v. BEHREND.

(Argued April 25, 1918. Decided June 3, 1918.)

No. 267.

1. INSURANCE ⟸783 — FRATERNAL BENEFIT INSURANCE—CHANGE OF BENEFICIARY.

The naming of a person as beneficiary in the benefit certificate of a fraternal benefit association confers no vested right, but a mere expectancy, and, in the absence of special provision of law or rule of the association to the contrary, the beneficiary may be changed, regardless of the rules applicable to ordinary life insurance.

2. INSURANCE ⟸806 — FRATERNAL INSURANCE—RIGHTS OF BENEFICIARY.

While a contract between a member of a fraternal benefit association and a beneficiary named in the certificate that the latter shall remain such may be enforced, if consistent with general laws and the laws of the association, the remedy of the beneficiary, the member having died after designating another as beneficiary, is not by suit on the original certificate.

3. INSURANCE ⟸780—FRATERNAL INSURANCE—RIGHTS.

That the wife of a member of a fraternal benefit association, who was named as beneficiary, paid assessments out of her separate estate, raises no legal claim which would preclude a change of beneficiaries.

4. PLEADING ⟸350(3)—MOTION FOR JUDGMENT—AVERMENTS.

Where plaintiff moved for judgment on account of defendant's failure to file a good and sufficient affidavit of defense, allegations and statements in the affidavit filed must be accepted as true.

5. Insurance ⟸784(3)—Fraternal Insurance—Change of Beneficiary.

Where a benefit certificate, issued by a fraternal benefit association, contained the form for change of beneficiary, which referred both to surrender and return of the certificate, the requirement of a surrender does not necessarily imply a return to the order of the original paper, called the "benefit certificate," where it was beyond the control of the member.

6. Insurance ⟸782 — Fraternal Insurance—Change of Beneficiary.

Provisions in a benefit certificate, issued by a fraternal benefit association, relating to the change of beneficiary, are for the protection of the society, and if complied with to its satisfaction, or if waived by it during the lifetime of the insured, they cannot be availed of to support the claim of a former beneficiary.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

Action by Sue B. Behrend against the Supreme Council of the Royal Arcanum. A judgment for plaintiff was affirmed by the Court of Appeals in the District of Columbia (45 App. D. C. 260), and defendant brings certiorari. Reversed.

Messrs. Howard C. Wiggins, of Rome, N. Y., and Philip Walker, of Washington, D. C., for petitioner.

Mr. W. Gwynn Gardiner, of Washington, D. C., for respondent.

*395 * Mr. Justice BRANDEIS delivered the opinion of the Court.

The Supreme Council of the Royal Arcanum is incorporated under the laws of Massachusetts as a fraternal benefit society, and it is licensed as a fraternal beneficial association in the District of Columbia.[1] The character and purposes of the organization and the relation to its members are described in Supreme Council of the Royal Arcanum v. Green, 237 U. S. 531, 35 Sup. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771. Samuel K. Behrend became a member of a local lodge of the order in Washington, known as "Oriental Council, No. 312, Royal Arcanum." On March 1, 1899, a $3,000 "benefit certificate" was issued to him there, payable on his death to his wife, Sue, as beneficiary; and there the first premium or assessment was paid. He delivered the certificate to her, giving it as a wedding present. From that time on, the certificate remained in her possession; and until August, 1913, most of the premiums and assessments were paid by her. On August 8, 1913, Behrend, having ceased to live with his wife, requested the order to change the beneficiary from his wife to his son and his daughter. As the original certificate was still in the wife's possession and she refused to surrender it, Behrend made affidavit that the certificate was beyond his control and in writing relinquished all interest therein. Thereupon a new certificate was issued by the order payable to the children, as requested; and the wife was notified that the certificate held by her had been canceled. On October 20, 1914, Behrend died. On December 21, 1914, the order paid to his son and to his daughter each $1,500 upon surrender of the new certificate. Thereafter the widow brought, in the Supreme Court of the District of Columbia, this action to recover $3,000 under the original certificate.

*396 * The order set up, by plea and affidavit of defense, the facts showing the change of beneficiary and payment to the new beneficiaries, which it alleged was in accordance with the contract contained in the benefit certificate and the constitution and laws of the organization. The case was heard by the Supreme Court on motion for judgment against the defendant for failure to file a good and sufficient affidavit of defense; and judgment was entered for $3,000 with interest. The Court of Appeals of the District reversed this judgment, but later granted a rehearing, the order reciting:

"The question to be argued is this: Had the beneficiary of the certificate a vested interest in the same that could not be divested by the issue of a substitute certificate without the surrender of the original and without the consent of the beneficiary named in the original certificate?"

Upon the rehearing the judgment of the lower court was affirmed. 45 App. D. C. 260. The case comes here on writ of certiorari under section 251 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1159 [Comp. St. 1916, § 1228]).

The benefit certificate provided, among other things, that the corporation will pay "out of its Widows and Orphans' Benefit Fund to Sue B. Behrend (wife) a sum not exceeding three thousand dollars in accordance with and under the provisions of the laws governing said fund, upon satisfactory evidence of the death of said member, and upon the surrender of this certificate; provided that said member is in good standing in this order at the time of his death, and provided also that this certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of this order." On the back of said certificate appears the following:

"Form for Change of Beneficiary.

"——— Council No. ———, R. A.

*397 "To ———, Sup. Sec., S. C. R. A.: I herewith surrender and return to the Supreme Council of the Royal Arcanum, the within benefit certificate No. ———, and direct that a new one be issued to me, payable to ———, residing at ———, related to me as ———.

———.

(Member will write his name in full.)

"Attest:

"[Seal of Sub. Council.]

"———, Secretary."

The general laws of the order, in force at latest when the new certificate was issued, provide that a member in good standing may at any time make "a written surrender of his benefit certificate, and direct that a new

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] District Code, § 749 (Act of Congress March 3, 1897, c. 382, § 1, 29 Stat. 630).

certificate be issued to him, payable to such beneficiary or beneficiaries as such member may designate" and that the issue of such new certificate shall cancel all previous certificates. They also provide that, in case "a benefit certificate is lost or beyond a member's control," he may, upon making satisfactory proof of the fact by affidavit or otherwise and paying the required fee of fifty cents, "in writing, surrender all claim thereto, and direct that a new certificate be issued to him, payable to the same or a new beneficiary or beneficiaries." These conditions were complied with before the new certificate making the son and daughter beneficiaries was issued.

Act of Congress January 26, 1887, c. 46, § 6 (24 Stat. 367), provided that each life insurance company doing business within the district should attach to each policy a copy of the application "so that the whole contract may appear in said application and policy." Section 657 of the District of Columbia Code, as amended June 30, 1902 (32 Stat. 534, c. 1329), extended the provision to benefit orders and associations and declared that, in case of failure to furnish a copy of the application, "no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application." The *Court of Appeals decided that Mrs. Behrend acquired a vested interest in the benefit certificate which could not be divested by the issue of a substitute certificate without the surrender of the original and without her consent as beneficiary; that the rights of the parties were governed by the laws of the District of Columbia; that the benefit certificate was an insurance policy within the meaning of both the above acts; that the order was an assessment insurance company and as such came within the scope of both acts, so that the fact that the benefit certificate was issued before the amendment of 1902 was immaterial; that it did not appear that there had been attached to the certificate a copy of the application therefor; that the failure to annex the application precluded allowing as a defense any matter not appearing on the face of the benefit certificate; that the change of beneficiary was such a defense; and that since matters found only in the application and laws of the association could not be availed of, the court must "look solely to the terms of the contract, that is, to the terms of this so-called benefit certificate, to determine the measure of the insured's rights to change the beneficiary"; and that by its terms there was no such right.

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This court held in Washington Central Bank v. Hume, 128 U. S. 195, 206, 9 Sup. Ct. 41, 32 L. Ed. 370, that under the ordinary policy of life insurance, when no right is reserved to surrender the policy or to change beneficiaries, the beneficiary named therein acquires, at the moment it is issued, a vested right which cannot be affected by any act of the insured subsequent to the execution of the policy. The rule there declared was deemed by the Court of Appeals to control the case at bar. But it was not applicable, because the contract sued on was a benefit certificate of a fraternal benefit association, not an ordinary policy of life insurance, and also because the benefit certificate on its face reserves the right to change beneficiaries.

*399

[1-3]*First. The difference between ordinary life insurance and that furnished by the fraternal benefit societies has been universally recognized in legislation and is a matter of common knowledge. The differences in the legal incidents of these different forms of protection have been illustrated by numerous decisions. The difference in respect to the insured's right to change the beneficiary has been frequently commented on and is firmly established. In the absence of a special provision of law or of a rule of the association to the contrary, the naming of a person as beneficiary in the benefit certificate of a fraternal benefit association confers not a vested right, but an expectancy merely which may be defeated at any time by act of the insured member.[2] A different case is presented where the insured has contracted with the beneficiary that he shall remain such. A contract of that nature

[2] Slaughter v. Grand Lodge, 192 Ala. 301, 68 South. 367; Jory v. Supreme Council A. L. H., 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; Masonic Mutual Benefit Ass'n v. Tolles, 70 Conn. 537, 544, 40 Atl. 448; Smith v. Locomotive Engineers Mutual Life & Accident Ins. Ass'n, 138 Ga. 717, 76 S. E. 44; Delaney v. Delaney, 175 Ill. 187, 51 N. E. 961; Masonic Mutual Benefit Society v. Burkhart, 110 Ind. 189, 194-195, 10 N. E. 79, 11 N. E. 449; Carpenter v. Knapp, 101 Iowa, 712, 70 N. W. 764, 38 L. R. A. 128; Titsworth v. Titsworth, 40 Kan. 571, 20 Pac. 213; Marsh v. American Legion of Honor, 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382; Schoenau v. Grand Lodge A. O. U. W., 85 Minn. 349, 88 N. W. 999; Carson v. Vicksburg Bank, 75 Miss. 167, 22 South. 1, 37 L. R. A. 559, 65 Am. St. Rep. 596; Masonic Benevolent Association v. Bunch, 109 Mo. 560, 19 S. W. 25; Knights of Maccabees v. Sackett, 34 Mont. 357, 363, 86 Pac. 423, 115 Am. St. Rep. 532; Ogden v. Sovereign Camp, W. O. W., 78 Neb. 804, 111 N. W. 797; Barton v. Provident Mutual Relief Association, 63 N. H. 535, 3 Atl. 627; Spengler v. Spengler, 65 N. J. Eq. 176, 55 Atl. 285; Lahey v. Lahey, 174 N. Y. 146, 66 N. E. 670, 61 L. R. A. 791, 95 Am. St. Rep. 554; Pollock v. Household of Ruth, 150 N. C. 211, 63 S. E. 940; Lentz, Ex'r, v. Fritter, 92 Ohio St. 186, 110 N. E. 637; Noble v. Police Beneficiary Association, 224 Pa. 298, 73 Atl. 336, 132 Am. St. Rep. 783; Catholic Knights of America v. Morrison, 16 R. I. 468, 17 Atl. 57; Christenson v. El Riad Temple, 37 S. D. 68, 71, 156 N. W. 581; Alfsen v. Crouch, 115 Tenn. 352, 89 S. W. 329; Byrne v. Casey, 70 Tex. 247, 8 S. W. 38; Cade v. Head Camp, W. O. W., 27 Wash. 218, 67 Pac. 603; Supreme Conclave, Royal Adelphia v. Cappella (C. C.) 41 Fed. 1.

The right of a member of a fraternal benefit society to change the beneficiary has been denied in a few cases which have failed to distinguish between benefit certificates and ordinary life policies. See Pittinger v. Pittinger, 28 Colo. 308, 64 Pac. 195, 89 Am. St. Rep. 193.

*400 may be enforced by appropriate proceeding if consistent with the general law and with the laws of the association.[3] But the remedy to enforce rights arising out of such a contract would obviously not be a suit, like that at bar, upon the certificate. Nor is it contended that Behrend made any such contract concerning the certificate with his wife. The mere fact that she paid some, and possibly all, of the assessments, prior to the change of beneficiary, even if paid out of her separate estate, raises no legal claim.[4] Perhaps there was not even a moral claim; since throughout the period during which she paid assessments, she enjoyed the full protection which the order agreed to furnish; and for this alone payments were made. Under the form of insurance furnished by fraternal beneficial associations no reserve is accumulated.

[4-6] Second. The certificate, on its face, expressed not an unconditional promise to make payment to the wife therein named, but a conditional promise to pay provided the "certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of this order." The plaintiff alleged that the certificate had not been surrendered and that she had not been requested to surrender or deliver up the same for change of beneficiary. The latter allegation is denied by the affidavit of defense and the statements therein contained must be taken as true. But the fact is not material. As indicated by the printed "Form for Change of Beneficiary" indorsed on the certificate, which refers to both "surrender and return," the requirement of a surrender does not necessarily imply a return to the order of the original paper called the benefit certificate. Furthermore, requirements of that character are made for the protection of the society and, if complied with to its satisfaction or if waived by it during the lifetime of the insured, cannot be availed of to support the claim of a former beneficiary.[5] It is unnecessary therefore to determine whether, under this form of certificate, the burden rested upon the plaintiff to prove, as she alleged, that she had remained the beneficiary. As the judgment of the Court of Appeals must be reversed for the reasons stated above, we express no opinion upon other questions argued by counsel and, in part, passed upon below.

Reversed.

[3] Grimbley v. Harrold, 125 Cal. 24, 57 Pac. 558, 73 Am. St. Rep. 19; McGrew v. McGrew, 190 Ill. 604, 60 N. E. 861; In re Reid's Estate, 170 Mich. 476, 136 N. W. 476; Catholic Benevolent Legion v. Murphy, 65 N. J. Eq. 60, 55 Atl. 497; Stronge v. Knights of Pythias, 189 N. Y. 346, 82 N. E. 433, 12 L. R. A. (N. S.) 1206, 121 Am. St. Rep. 902, 12 Ann. Cas. 941; Supreme Lodge, Knights and Ladies of Honor v. Ulanowsky, 246 Pa. 591, 92 Atl. 711. Section 758 of the Code of the District of Columbia (section 10 of the Act of March 3, 1897, supra) provides in regard to fraternal beneficiary associations, that "no contract with any such association shall be valid when there is a contract, agreement, or understanding between the member and the beneficiary prior to or at the time of becoming a member of the association that the beneficiary, or any person for him, shall pay such member's assessments and dues, or either of them."

[4] Jory v. Supreme Council A. L. H., 105 Cal. 20, 30, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; Supreme Lodge, N. E. O. P. v. Hine, 82 Conn. 315, 320, 73 Atl. 791; Schiller-Bund v. Knack, 184 Mich. 95, 150 N. W. 337; Spengler v. Spengler, 65 N. J. Eq. 176, 180, 55 Atl. 285; Fischer v. Fischer, 99 Tenn. 629, 636, 42 S. W. 448; Preusser v. Supreme Hive L. O. T. M., 123 Wis. 164, 101 N. W. 358.

[5] Ladies of the Modern Maccabees v. Daley, 166 Mich. 542, 545, 131 N. W. 1127; Fischer v. Malchow, 93 Minn. 396, 101 N. W. 602; Lentz, Ex'r, v. Fritter, 92 Ohio St. 186, 194-195, 110 N. E. 637; Noble v. Police Beneficiary Association, 224 Pa. 298, 73 Atl. 336, 132 Am. St. Rep. 783; Schardt v. Schardt, 100 Tenn. 276, 279, 280, 45 S. W. 340.

(247 U. S. 310)

UNITED STATES v. ST. PAUL, M. & M. RY. CO. et al.

(Argued Jan. 15 and 16, 1918. Decided June 3, 1918.)

No. 75.

1. LIMITATION OF ACTIONS ⊂=11(1) — STATUTES—CONSTRUCTION.

The general principle of public policy applicable to all governments that the public interest should not be prejudiced by the negligence or default of public officers is the reason for the strict construction of statutes prescribing a period of limitation against the government.

2. STATUTES ⊂=216 — CONSTRUCTION — DEBATES.

While debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment, the reports of the committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it, stand on a different footing, and may be resorted to under proper qualifications.

3. PUBLIC LANDS ⊂=120—SUIT FOR CANCELLATION OF PATENT—STATUTE.

In view of the legislative history, which showed that it was inserted to meet a particular case, the proviso of Act March 2, 1896, c. 39, 29 Stat. 42 (Comp. St. 1916, §§ 4901–4903), prescribing periods of limitation for suits to cancel patents to public lands, provided that no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry, must be confined to lands already patented, for the rule of strict construction applicable to limitation statutes peculiarly applies to such proviso.

4. PUBLIC LANDS ⊂=120—CANCELLATION OF PATENTS—STATUTES—CONSTRUCTION.

The proviso of the act cannot, on equitable considerations, be extended so as to bar a suit to cancel patents to lands selected after its enactment by a railroad company in lieu of those granted which had been lost because the Land Department failed to withdraw the same from entry, where the company's agents fraud-

ulently represented the lieu lands were not mineral, for equity implies equal fairness and honesty on both sides.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by United States against the St. Paul, Minneapolis & Manitoba Railway Company and the Great Northern Railway Company. A decree for defendants was affirmed by the Circuit Court of Appeals (225 Fed. 27, 139 C. C. A. 301), and the United States appeals. Reversed and remanded for further proceedings.

Mr. Assistant Attorney General Kearful, for the United States. Messrs. I. Parker Veazey, Jr., of Great Falls, Mont., and E. C. Lindley, of St. Paul, Minn., for appellees.

*311 Mr. Justice PITNEY delivered the opinion of the Court.

This was a suit by the United States to annul a patent issued June 24, 1907, to the St. Paul, Minneapolis & Manitoba Railway Company (referred to below as the Manitoba Company), for certain lands in the state of Montana, upon the ground of fraud and mistake—fraud on the part of the agents of the company in representing that the land was nonmineral in character, and mistake on the part of the officers of the Land Department in failing to notify the register and receiver of the local land office that the lands had been classified as mineral and the classification sustained by the Secretary of the Interior under the act of February 26, 1895 (chapter 131, 28 Stat. 683). The District Court granted a motion to dismiss the bill upon the ground that the suit was barred by the proviso of section 1 of the act of March 2, 1896 (chapter 39, 29 Stat. 42 [Comp. St. 1916, § 4901]); and its decision was affirmed by the Circuit Court of Appeals, 225 Fed. 27, 139 C. C. A. 301.

It appears that by act of March 3, 1857 (chapter 99, 11 Stat. 195), certain public lands were granted to the territory of Minnesota for the purpose of aiding in the construction of railroads, and the Manitoba Company afterwards succeeded to the rights and privileges of the territory under the granting act. At the time of the grant the Missouri river formed the western boundary of the territory; but in the following year the state of Minnesota was admitted into the Union, with its western boundary fixed on a line some distance east of that river (Act of May 11, 1858, ch. 31, 11 Stat. 285); the excluded land being left to become a part of the territory of Dakota (Act March 2, 1861, c. 86, 12 Stat. 239), afterwards admitted as the states of North Dakota and South Dakota. After the admission of Minnesota, the Land Department, in the administration of the land grant, rejected the claim of the Manitoba Company to lands within the limits of the grant but without the limits of that state, and recognized the rights of settlers and purchasers to Dakota lands within the limits of the grant. In St. Paul, etc., Railway Co. v. Phelps (1890) 137 U. S. 528, 11 Sup. Ct. 168, 34 L. Ed. 767, this court set aside the departmental construction and sustained the company's claim to the Dakota lands. To obviate the resulting hardships to settlers and patentees, Congress passed an act of August 5, 1892 (chapter 382, 27 Stat. 390), providing that the Secretary of the Interior should cause to be prepared and delivered to the Manitoba Company a list of the lands claimed by purchasers or occupants, and, that the company should be permitted to select in lieu of these "an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual government survey * * * not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection lying within any state into or through which the railway owned by said railway company runs, to the extent of the lands so relinquished and released." The Montana lands here in question were selected by the company in March, 1906, and patented to it in June, 1907, in lieu of Dakota lands relinquished by the company pursuant to its acceptance of the act of 1892.

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There is no question but that the bill of complaint sets forth sufficient grounds of fraud and mistake to warrant the annulment of the patent, were it not for the bar set up under the act of March 2, 1896; and whether that bar applies is the sole matter presented for decision upon this appeal.

The act is entitled "An act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes," and its first section reads as follows:

"Be it enacted * * * That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-First Congress and amendments thereto [1] is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: Provided, that no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry." Comp. St. 1916, § 4901.

[1-3] Laying aside other questions raised by the government, we have reached the conclusion that, having regard to the general principle which requires a strict construction

[1] Act of March 3, 1891, c. 561, as amended by act of the same date, chapter 559 (26 Stat. 1099, 1093 [Comp. St. 1916, § 4992]).

to be given to legislation in derogation of the public right, and in view of the legislative history of this particular enactment, the proviso must be given the effect of a curative measure confined to lands theretofore patented, and not granting dispensation for frauds or mistakes thereafter occurring.

*314 It will be observed that the proviso is not a mere statute of limitation, but an absolute bar of suits by the United States; not merely of suits to vacate and annul patents, but of suits to recover either the land or the value thereof; not merely in favor of bona fide purchasers, but also of the immediate recipient of an unlawful certification or patent. The general principle of public policy applicable to all governments, that the public interest should not be prejudiced by the negligence or default of public officers, which underlies the rule of strict construction for statutes of limitation, applies with peculiar force to a statute of this character. United States v. Knight, 14 Pet. 301, 315, 10 L. Ed. 465; Gibson v. Chouteau, 13 Wall. 92, 99, 20 L. Ed. 534; United States v. Thompson, 98 U. S. 486, 489, 25 L. Ed. 194; Fink v. O'Neil, 106 U. S. 272, 281, 1 Sup. Ct. 325, 27 L. Ed. 196; United States v. Nashville, etc., Ry. Co., 118 U. S. 120, 125, 6 Sup. Ct. 1006, 30 L. Ed. 81; United States v. Whited & Wheless, 38 Sup. Ct. 367, 246 U. S. 552, 62 L. Ed. ——.

If the language of the proviso stood alone:

"That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry"

—it hardly would be questioned that the rule of strict construction would confine its effect to past cases presumably known to the lawmaker. Aside from a nice grammatical criticism based upon the use of the imperfect tense, full effect can be given to its language by treating it as a validation of the title of lieu lands theretofore certified or patented under the conditions mentioned. The very particular specification of the circumstances under which it was to apply, with resulting narrowness of its scope, tends to negative the inference that it was designed to lay down a general policy for the future. It conveys rather the impression of a curative measure, upon which the general presumption that legislation is intended to operate prospectively and not retrospectively can have little if any bearing.

*315 * * It is said that this view is untenable because in the former part of the section specific reference is made to patents "heretofore erroneously issued" and to "patents hereafter issued," and if Congress had intended to limit the proviso to lands certified or patented before the passage of the act it would have used appropriate and specific language for the purpose. The suggestion has weight, but we cannot regard it as determinative, in view of opposing considerations. Looking at the section as a whole, it will be seen that the proviso expresses a thought so different from what precedes that it seems almost like a separate provision inserted here for convenience, and without much regard for structural conformity with the context.

This impression is confirmed when we review the legislative history of the measure.

By an act of March 3, 1887 (chapter 376, 24 Stat. 556 [Comp. St. 1916, §§ 4895–4900]), Congress had directed the Secretary of the Interior immediately to adjust, in accordance with the decisions of this court, railroad land grants theretofore unadjusted, with the object of restoring to the United States the title to lands erroneously certified or patented under such grants, saving the entries of bona fide settlers erroneously canceled on account of a railroad grant and the rights of bona fide purchasers from the grantee company of lands erroneously patented. The work of adjustment proved to be one of great magnitude, and it had not been completed at the time when the act under consideration was passed. Meanwhile the acts of March 3, 1891 (chapter 561, § 8, 26 Stat. 1095, 1099; chapter 559, 26 Stat. 1093 [Comp. St. 1916, § 4992]), had provided that suits by the United States to vacate and annul any patent theretofore issued should only be brought within five years thereafter (that is, within five years after March 3, 1891). Not long before the end of the period thus fixed, beyond which lands could not be recovered even if the investigation in progress under the 1887 act should *316 disclose that they had been erroneously certified or patented, the President transmitted to Congress a special message, under date January 17, 1896 (House Doc. No. 151, 54th Cong., 1st Sess.), explaining the situation and recommending that the act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants. This was referred to the Committee on Public Lands of the House of Representatives, and that committee, not acceding to the particular recommendation of the message, reported a bill intended to give five years' additional time for bringing to a conclusion the pending investigation and adjustment, but providing that as to bona fide purchasers even this extension should not apply (Report No. 253, House of Representatives, 54th Cong., 1st Sess.; 28 Cong. Rec. pt. 2, p. 1761). The first section of the bill as reported, with which alone we are concerned, is given verbatim in the margin.[2] As will be observed, it contain-

[2] "Be it enacted," etc., "that suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a special grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought

ed nothing corresponding to what is now the proviso.

The proviso was inserted, upon the motion of Mr. Lacey, chairman of the committee and in charge of the bill, while it was under consideration in the House, for the plainly declared purpose of providing for a specific case referred to in the debate as having arisen in the state of Nebraska, where lieu lands to the extent of more than 200,000 acres had been certified or patented to a railroad company to make good the loss of an equal acreage of lands within the limits of the grant due to an erroneous ruling of the Land Department resulting in a failure to withdraw the granted lands from entry; and upon the ground that the lieu land locations were without warrant in law, suit had been brought, and was then pending, to cancel the patents.[3]

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It is not our purpose to relax the rule that debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment. United States v. Freight Association, 166 U. S. 290, 318, 17 Sup. Ct. 540, 41 L. Ed. 1007. But the reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to under proper qualifications. Blake v. National Banks, 23 Wall. 307, 317, 23 L. Ed. 119; Holy Trinity Church v. United States, 143 U. S. 457, 464, 12 Sup. Ct. 511, 36 L. Ed. 226; Dunlap v. United States, 173 U. S. 65, 75, 19 Sup. Ct. 319, 43 L. Ed. 616; Binns v. United States, 194 U. S. 486, 495, 24 Sup. Ct. 816, 48 L. Ed. 1087; Johnson v. Southern Pacific Co., 196 U. S. 1, 20, 25 Sup. Ct. 158, 49 L. Ed. 363; Penna. R. R. Co. v. International Coal Co., 230 U. S. 184, 198, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; Five Per Cent. Discount Cases, 243 U. S. 97, 107, 37 Sup. Ct. 346, 61 L. Ed. 617. The remarks of Mr. Lacey, and the amendment offered by him, in response to an objection urged by another member during the debate, were in the nature of a supplementary report of the committee; and as they related to matters of common knowledge they may very properly be taken into consideration as throwing light upon the meaning of the proviso; not for the purpose of construing it contrary to its plain terms, but in order to remove any ambiguity by pointing out the subject-matter of the amendment. This is but an application of the doctrine of the old law, the mischief, and the remedy.

The case of the Nebraska lands, mentioned in the debate, is easily identified from public sources of information. By act of July 2, 1864 (chapter 216, § 19, 13 Stat. 356, 364), the Burlington & Missouri River Railroad Company was granted ten alternate sections per mile on each side of its road in that state. Owing to the failure of the Land Department to take the proper steps about withdrawing the land from entry, large quantities of the granted lands south of the line were taken up by settlers, and in lieu of this the company was permitted by the department to take excess lands on the north side of the line to the amount of over 200,000 acres. In United States v. Burlington, etc., R. R. Co. (1878) 98 U. S. 334, 340, 25 L. Ed. 198, this court held that the grant was not limited to lands situate within twenty miles of the road, nor confined to the land opposite to each twenty-

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within ten years after the date of the issuance of such patents. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

[3] (From 28 Cong. Record, pt. 2, p. 1906.)

"Mr. Hepburn: * * * In another instance that I am familiar with, Mr. Speaker, in your own state [Mr. Mercer in the chair], there was a grant to a company when practically, by an error or an oversight on the part of the officers of the United States, the lands lying on the line on either side of the file plat of the road were not withdrawn from market for a considerable period. Settlers came in and took these lands. Later, when the railroad was constructed, it was found that there was not within the limits of the grant a sufficient quantity to meet the purposes of the grant. The department held that lieu lands might be given—lands in another locality—and the company was compelled to go away beyond its grant to lands that did not have the benefit of the construction of this road and take 201,000 acres, and one block of 10,000 acres of it they sold for $2,500—25 cents an acre; but they took these lands under the then ruling of the department. Under the advice of the law officers of the department subsequently the department changed its view. * * * Then they changed the ruling and held that lands must be taken within the prescribed limits or else the entries and selections were void. Now, one of the suits ordered is to recover the title of these lands taken in lieu of those that the company lost through the failure of the federal officers to withdraw the lands from market. * * *

"Mr. Lacey: As to the instance that my colleague cites as having occurred in Nebraska, I propose at the proper time to offer an amendment which I think will cover the points he has in mind. I will send the amendment to the clerk's desk to be read as a part of my remarks, so that it may appear in the record for the information of members.

"The amendment was read, as follows:

"Add at the end of section 1: 'Provided, that no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry.' "

On the following legislative day (page 1937), the amendment was offered by Mr. Lacey, accompanied with this explanation: "My colleague [Mr. Hepburn] on yesterday explained that in Nebraska and in some other localities 'lieu lands' had been patented in place of lands that the railroad companies had lost by reason of mistake in the department in allowing settlement upon those lands. The amendment that I offer confirms the title to those lands that have been thus patented to railroad companies where they have lost other lands by reason of mistake committed in the department."

The amendment was agreed to (page 1938).

mile section of the line, as the department had held; the court saying:

"If, as in the present case, by its [the department's] neglect for years to withdraw from sale land beyond twenty miles from the road, the land opposite to any section of the road has been taken up by others and patented to them, there can be no just objection to allowing the grant to the company to be satisfied by land situated elsewhere along the general line of the road."

At the same time the court held (98 U. S. 342, 25 L. Ed. 198):

"The act of Congress contemplates that one-half of the land granted should be taken on each side of the road; and the department could not enlarge the quantity on one side to make up a deficiency on the other."

However, because the bill as drawn did not identify that part of the land as to which the company's patents were invalid, the decree of the Circuit Court in favor of the company was affirmed. Soon after the passage of the act of March 3, 1887, an adjustment was directed for the purpose of distinguishing the tracts erroneously patented to the company on the north side in excess of the amount to which it was entitled on that side, the excess being 200,364.70 acres, and procuring a *320 relinquishment by the company or a cancellation of the*patents, in accordance with the act of 1887. The Burlington & Missouri River R. R. Co., 6 L. D. 589; Chapman v. Burlington & Missouri River R. R. Co., 20 L. D. 496. It appears that a suit to carry out the adjustment by vacating the erroneous patents was pending at the time of the passage of the act of 1896. The language of the proviso was aptly chosen to bar such a suit.

[4] But it is said that there is no reason for confining the policy of the proviso to past patents; that if it is only fair, honest, and just that lands patented in lieu of others lost or relinquished by the grantee in consequence of some failure on the part of the government or its officers should be held by indefeasible title, the same policy would with equal reason apply to future patents. In short, the appeal is to the equity of the statute. But equity implies equality; equal fairness and honesty on both sides. If the prospective interpretation of the proviso could be confined to future patents obtained without fraud or mistake, there would be force in the argument; but suits for the annulment of patents based upon fraud or mistake are the very ones that are proposed to be barred; and in such circumstances no appeal to the equity of the statute can carry us beyond what is clearly expressed in the language of the lawmaker; equitable considerations lie on the side of a strict construction of a statutory provision that proposes to bar an equitable remedy.

And we deem the prospective interpretation as unreasonable as it is inequitable. It was one thing for Congress to pass an act to prevent further prosecution of a suit or suits to annul patents that already had been made, unlawfully indeed, but for the purpose of making good the consequences of previous mistakes by the Land Department. Thus far it could act in the reasonable belief that it knew the extent and consequences of the immunity it was granting. But to say that where lieu lands were thereafter certified or *321 patented in place of*lands lost or relinquished by the grantee no suit should be maintained nor recovery had either for the lands or their value, no matter through what fraud or mistake they might be acquired, would be an entirely different matter, and would offer a premium for future wrongdoing, the extent of which could not easily be foreseen. We cannot attribute such a purpose to Congress without plainer language than is contained in this act.

For the reasons stated, we hold that the proviso is not a bar to the present suit, brought to annul a patent applied for and issued long after its enactment; and the decree under review is

Reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Mr. Justice McREYNOLDS took no part in the consideration or decision of this case.

(247 U. S. 251)

HAMMER, U. S. Atty., v. DAGENHART et al.

(Argued April 15 and 16, 1918. Decided June 3, 1918.)

No. 704.

1. COMMERCE ⟸33—INTERSTATE "COMMERCE"—CONGRESS—AUTHORITY OF.

Act Sept. 1, 1916, c. 432, 39 Stat. 675 (Comp. St. 1916, §§ 8819a–8819f), prohibiting the transportation in interstate commerce of the products of mines or factories in which within 30 days prior to removal children under the age of 14 were employed, or children between the ages of 14 and 16 were employed or permitted to work more than 8 hours a day or more than 6 days in any week, is invalid, and cannot be sustained as an exercise by Congress of its power to regulate commerce between the states, for the products of child labor are in themselves inherently harmless, for the act instead of being one regulating commerce, which consists of intercourse and traffic and includes the transportation of persons and property as well as the purchase, sale, and exchange of commodities, would serve to bring under federal control to the practical exclusion of the authority of the states all manufacture of articles intended for interstate shipment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Commerce.]

2. COMMERCE ⟸33—INTERSTATE COMMERCE—CONGRESS—AUTHORITY OF.

Such act cannot be sustained on the theory that Congress has power to control interstate commerce in the shipment of child-made goods because of the effect of such goods in states where the evil of child labor has been recognized by local legislation and the right to employ child labor has been more rigorously restrained than in the state of production.

3. STATUTES ⟹181(2) — CONSTRUCTION — EFFECT.

A statute must be judged by its natural and reasonable effect.

4. STATES ⟹4—AUTHORITY—NONDELEGABLE POWERS.

Act Sept. 1, 1916, attempting to regulate child labor in the states by prohibiting the transportation in interstate commerce of certain child-made goods, is invalid, being an invasion of the powers of the states, whose inherent power to regulate their own local affairs has never been delegated to the general government.

Mr. Justice Holmes, Mr. Justice McKenna, Mr. Justice Brandeis, and Mr. Justice Clarke, dissenting.

Appeal from the District Court of the United States for the Western District of North Carolina.

Bill by Roland H. Dagenhart and Reuben Dagenhart and John Dagenhart, minors, by Roland H. Dagenhart, their next friend, against W. C. Hammer, United States Attorney for the Western District of North Carolina to enjoin the enforcement of Act Sept. 1, 1916, intended to prevent interstate commerce in the products of child labor. From a decree for enjoining enforcement of the act, defendant appeals. Affirmed.

Mr. Solicitor General Davis, of Washington, D. C., Mr. W. L. Frierson, Asst. Atty. Gen., and Mr. Robert Szold, of Chicago, Ill., for appellant.

Messrs. Morgan J. O'Brien, of New York City, W. M. Hendren and Clement Manly, both of Winston-Salem, N. C., W. P. Bynum, of Greensboro, N. C., and Junius Parker, of New York City, for appellees.

*268 *Mr. Justice DAY delivered the opinion of the Court.

A bill was filed in the United States District Court for the Western District of North Carolina by a father in his own behalf and as next friend of his two minor sons, one under the age of fourteen years and the other between the ages of fourteen and sixteen years, employés in a cotton mill at Charlotte, North Carolina, to enjoin the enforcement of the act of Congress intended to prevent interstate commerce in the products of child labor. Act Sept. 1, 1916, 39 Stat. 675, c. 432 (Comp. St. 1916, §§ 8819a–8819f).

The District Court held the act unconstitutional and entered a decree enjoining its enforcement. This appeal brings the case here. The first section of the act is in the margin.[1]

Other sections of the act contain provisions for its enforcement and prescribe penalties for its violation.

The attack upon the act rests upon three propositions: First: It is not a regulation of interstate and foreign commerce; second: It contravenes the Tenth Amendment to the Constitution; third: It conflicts with the Fifth Amendment to the Constitution.

[1] The controlling question for decision is: Is it within the authority of Congress in regulating commerce among the states to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of 7 o'clock p. m., or before the hour of 6 o'clock a. m.?

The power essential to the passage of this act, the government contends, is found in the commerce clause of the Constitution which authorizes Congress to regulate commerce with foreign nations and among the states.

In Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power, said, "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed." In other words, the power is one to control the means by which commerce is carried on, which is *directly the contrary of the assumed right* 270 to forbid commerce from moving and thus destroying it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate.

The first of these cases is Champion v. Ames, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492, the so-called Lottery Case, in which it was held that Congress might pass a law having the effect to keep the channels of commerce free from use in the transportation of tickets used in the promotion of lottery schemes. In Hipolite Egg Co. v. United

[1] That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock postmeridian, or before the hour of six o'clock antemeridian."

States, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed 364, this court sustained the power of Congress to pass the Pure Food and Drug Act (Act June 30, 1906, c. 3915, 34 Stat. 768 [Comp. St. 1916, §§ 8717–8728]), which prohibited the introduction into the states by means of interstate commerce of impure foods and drugs. In Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905, this court sustained the constitutionality of the so-called "White Slave Traffic Act" (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1916, §§ 8812–8819]), whereby the transportation of a woman in interstate commerce for the purpose of prostitution was forbidden. In that case we said, having reference to the authority of Congress, under the regulatory power, to protect the channels of interstate commerce:

"If the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to, and the enslavement in prostitution and debauchery of women, and, more insistently, of girls."

*271 * In Caminetti v. United States, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168, we held that Congress might prohibit the transportation of women in interstate commerce for the purposes of debauchery and kindred purposes. In Clark Distilling Co. v. Western Maryland Railway Co., 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, the power of Congress over the transportation of intoxicating liquors was sustained. In the course of the opinion it was said:

"The power conferred is to regulate, and the very terms of the grant would seem to repel the contention that only prohibition of movement in interstate commerce was embraced. And the cogency of this is manifest, since if the doctrine were applied to those manifold and important subjects of interstate commerce as to which Congress from the beginning has regulated, not prohibited, the existence of government under the Constitution would be no longer possible."

And concluding the discussion which sustained the authority of the Government to prohibit the transportation of liquor in interstate commerce, the court said:

"* * * The exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace."

In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The act in its effect does not *272 regulate * transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.

Commerce "consists of intercourse and traffic * * * and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities." The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof. Delaware, Lackawanna & Western R. R. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397.

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation. "When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state." Mr. Justice Jackson in Re Greene (C. C.) 52 Fed. 113. This principle has been recognized often in this court. Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715; Bacon v. Illinois, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615, and cases cited. If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the states, a result *273 certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States. Kidd v. Pearson, 128 U. S. 1, 21, 9 Sup. Ct. 6, 32 L. Ed. 346.

[2] It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other states where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the state of production. In other words, that the unfair competition,

thus engendered, may be controlled by closing the channels of interstate commerce to manufacturers in those states where the local laws do not meet what Congress deems to be the more just standard of other states.

There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may co-operate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions. In some of the states laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other states and approved by Congress.

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the *states in their exercise of the police power over local trade and manufacture. *274

The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution.

Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. "This," said this court in United States v. Dewitt, 9 Wall. 41, 45, 19 L. Ed. 593, "has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion." See Keller v. United States, 213 U. S. 138, 144, 145, 146, 29 Sup. Ct. 470, 53 L. Ed. 737, 16 Ann. Cas. 1066; Cooley's Constitutional Limitations (7th Ed.) p. 11.

In the judgment which established the broad power of Congress over interstate commerce, Chief Justice Marshall said (9 Wheat. 203, 6 L. Ed. 23):

"They [inspection laws] act upon the subject, before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government; all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass."

And in Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629, the same great judge said:

"That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed may be admitted." *275

That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every state in the Union has a law upon the subject, limiting the right to thus employ children. In North Carolina, the state wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work.

It may be desirable that such laws be uniform, but our federal government is one of enumerated powers; "this principle," declared Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, "is universally admitted."

[3, 4] A statute must be judged by its natural and reasonable effect. Collins v. New Hampshire, 171 U. S. 30, 33, 34, 18 Sup. Ct. 768, 43 L. Ed. 60. The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. Pipe Line Case, 234 U. S. 548, 560, 34 Sup. Ct. 956, 58 L. Ed. 1459. The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the federal Constitution.

In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. Lane County v. Oregon, 7 Wall. 71, 76, 19 L. Ed. 101. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. *New York v. Miln, 11 Pet. 102, 139, 9 L. Ed. 648; Slaughter House Cases, 16 Wall. 36, 63, 21 L. Ed. 394; Kidd v. Pearson, supra. To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states. *276

We have neither authority nor disposition to question the motives of Congress in enacting

this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the states. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority federal and state to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities to regulate the hours of labor of children in factories and mines within the states, a purely state authority. Thus the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.

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*For these reasons we hold that this law exceeds the constitutional authority of Congress. It follows that the decree of the District Court must be

Affirmed.

Mr. Justice HOLMES, dissenting.

The single question in this case is whether Congress has power to prohibit the shipment in interstate or foreign commerce of any product of a cotton mill situated in the United States, in which within thirty days before the removal of the product children under fourteen have been employed, or children between fourteen and sixteen have been employed more than eight hours in a day, or more than six days in any week, or between seven in the evening and six in the morning. The objection urged against the power is that the States have exclusive control over their methods of production and that Congress cannot meddle with them, and taking the proposition in the sense of direct intermeddling I agree to it and suppose that no one denies it. But if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void.

The first step in my argument is to make plain what no one is likely to dispute—that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects and that if invalid it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate*commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid. At all events it is established by the Lottery Case and others that have followed it that a law is not beyond the regulative power of Congress merely because it prohibits certain transportation out and out. Champion v. Ames, 188 U. S. 321, 355, 359, 23 Sup. Ct. 321, 47 L. Ed. 492, et seq. So I repeat that this statute in its immediate operation is clearly within the Congress's constitutional power.

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The question then is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the States in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State.

The manufacture of oleomargarine is as much a matter of State regulation as the manufacture of cotton cloth. Congress levied a tax upon the compound when colored so as to resemble butter that was so great as obviously to prohibit the manufacture and sale. In a very elaborate discussion the present Chief Justice excluded any inquiry into the purpose of an act which apart from that purpose was within the power of Congress. McCray v. United States, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561. As to foreign commerce see Weber v. Freed, 239 U. S. 325, 329, 36 Sup. Ct. 131, 60 L. Ed. 308, Ann. Cas. 1916C, 317; Brolan v. United States, 236 U. S. 216, 217, 35 Sup. Ct. 285, 59 L. Ed. 544; Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525. Fifty years ago a tax on state banks, the obvious purpose and actual effect of which was to drive them, or at least*their circulation, out of existence, was sustained, although the result was one that Congress had no constitutional power to require. The Court made short work of the argument as to the purpose of the Act. "The Judicial can-

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not prescribe to the Legislative Departments of the Government limitations upon the exercise of its acknowledged powers." Veazie Bank v. Fenno, 8 Wall. 533, 19 L. Ed. 482. So it well might have been argued that the corporation tax was intended under the guise of a revenue measure to secure a control not otherwise belonging to Congress, but the tax was sustained, and the objection so far as noticed was disposed of by citing McCray v. United States; Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312. And to come to cases upon interstate commerce notwithstanding United States v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209) has been made an instrument for the breaking up of combinations in restraint of trade and monopolies, using the power to regulate commerce as a foothold, but not proceeding because that commerce was the end actually in mind. The objection that the control of the States over production was interfered with was urged again and again but always in vain. Standard Oil Co. v. United States, 221 U. S. 1, 68, 69, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; United States v. American Tobacco Co., 221 U. S. 106, 184, 31 Sup. Ct. 632, 55 L. Ed. 663; Hoke v. United States, 227 U. S. 308, 321, 322, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905. See finally and especially Seven Cases of Eckman's Alterative v. United States, 239 U. S. 510, 514, 515, 36 Sup. Ct. 190, 60 L. Ed. 411, L. R. A. 1916D, 164.

The Pure Food and Drug Act which was sustained in Hipolite Egg Co. v. United States, 220 U. S. 45, 57, 31 Sup. Ct. 364, 367 (55 L. Ed. 364), with the intimation that "no trade can be carried on between the States to which it [the power of Congress to regulate commerce] does not extend," applies not merely to articles that the changing opinions of the time condemn as intrinsically harmful but to others innocent in themselves, simply on the ground that the order for them was induced by a preliminary fraud. Weeks v. United States, 245 U. S. 618, 38 Sup. Ct. 219, 62 L. Ed. ——. It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil. I may add that in the cases on the so-called White Slave Act it was established that the means adopted by Congress as convenient to the exercise of its power might have the character af police regulations. Hoke v. United States, 227 U. S. 308, 323, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905; Caminetti v. United States, 242 U. S. 470, 492, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168. In Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311, 328, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, Leisy v. Hardin, 135 U. S. 100, 108, 10 Sup. Ct. 681, 34 L. Ed. 128, is quoted with seeming approval to the effect that "a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State unless placed there by congressional action." I see no reason for that proposition not applying here.

The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused—it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where in my opinion they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States.

But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink but not as against the product of ruined lives.

The Act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the State line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. If, as has been the case within the memory of men still living, a State should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in Champion v. Ames. Yet in that case it would be said with quite as much force as in this that Congress was attempting to intermeddle with the State's domestic affairs. The national welfare as understood by Congress may re-

quire a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

Mr. Justice McKENNA, Mr. Justice BRANDEIS, and Mr. Justice CLARKE concur in this opinion.

(247 U. S. 367)

NEW ORLEANS & N. E. R. CO. et al. v. HARRIS.

(Argued and Submitted April 30, 1918. Decided June 3, 1918.)

No. 276.

1. MASTER AND SERVANT ⟸265(2)—INJURIES TO SERVANT — NEGLIGENCE — BURDEN OF PROOF.

Where suit is brought in the federal court against a railroad company for injuries to an employé, the negligence of the company is an affirmative fact which the plaintiff must establish.

2. COURTS ⟸376—FOLLOWING STATE LAW—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT.

As rights under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]) depend upon the act and applicable principles of common law, as interpreted and applied in the federal courts, which tribunals have held negligence essential to recovery by a servant, the question of burden of proof is a matter of substance, not subject to control by the laws of the several states; and hence Code Miss. 1906, § 1985, as amended by Laws 1912, c. 215, § 1, making proof of injury inflicted by the running of engines prima facie evidence of negligence, is inapplicable to an action under the act against a railroad company for the death of a brakeman, run over by the tender of an engine.

3. DEATH ⟸82—DAMAGES — SUFFERING OF DECEASED.

Where a brakeman engaged in interstate commerce was run over, and died in a few minutes, without regaining consciousness, an instruction, in action under federal Employers' Liability Act, allowing compensation for his pain and the value of his life if he had survived was erroneous, as the only possible recovery, where he endured no conscious suffering, was the pecuniary loss of his beneficiary.

4. DEATH ⟸32 — INJURIES TO SERVANT — FEDERAL EMPLOYERS' LIABILITY ACT.

The federal Employers' Liability Act makes the widow sole beneficiary when there is no child, and only in the absence of both may parents be considered; so proof of pecuniary loss by a mother on account of the death of her son will not support a recovery, where the son left a surviving widow, though he and she had been living apart.

In Error to the Supreme Court of the State of Mississippi.

Action by Cheney Harris, administratrix of the estate of Van Harris, deceased, against the New Orleans & Northeastern Railroad Company. A judgment for plaintiff was affirmed by the Supreme Court of Mississippi (71 South. 913), and defendant and the United States Fidelity & Guaranty Company, surety on the appeal bond given on appeal to the Supreme Court of Mississippi, bring error. Reversed.

Messrs. J. Blanc Monroe, of New Orleans, La., and Robert H. Thompson, of Jackson, Miss., for plaintiffs in error.

Mr. Thomas G. Fewell, of Meridian, Miss., for defendant in error.

*368 * Mr. Justice McREYNOLDS delivered the opinion of the Court.

While employed in interstate commerce by plaintiff in error, a common carrier by railroad then engaging in such commerce, Van Harris a brakeman was run over by the tender of an engine moving in the yard at New Orleans, Louisiana—February 5, 1914. He died within a few minutes without regaining consciousness. Having qualified as administratrix, his mother (defendant in error), charging negligence and relying upon the federal Employers' Liability Act, sued for damages in a state court for Lauderdale county, Mississippi. A judgment in her favor was affirmed by the Supreme Court without opinion.

*369 * The declaration contained no averment of conscious pain or suffering by deceased. It alleged:

"That by reason of the negligence hereinabove set out, the defendant railroad company is liable for the killing of said Van Harris and the administratrix is given the right to sue by the act of Congress, she therefore brings this, her suit, and demands judgment against the defendant for the sum of ten thousand dollars."

It further charged that the dead son had been his mother's sole support but contained no reference to his widow.

One witness who claimed to have seen the accident gave evidence tending to show negligence by the railroad; but his presence at the scene was not left free from doubt and other eyewitnesses narrated the circumstances differently. Concerning deceased's contributions to his mother's support, she said he was her sole dependence, paid her house rent, gave her something to eat, looked after her, was regularly at work and would bring home $30 or $40 a month. Her statements are the only evidence concerning the son's marriage and widow. He duly married Mollie on an undisclosed date; after living together for six months he fell ill and she left; thereafter her whereabouts were unknown to him; she was alive at time of trial (October, 1914); he left no child. Nothing indicates a divorce proceeding. Answering "Do you know whether Mollie ever married anybody else or not?" the witness replied: "I don't know, sir; I hear them say she married."

Upon request of the administratrix, the following instructions (among others) were given to the jury:

"No. 1. The court charges the jury for the plaintiff in this case that under the rule of evidence in the state of Mississippi all that is required of the plaintiff in this case is to prove that injury was inflicted by the movement of the defendant's train or engine and then the

*370 law presumes negligence and then the burden of proof shifts to the*defendant to prove all of the facts and circumstances surrounding the injury and from those facts so shown exonerate itself from all negligence.

"No. 2. The court charges the jury for the plaintiff that under the rule of evidence under the Mississippi statutes known as the prima facie statute all that the plaintiff need prove to entitle her to a judgment or verdict is that the defendant's engine or train caused the injury complained of and then the plaintiff is entitled to a verdict at the hands of the jury unless the defendant has shown all of the facts surrounding the injury and from such facts has shown by a preponderance of the evidence that its servants were not guilty of negligence.

"No. 3. The court charges the jury for the plaintiff that if you believe from the evidence that deceased was injured by the running of defendant's engine, then the burden placed on defendant by the prima facie statute cannot be met or overcome by mere speculation or conjecture, but it devolves on defendant the duty of showing by a preponderance of the evidence all of the facts and circumstances surrounding the injury and by such proof thus exonerate itself from negligence."

"No. 8. The court charges the jury for the plaintiff in this case that if your verdict shall be for the plaintiff then it should be in such sum as you may believe from the evidence would fully compensate the deceased for his pain and suffering, if any have been shown by the evidence, and the value of his life reckoned according to the American Mortality Table had the deceased survived and that such amount or the measure of same is peculiarly within the province of the jury reckoned as above outlined. And that the law does not require the plaintiff to prove the damages in dollars and cents but the amount thereof is to be fixed by the jury in all not to exceed the sum of ten thousand dollars."

*371 The so-called "Prima Facie Act" of Mississippi, set*out below,[1] provides that in actions against railroads for damages proof of injury inflicted by an engine propelled by steam shall be prima facie evidence of negligence. Relying upon and undertaking to apply this statute, the trial court gave the quoted instructions, and in so doing, we think, committed error.

[1, 2] The federal courts have long held that where suit is brought against a railroad for injuries to an employé resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish. The Nitro-Glycerine Case, 15 Wall. 524, 537, 21 L. Ed. 206; Patton v. Texas & Pacific Railway Co., 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361; Looney v. Metropolitan Railroad Co., 200 U. S. 480, 487, 26 Sup. Ct. 303, 50 L. Ed. 564; Southern Ry. Co. v. Bennett, 233 U. S. 80, 85, 34 Sup. Ct. 566, 58 L. Ed. 860. In proceedings brought under the federal Employers' Liability Act rights and obligations depend upon it and applicable principles of common law as interpreted and applied in federal courts; and negligence is essential to recovery. Seaboard Air Line v. Horton, 233 U. S. 492, 501, 502, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Southern Ry. v. Gray, 241 U. S. 333, 339, 36 Sup. Ct. 558, 60 L. Ed. 1030; New York Central R. R. Co. v. Winfield, 244 U. S. 147, 150, 37 Sup. Ct. 546, 61 L. Ed. 1045, Ann. Cas. 1917D, 1139; Erie R. R. Co. v. Winfield, 244 U. S. 170, 172, 37 Sup. Ct. 556, 61 L. Ed. 1057. These established principles and our holding in Central Vermont Ry. v. White, 238 U. S. 507, 511, 512, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252, we think make it clear that the question of burden of proof is a matter of substance and not subject to control by laws of the several states.

[3] It was also error to give quoted instruction number eight. Since the deceased endured no conscious suffering he had no right of action; and possible recovery was limited to pecuniary loss sustained by the designated beneficiary. Garrett v. Louisville & Nashville R. R., 235 U. S. 308, 312, 35 Sup. Ct. 32, 59 L. Ed. 242; Ches. & Ohio Ry. v. Kelly, 241 U. S. 485, 489, 36 Sup. Ct. 630, 60 L. Ed. 1117, L. R. A. 1917F, 367.

[4] The act makes the widow sole beneficiary when there is no child and only in the absence of both may parents be considered. The deceased left a widow and although they had lived apart no claim is made that rights and liabilities consequent upon marriage had disappeared under local law. Of course, we do not go beyond the particular facts here disclosed. In the circumstances, proof of the mother's pecuniary loss could not support a recovery.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

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[1] Mississippi Code 1906, § 1985, as amended by chapter 215, Laws 1912, p. 290:

"1985 (1808). *Injury to Persons or Property by Railroads Prima Facie Evidence of Want of Reasonable Skill and Care, etc.*—In all actions against railroad corporations and all other corporations, companies, partnerships and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, locomotives or cars of any such railroad corporations or such other corporation, company, partnership or individual shall be prima facie evidence of the want of reasonable skill and care of such railroad corporation, or such other corporation, company, partnership or individual in reference to such injury. This section shall also apply to passengers and employés of railroad corporations and of such other corporations, companies, partnerships and individuals."

(247 U. S. 221)

LYNCH, Collector of Internal Revenue, v. TURRISH.

(Argued March 4, 5, and 6, 1918. Decided June 3, 1918.)

No. 421.

1. INTERNAL REVENUE ⟸7 — INCOME TAX LAW—"INCOME"—"GAINS"—"PROFITS."

A sum in excess of the par value of corporate stock received by a shareholder, subject to Income Tax Law Oct. 3, 1913, c. 16, pars. A, B, 38 Stat. 166, 167, on sale of the corporate assets and distribution of the proceeds as a final dividend in liquidation of the corporation, after the law had become effective, is not taxable as "income, gains or profits," where it represented an increase in value of the stock resulting from a gradual advance of the corporate property during a series of years, which reached its height before the act became effective, or there was a mere change in the form of the property without change in value.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gain; Income; Profit.]

2. INTERNAL REVENUE ⟸7 — INCOME TAX LAW—"INCOME, GAINS OR PROFITS."

The enhancement in value of corporate property resulting from the gradual increase of its value during a series of years prior to the effective date of Income Tax Law Oct. 3, 1913, is an increase of capital, and, though divided or distributed among the stockholders on sale of the corporate assets subsequent to that date, is not taxable as "income, gains or profits."

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Action by Henry Turrish against E. J. Lynch, Collector of Internal Revenue for the District of Minnesota. A judgment for plaintiff was affirmed by the Circuit Court of Appeals (236 Fed. 653), and defendant brings certiorari. Affirmed.

Mr. Solicitor General Davis, for petitioner.

Messrs. A. W. Clapp and Newell Clapp, both of St. Paul, Minn., and H. Oldenburg, of Carleton, Minn., for respondent.

*221 *Mr. Justice McKENNA delivered the opinion of the Court.

Suit to recover an income tax, paid under protest, assessed under the Act of October 3, 1913, c. 16, 38 Stat. 166.

The facts, as admitted by demurrer, are these: Respondent, Turrish, who was plaintiff in the trial court, made a return of his income for the calendar year 1914 which showed that he had no net income for that year; afterwards the Commissioner of Internal Revenue made a supplemental assessment showing that he had received a net income of $32,712.08, which, because of specific deductions and exemptions, resulted in no normal tax, but as the net income exceeded the sum of $20,000 the Commissioner assessed an additional or super tax of 1 per cent. upon the excess, resulting in a tax of $127.12, which was sought to be recovered. The reassessment was based upon certain sums received by the plaintiff in the year 1914 as distributions from corporations subject to the Income Tax Law and held by the Commissioner to be income derived from dividends received by the plaintiff on stock of domestic corporations; of which the sum of $79,975, received as a distribution from the Payette Lumber & Manufacturing Company, and without which no tax could have been levied against the plaintiff, is here in dispute.

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Prior to March 1, 1913, and continuously thereafter until the surrender of his stock as hereinafter mentioned, plaintiff was a stockholder in the Payette Company, which was organized in the year 1903 with power to buy, hold, and sell timber lands, and in fact never engaged in any other business than this except minor businesses incidental to it. Immediately after its organization this company began to invest in timber lands, and prior to March 1, 1913, had thus invested approximately $1,375,000.

On March 1, 1913, the value of its assets was not less than $3,000,000 of which sum the value of the timber lands was not less than $2,875,000. The increase was due to the gradual rise in the market value of the lands. At that date the value of Turrish's stock was twice its par value, or $159,950, and about that time he and all the other stockholders gave an option to sell their stock for twice its par value. The holders of the option formed another company, called the Boise-Payette Lumber Company, and transferred the options to it. The options having been extended to December 31, 1913, the new company informed the Payette Company and its stockholders shortly before this date that instead of exercising the option it preferred and proposed to purchase all of the assets of the Payette Company, paying to that company such a purchase price that there would be*available for distribution to its stockholders twice the par value of their stock. The stockholders by resolution authorized this sale, and, pursuant to this and a resolution of the directors, the Payette Company transferred to the new company all of its assets, property, and franchises, and upon the completion of the transaction found itself with no assets or property, except cash to the amount of double the par value of its stock which had been paid to it by the new company, and with no debt, liabilities, or obligations except those which the new company had assumed. The cash was distributed to the stockholders on the surrender of their certificates of stock, and the company went out of business. In this way, upon the surrender of his shares, Turrish received $159,950, being double their par value.

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The Commissioner of Internal Revenue considered that of this sum one-half was not taxable, being the liquidation of the par value of Turrish's stock, but that the other half

was income for the year 1914 and taxable under the act of 1913.

The question in the case is thus indicated. The District Court took a different view from that of the Commissioner of Internal Revenue and therefore overruled the demurrer to Turrish's complaint and entered judgment for him for the sum prayed, which judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit. 236 Fed. 653, 149 C. C. A. 649.

The point in the case seems a short one. It, however, has provoked much discussion on not only the legal but the economic distinction between capital and income and by what processes and at what point of time the former produces or becomes the latter. And this in resolution of a statute which concerns the activities of men and intended, it might be supposed, to be without perplexities and readily solvable by the off-hand conceptions of those to whom it was addressed.

*225 *[1, 2] The provisions of the act, so far as material to be noticed, are the following: That there is assessed

"upon the entire net income arising or accruing from all sources in the preceding calendar year to every * * * person residing in the United States * * * a tax of 1 per centum per annum upon such income. * * *" Paragraph A, subd. 1.

In addition to that tax, which is denominated the normal income tax, it is provided that there shall be levied "upon the net income of every individual an additional income tax * * * of 1 per centum per annum upon the amount by which the total net income exceeds" certain amounts, and the person subject to the tax is required to make a personal return of his total net income from all sources under rules and regulations to be prescribed by the Commissioner of Internal Revenue. Subdivision 2.

By paragraph B it is provided that, subject to certain exemptions and deductions, "the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service * * * also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever."

After specifying the exemptions and deductions allowed, the law declares as follows:

"The said tax shall be computed upon the remainder of said net income of each person subject thereto, accruing during each preceding calendar year ending December thirty-first: Provided, however, that for the year ending December thirty-first, nineteen hundred and thirteen, said tax shall be computed on the net income accruing from March first to December thirty-first, nineteen hundred and thirteen, both dates inclusive. * * *" Paragraph D.

*226 It will be observed, therefore, that the statute levies a normal tax and an additional tax upon net incomes, *derived from whatever source, "arising or accruing" each preceding calendar year ending December 31, except that for the year ending December 31, 1913, the tax shall be computed on the net income accruing from March 1, 1913, to December 31, 1913.

And in determining the application of the statute to Turrish we must keep in mind that on the admitted facts the distribution received by him from the Payette Company manifestly was a single and final dividend in liquidation of the entire assets and business of the company, a return to him of the value of his stock upon the surrender of his entire interest in the company, and at a price that represented its intrinsic value at and before March 1, 1913, when the act took effect.

The District Court and the Circuit Court of Appeals decided that the amount so distributed to Turrish was not income within the meaning of the statute, basing the decision on two propositions, as expressed in the opinion of the Circuit Court of Appeals, by Sanborn, Circuit Judge: (a) The amount was the realization of an investment made some years before, representing its gradual increase during those years, and which reached its height before the effective date of the law; that is, before March 1, 1913, and the mere change of form of the property "as from real to personal property, or from stock to cash" was not income to its holders because the value of the property was the same after as before the change. (b) The timber lands were the property, capital and capital assets, of their legal and equitable owner and the enhancement of their value during a series of years "prior to the effective date of the income tax law, although divided or distributed by dividend or otherwise subsequent to that date, does not become income, gains, or profits taxable under such an act."

For proposition (a) the court cited Collector v. Hubbard, 12 Wall. 1, 20 L. Ed. 272; Bailey v. Railroad Company, 22 Wall. *604, *22 L. Ed. 840, and the same case in 106 U. S. 109, 1 Sup. Ct. 62, 27 L. Ed. 81. For proposition (b) Gray v. Darlington, 15 Wall. 63, 21 L. Ed. 45, was relied on.

The government opposes both contentions by an elaborate argument containing definitions of capital and income drawn from legal and economic sources and given breadth to cover a number of other cases submitted with this. The argument, in effect, makes any increase of value of property income, emerging as such and taxable at the moment of realization by sale or some act of separation, as by dividend declared or by distribution, as in the instant case.

To sustain the argument these definitions are presented:

"1. Capital is anything, material or otherwise, capable of ownership, viewed in its static condition at a moment of time, or the rights of ownership therein. 2. Income is the service or return rendered by capital during a period of time. * * * 4. Net income ('profits') is the difference between income and outgo. * * * 7. In the actual production and distribution of capital there is a constant conversion of capital

into income, and vice versa. 8. The attempt to conceal this conversion by treating 'income' as the standard return from intact 'capital' only leads to confusion of the value of capital with capital itself."

From these definitions are deduced the following propositions, which are said to be decisive of the problems in the cases:

"1. Income being derived from the use of capital, the conversion or transfer of capital always produces income. 2. Mere appreciation of capital value does not produce 'income,' nor mere depreciation 'outgo.' 3. Net income is the difference between actual 'income' and actual 'outgo.' 4. Income is not confined to money income, but includes anything capable of easy valuation in money."

*228 It will be observed that the breadth of definition and *the breadth of application are necessary to the refutation of the reasoning of the Circuit Court of Appeals. There is direct antagonism, the court basing its reliance, it says, upon what it asserts is the common sense and understanding of the words of the law, and the exposition of like laws by the decisions of this court. The government's resource is the discussion of economists and the fact, concrete and practical, of wealth not only increased but come to actual hand. The instant case is an example. Turrish's stock doubled in value. He paid for it $79,975; he received $159,950. It requires a struggle to resist the influence of the fact, but we are aided and fortified by our own precedents and saved from much intricate and subtle discussion and an elaborate review of other cases cited in confirmation or opposition.

In Collector v. Hubbard, supra, the distinction between a corporation and its stockholders was recognized and that the stockholder had no title for certain purposes to the earnings of the corporation, net or other, prior to a dividend being declared, but they might become capital by investment in permanent improvements and thereby increase the market value of the shares, "whether held by the original subscribers or by assignees." In other words, it was held that the investments of the corporation were the investments of the stockholders; that is, the stockholders could have an interest, taxable under the act considered, though not identical with the corporation. This was repeated in Bailey v. Railroad Company, 22 Wall. 604, 635, 636, 22 L. Ed. 840.

The latter case came here again in 106 U. S. 109, 1 Sup. Ct. 62, 27 L. Ed. 81, and it was then declared that the purpose of an income tax law was to tax the income for the year that it accrued; in other words, no tax in contemplation of the law accrues upon something except for the year in which that something—earnings, profits, gains or income—accrues. In that case the subject of the tax *229 was a scrip dividend, but *the certificates did not show the year of the earnings and testimony as to the particular year was admitted. The principle applies to the case at bar. If increase in value of the lands was income, it had its particular time and such time must have been within the time of the law to be subject to the law, that is, it must have been after March 1, 1913. But, according to the fact admitted, there was no increase after that date and therefore no increase subject to the law. There was continuity of value, not gain or increase. In the first proposition of the Court of Appeals we, therefore, concur.

In support of its second proposition it adduced, as we have seen, Gray v. Darlington, 15 Wall. 63, 21 L. Ed. 45. The case arose under the Income Tax Law of 1867 (Act March 2, 1867, c. 169, 14 Stat. 478), which levied "upon the gains, profits, and income of every person, * * * whether derived from any kind of property * * * or from any other source whatever a tax of five per centum on the amount so derived over $1,000 * * * for the year ending the thirty-first day of December next preceding the time for levying, collecting, and paying said tax."

Darlington, in 1865, being the owner of certain United States Treasury notes, exchanged them for United States bonds. In 1869 he sold the bonds at an advance of $20,000 over the cost of the notes and upon this amount was levied a tax of five per centum as gains, profits and income for that year. He paid the tax under protest and sued to recover, and prevailed. This court, by Mr. Justice Field, said:

"The question presented is whether the advance in the value of the bonds, during this period of four years, over their cost, realized by their sale, was subject to taxation as gains, profits, or income of the plaintiff for the year in which the bonds were sold. The answer which should be given to this question does not, in our judgment, admit of any doubt. The advance in the value of property during a series *230 of years can, in no *just sense, be considered * the gains, profits, or income of any one particular year of the series, although the entire amount of the advance be at one time turned into money by the sale of the property. The statute looks, with some exceptions, for subjects of taxation only to annual gains, profits, and income."

And again:

"The mere fact that property has advanced in value between the date of its acquisition and sale does not authorize the imposition of a tax on the amount of the advance. Mere advance in value in no sense constitutes the gains, profits, or income specified by the statute. It constitutes and can be treated merely as increase of capital."

This case has not been since questioned or modified.

The government feels the impediment of the case and attempts to confine its ruling to the exact letter of the Act of March 2, 1867, and thereby distinguish that act from the act of 1913 and give to the latter something of retrospective effect. Opposed to this there is a presumption, resistless except against an intention imperatively clear. The government, however, makes its view depend upon disputable differences between certain words of the two acts. It urges that the act

of 1913 makes the income taxed one "arising or accruing" in the preceding calendar year, while the act of 1867 makes the income one "derived." Granting that there is a shade of difference between the words, it cannot be granted that Congress made that shade a criterion of intention and committed the construction of its legislation to the disputes of purists. Besides, the contention of the government does not reach the principle of Gray v. Darlington, which is that the gradual advance in the value of property during a series of years in no just sense can be ascribed to a particular year, not therefore as "arising or accruing," to meet the challenge of the words, in the last one of the years, as the government contends, and taxable as income for that year or when turned into cash. Indeed, the case decides that such advance in value is not income at all, but merely increase of capital and not subject to a tax as income.

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We concur, therefore, in the second proposition of the Circuit Court of Appeals as well as in the first and affirm the judgment.

Mr. Justice BRANDEIS and Mr. Justice CLARKE concur in the result.

(247 U. S. 330)

SOUTHERN PAC. CO. v. LOWE, Collector of Internal Revenue.

(Argued March 4, 5, and 6, 1918. Decided June 3, 1918.)

No. 452.

1. INTERNAL REVENUE ⟸7 — INCOME TAX LAW—CONSTRUCTION.

Income Tax Act Oct. 3, 1913, c. 16, § 2, par. G (c), 38 Stat. 174, providing that the tax upon corporations is to be computed upon the entire net income accrued within each calendar year, but for the year 1913 only upon the net income accrued from March 1st to December 31st, must be construed as excluding from taxation any income that accrued prior to March 1, 1913, particularly as before the ratification of the Sixteenth Amendment, in February, 1913, Congress had no authority to tax income without apportioning the tax among the states according to population.

2. INTERNAL REVENUE ⟸7 — INCOME TAX LAW—"INCOME."

The term "income," as used in Income Tax Act Oct. 3, 1913, has the same meaning as when used in Corporation Excise Tax Act Aug. 5, 1909, c. 6, 36 Stat. 11; so accumulations that accrued to a corporation before the act went into effect should be considered as capital, and not taxable as income.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

3. INTERNAL REVENUE ⟸7 — INCOME TAX LAW—INCOME.

Under Income Tax Act Oct. 3, 1913, § 2, par. G (a), declaring that the normal tax imposed upon individuals shall be levied, assessed, and paid annually upon the entire income arising or accruing from all sources during the preceding year to every corporation, dividends declared by a corporation out of a surplus that accrued prior to the effective date of the act are not income, for purposes of taxation, where paid to a second corporation, which owned all the stock of the corporation declaring the dividend, had possession of its property under a lease, and controlled its directorate, though for bookkeping purposes the accounts of the two corporations were kept separately, for under the circumstances the rules applicable to ordinary stockholders do not apply, and the declaration of dividends was a mere paper transaction.

4. CORPORATIONS ⟸152 — DIVIDENDS — RIGHTS OF STOCKHOLDERS.

Ordinarily the mere accumulation of an adequate surplus does not entitle a stockholder to dividends until the directors in their discretion declare them.

Mr. Justice Clarke dissenting.

In Error to the District Court of the United States for the Southern District of New York.

Action by the Southern Pacific Company against John Z. Lowe, Jr., United States Collector of Internal Revenue for the Second District of New York. There was a judgment for defendant (238 Fed. 847), and plaintiff brings error. Reversed and remanded for further proceedings.

Mr. Gordon M. Buck, of New York City, for plaintiff in error.

Mr. Solicitor General Davis, for defendant in error.

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*Mr. Justice PITNEY delivered the opinion of the Court.

This case presents a question arising under the Federal Income Tax Act of October 3, 1913 (chapter 16, 38 Stat. 114, 166). Suit was brought by plaintiff in error against the collector to recover taxes assessed against it and paid under protest. There were two causes of action, of which only the second went to trial, it having been stipulated that the trial of the other might be postponed until the final determination of this one. So far as it is presented to us, the suit is an effort to recover a tax imposed upon certain dividends upon stock, in form received by the plaintiff from another corporation in the early part of the year 1914, and alleged by the plaintiff to have been paid out of a surplus accumulated not only prior to the effective date of the act but prior to the adoption of the Sixteenth Amendment to the Constitution of the United States. The district court directed a verdict and judgment in favor of the collector (238 Fed. 847), and the case comes here by direct writ of error under section 238, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. 1916, § 1215]), because of the constitutional question. That our jurisdiction was properly invoked is settled by Towne v. Eisner, 245 U. S. 418, 425, 38 Sup. Ct. 158, 62 L. Ed. ——.

The case was submitted at the same time with several other cases arising under the same act and decided this day, viz., Lynch, Collector, v. Turrish, 247 U. S. 221, 38 Sup. Ct. 537, 62 L. Ed. ——, Lynch, Collector, v. Hornby, 247 U. S. 339, 38 Sup. Ct. 543, 62 L. Ed.

—, and Peabody v. Eisner, Collector, 247 U. S. 347, 38 Sup. Ct. 546, 62 L. Ed. —.

The material facts are as follows: Prior to January 1, 1913, and at all times material to the case, plaintiff, a corporation organized under the laws of the state of Kentucky owned all the capital stock of the Central Pacific Railway Company, a corporation of the state of Utah, including the stock registered in the names of the directors.[1] This situation existed continuously from the incorporation of the Railway Company in the year 1899. That company is the successor of the Central Pacific Railroad Company and acquired all of its properties, which constitute a part of a large system of railways owned or controlled by the Southern Pacific Company. The latter company, besides being sole stockholder, was in the actual physical possession of the railroads and all other assets of the Railway Company, and in charge of it operations, which were conducted in accordance with the terms of a lease made by the predecessor company to the Southern Pacific and assumed by the Railway Company, the effect of which was that the Southern Pacific should pay to the lessor company $10,000 per annum for organization expenses, should operate the railroads, branches, and leased lines belonging to the lessor, and account annually for the net earnings, and if these exceeded 6 per cent. on the existing capital stock of the lessor the lessee should retain to itself one-half of the excess; advances by the lessee for account of the lessor were to bear lawful interest, and the lessee was to be entitled at any time and from time to time to refund to itself its advances and interest out of any net earnings which might be in its hands. The provisions of the lease were observed by both corporations for bookkeeping purposes. The Southern Pacific acted as cashier and banker for the entire system; the Central Pacific kept no bank account, its earnings being deposited with the bank account of the Southern Pacific; and if the Central Pacific needed money for additions and betterments or for making up a deficit of current earnings, the necessary funds were advanced by the Southern Pacific. As a result of these operations and of the conversion of certain capital assets of the Central Pacific Company, that company showed upon its books a large surplus accumulated prior to January 1, 1913, principally in the form of a debit against the Southern Pacific, which at the same time, as sole stockholder, was entitled to any and all dividends that might be declared, and being in control of the board of directors was able to and did control the dividend policy. The dividends in question were declared and paid during the first six months of the year 1914 out of this surplus of the Central Pacific accumulated prior to January 1, 1913; but the payment was only constructive, being carried into effect by bookkeeping entries which simply reduced the apparent surplus of the Central Pacific and reduced the apparent indebtedness of the Southern Pacific to the Central Pacific by precisely the amount of the dividends.

The question is whether the dividends received under these circumstances and in this manner by the Southern Pacific Company were taxable as income of that company under the Income Tax Act of 1913.[2]

The act provides, in section 2, paragraph A, subdivision 1 (38 Stat. 166), "that there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year" to every person residing in the United States a tax of 1 per centum per annum, with exceptions not now material. By paragraph G (a), p. 172, it is provided "that the normal tax hereinbefore imposed upon individuals [1 per cent.] likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation * * * organized in the United States," with other provisions not now material.

It is provided in paragraph G (b), as to domestic corporations, that such net income shall be ascertained by deducting from the gross amount of the income of the corporation (1) ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals and the like; (2) losses sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear and tear of property, if any, and in the case of mines a certain allowance for depletion of ores and other natural deposits; (3) interest accrued and paid within the year upon indebtedness of the corporation, within prescribed limits; (4) national and state taxes paid. It will be observed that moneys received as dividends upon the stock of other corporations are not deducted, as they are in computing the income of individuals for the purpose of the normal tax under this act (page 167), and as they were in computing the income of a corporation under the Excise Tax Act of August 5, 1909 (chapter 6, 36 Stat. 11, 113, § 38).

[1] By paragraph G (c), the tax upon corporations is to be computed upon the entire net income accrued within each calendar year, but for the year 1913 only upon the net income accrued from March 1 to December 31, to be ascertained by taking five-sixths of

[1] There was another question, concerning a dividend paid by the Reward Oil Company, whose stock likewise was owned by the Southern Pacific Company, but the contention of plaintiff in error respecting this item has been abandoned.

[2] In addition, a question was made in the District Court as to a special dividend declared by the Central Pacific out of the proceeds of sale of certain land on Long Island, taken in satisfaction of a debt and sold in December, 1913. As to this, however, no argument is submitted by plaintiff in error, the facts are not clear, and we pass it without consideration.

the entire net income for the calendar year.

The purpose to refrain from taxing income that accrued prior to March 1, 1913, and to exclude from consideration in making the computation any income that accrued in a preceding calendar year, is made plain by the provision last referred to; indeed, the Sixteenth Amendment, under which for the first time Congress was authorized to tax income from property without apportioning the tax among the states according to population, received the approval of the requisite number of states only in February, 1913. Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 581, 15 Sup. Ct. 673, 39 L. Ed. 759; Id., 158 U. S. 601, 637, 15 Sup. Ct. 912, 39 L. Ed. 1108; Brushaber v. Union Pacific R. R., 240 U. S. 1, 16, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414.

[2] We must reject in this case, as we have rejected in cases arising under the Corporation Excise Tax Act of 1909 (Doyle, Collector, v. Mitchell Brothers Co., 247 U. S. 179, 38 Sup. Ct. 467, 62 L. Ed. ——, and Hays, Collector, v. Gauley Mountain Coal Co., 247 U. S. 189, 38 Sup. Ct. 470, 62 L. Ed. ——, decided May 20, 1918), the broad contention submitted in behalf of the government that all receipts—everything that comes in—are income within the proper definition of the term "gross income," and that the entire proceeds of a conversion of capital assets, in whatever form and under whatever circumstances accomplished, should be treated as gross income. Certainly the term "income" has no broader meaning in the 1913 act than in that of 1909 (see Stratton's Independence v. Howbert, 231 U. S. 399, 416, 417, 34 Sup. Ct. 136, 58 L. Ed. 285), and for the present purpose we assume there is no difference in its meaning as used in the two acts. This being so, we are bound to consider accumulations that accrued to a corporation prior to January 1, 1913, as being capital, not income, for the purposes of the act. And we perceive no adequate ground for a distinction, in this regard, between an accumulation of surplus earnings, and the increment due to an appreciation in value of the assets of the taxpayer.

[3, 4] That the dividends in question were paid out of a surplus that accrued to the Central Pacific prior to January 1, 1913, is undisputed; and we deem it to be equally clear that this surplus accrued to the Southern Pacific Company prior to that date, in every substantial sense pertinent to the present inquiry, and hence underwent nothing more than a change of form when the dividends were declared.

We do not rest this upon the view that for the purposes of the act of 1913 stockholders in the ordinary case have the same interest in the accumulated earnings of the company before as after the declaration of dividends. The act is quite different in this respect from the Income Tax Act of June 30, 1864 (chapter 173, 13 Stat. 223, 281, 282), under which this court held, in Collector v. Hubbard, 12 Wall. 1, 16, 20 L. Ed. 272, that an individual was taxable upon his proportion of the earnings of the corporation although not declared as dividends. That decision was based upon the very special language of a clause of section 117 of the act (13 Stat. 282) that "the gains and profits of all companies, whether incorporated or partnership, other than the companies specified in this section, shall be included in estimating the annual gains, profits, or income of any person entitled to the same, whether divided or otherwise." The act of 1913 contains no similar language, but on the contrary deals with dividends as a particular item of income, leaving them free from the normal tax imposed upon individuals, subjecting them to the graduated surtaxes only when received as dividends (38 Stat. 167, paragraph B), and subjecting the interest of an individual shareholder in the undivided gains and profits of his corporation to these taxes only in case the company is formed or fraudulently availed of for the purpose of preventing the imposition of such tax by permitting gains and profits to accumulate instead of being divided or distributed.[3] Our view of the effect of this act upon dividends received by the ordinary stockholder after it took effect but paid out of a surplus that accrued to the corporation before that event, is set forth in Lynch, Collector, v. Hornby, 247 U. S. 339, 38 Sup. Ct. 543, 62 L. Ed. ——, decided this day.

We base our conclusion in the present case upon the view that it was the purpose and intent of Congress, while taxing "the entire net income arising or accruing from all sources" during each year commencing with the 1st day of March, 1913, to refrain from taxing that which, in mere form only, bore the appearance of income accruing after that date, while in truth and in substance it accrued before; and upon the fact that the Central Pacific and the Southern Pacific were in substance identical because of the complete ownership and control which the lat-

[3] "For the purpose of this additional tax the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not, of all corporations, joint-stock companies, or associations however created or organized, formed or fraudulently availed or for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed; and the fact that any such corporation * * * is a mere holding company, or that the gains and profits are permitted to accumulate beyond the reasonable needs of the business shall be prima facie evidence of a fraudulent purpose to escape such tax; but the fact that the gains and profits are in any case permitted to accumulate and become surplus shall not be construed as evidence of a purpose to escape the said tax in such case unless the Secretary of the Treasury shall certify that in his opinion such accumulation is unreasonable for the purposes of the business." 38 Stat. 166, 167.

ter possessed over the former, as stockholder and in other capacities. While the two companies were separate legal entities, yet in fact, and for all practical purposes they were merged, the former being but a part of the latter, acting merely as its agent and subject in all things to its proper direction and control. And, besides, the funds represented by the dividends were in the actual possession and control of the Southern Pacific as well before as after the declaration of the dividends. The fact that the books were kept in accordance with the provisions of the *338 lease, so that these funds appeared upon the accounts as an indebtedness of the lessee to the lessor, cannot be controlling, in view of the practical identity between lessor and lessee. Aside from the interests of creditors and the public—and there is nothing to suggest that the interests of either were concerned in the disposition of the surplus of the Central Pacific—the Southern Pacific was entitled to dispose of the matter as it saw fit. There is no question of there being a surplus to warrant the dividends at the time they were made, hence any speculation as to what might have happened in case of financial reverses that did not occur is beside the mark.

It is true that in ordinary cases the mere accumulation of an adequate surplus does not entitle a stockholder to dividends until the directors in their discretion declare them. New York, etc., Railroad v. Nickals, 119 U. S. 296, 306, 7 Sup. Ct. 209, 30 L. Ed. 363; Gibbons v. Mahon, 136 U. S. 549, 558, 10 Sup. Ct. 1057, 34 L. Ed. 525. And see Humphreys v. McKissock, 140 U. S. 304, 312, 11 Sup. Ct. 779, 35 L. Ed. 473. But this is not the ordinary case. In fact the discretion of the directors was affirmatively exercised by declaring dividends out of the surplus that was accumulated prior to January 1, 1913; it does not appear that any other fair exercise of discretion was open; and the complete ownership and right of control of the Southern Pacific at all times material makes it a matter of indifference whether the vote was at one time or another. Under the circumstances, the entire matter of the declaration and payment of the dividends was a paper transaction to bring the books into accord with the acknowledged rights of the Southern Pacific; and so far as the dividends represented the surplus of the Central Pacific that accumulated prior to January 1, 1913, they were not taxable as income of the Southern Pacific within the true intent and meaning of the act of 1913.

The case turns upon its very peculiar facts, and is distinguishable from others in which the question of the identity of a controlling *339 stockholder with his corporation has been raised. Pullman Car Co. v. Missouri Pacific Co., 115 U. S. 587, 596, 6 Sup. Ct. 194, 29 L. Ed. 499; Peterson v. Chicago, Rock Island & Pacific Ry., 205 U. S. 364, 391, 27 Sup. Ct. 513, 51 L. Ed. 841.

Judgment reversed, and the cause remanded for further proceedings in conformity with this opinion.

Mr. Justice CLARKE dissents.

(247 U. S. 339)

LYNCH, Collector of Internal Revenue, v. HORNBY.

(Argued March 4, 5, and 6, 1918. Decided June 3, 1918.)

No. 422.

1. INTERNAL REVENUE ⟸7 — INCOME TAX LAW—RETROACTIVE EFFECT.

The retroactivity of Income Tax Act Oct. 3, 1913, c. 16, 38 Stat. 114, from the date of its passage to a date not prior to the adoption of Const. Amend. 16, allowing Congress to tax income from property without apportioning the tax among the states according to population, was permissible.

2. INTERNAL REVENUE ⟸7 — INCOME TAX LAW—AUTHORITY OF CONGRESS.

Under Const. Amend. 16, authorizing taxes on income from property without apportioning the tax among the states according to population, Congress was at liberty to tax as income, without apportionment, everything that became income, in the ordinary sense of the word, after the adoption of the amendment, including dividends received by a corporate stockholder in the ordinary course, though paid from a surplus of corporate assets previously existing.

3. INTERNAL REVENUE ⟸7 — INCOME TAX LAW—"INCOME"—"DIVIDEND."

Under Income Tax Act Oct. 3, 1913, § 2, pars. A, B, imposing a tax on net incomes, and declaring that the net income of every person shall include gains, profits, and income derived from salaries, wages, etc., also from interest, rent, dividends, and securities, all dividends declared and paid in the ordinary course of business by a corporation to its stockholders, after the taking effect of the act, whether from current earnings or from the accumulated surplus, made up of past earnings or increase in value of corporate assets, notwithstanding it accrued to the corporation prior to the effective date of the act, are income, and taxable as such; the expression "dividends" embracing the tangible and recurrent returns upon corporate stock, analogous to interest and rent received upon other forms of invested capital.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dividend; Income.]

4. INTERNAL REVENUE ⟸7 — INCOME TAX LAW—CONSTRUCTION.

Provisions in Income Tax Acts (Act Sept. 8, 1916, c. 463, 39 Stat. 756, and Act Oct. 3, 1917, c. 63, 40 Stat. 300), relating to dividends cannot be deemed declaratory of the meaning of the term as used in Act Oct. 3, 1913, but should be treated as a concession to the equity of stockholders, in view of the attacks on the validity of the earlier act, which imposed taxes on dividends declared out of earnings or profits which accrued before it went into effect.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Action by H. C. Hornby against E. J. Lynch, Collector of Internal Revenue for the District of Minnesota. A judgment for plaintiff was affirmed by the Circuit Court of Appeals (236 Fed. 661, 149 C. C. A. 657), and

defendant brings error. Reversed and remanded for further proceedings.

Mr. Solicitor General Davis, for petitioner.

Messrs. A. W. Clapp and Newell Clapp, both of St. Paul, Minn., and H. Oldenburg, of Carlton, Minn., for respondent.

*340 *Mr. Justice PITNEY delivered the opinion of the Court.

Hornby, the respondent, recovered a judgment in the United States District Court against Lynch, as Collector of Internal Revenue, for the return of $171, assessed as an additional income tax under the Act of October 3, 1913 (chapter 16, 38 Stat. 114, 166), and paid under protest. The Circuit Court of Appeals affirmed the judgment (236 Fed. 661, 149 C. C. A. 657), and the case comes here on certiorari. It was submitted at the same time with Lynch, Collector, v. Turrish, 247 U. S. 221, 38 Sup. Ct. 537, 62 L. Ed. —, Southern Pacific Co. v. Lowe, Collector, 247 U. S. 330, 38 Sup. Ct. 540, 62 L. Ed. —, and Peabody v. Eisner, Collector, 247 U. S. 347, 38 Sup. Ct. 546, 62 L. Ed. —, arising under the same act, and this day decided.

The facts, in brief, are as follows: Hornby, from 1906 to 1915, was the owner of 434 (out of 10,000) shares of the capital stock of the Cloquet Lumber Company, an Iowa corporation, which for more than a quarter of a century had been engaged in purchasing timber lands, manufacturing the timber into lumber, and selling it. Its shares had a par value of $100 each, making the entire capital stock $1,000,000. On and prior to March 1, 1913, by the increase of the value of its timber lands and through its business operations, the total property of the company had come to be worth $4,000,000, and Hornby's stock, the par value of which was $43,400, *341 had become worth at least $150,000. In the year 1914 the company was engaged in cutting its standing timber, manufacturing it into lumber, selling the lumber, and distributing the proceeds among its stockholders. In that year it thus distributed dividends aggregating $650,000, of which $240,000, or 24 per cent. of the par value of the capital stock, was derived from current earnings, and $410,000 from conversion into money of property that it owned or in which it had an interest on March 1, 1913. Hornby's share of the latter amount was $17,794, and, this not having been included in his income tax return, the Commissioner of Internal Revenue levied an additional tax of $171 on account of it, and this forms the subject of the present suit.

The case was tried in the District Court and argued in the Circuit Court of Appeals together with Lynch, Collector, v. Turrish, 236 Fed. 653, 149 C. C. A. 649, and was treated as presenting substantially the same question upon the merits. In our opinion it is distinguishable from the Turrish Case, where the distribution in question was a single and final dividend received by Turrish from the Payette Company in liquidation of the entire assets and business of the company and a return to him of the value of his stock upon the surrender of his entire interest in the company, at a price that represented its intrinsic value at and before March 1, 1913, when the Income Tax Act took effect.

[1-3] In the present case there was no winding up or liquidation of the Cloquet Lumber Company, nor any surrender of Hornby's stock. He was but one of many stockholders, and had but the ordinary stockholder's interest in the capital and surplus of the company; that is, a right to have them devoted to the proper business of the corporation and to receive from the current earnings or accumulated surplus such dividends as the directors in their discretion might declare. Gibbons v. Mahon, 136 U. S. 549, 557, 10 Sup. Ct. 1057, 34 L. Ed. 525. The operations of this company in the year 1914 were, *342 according to the facts pleaded, of a nature essentially like those in which it had been engaged for more than a quarter of a century. The fact that they resulted in converting into money, and thus setting free for distribution as dividends, a part of its surplus assets accumulated prior to March 1, 1913, does not render Hornby's share of those dividends any the less a part of his income within the true intent and meaning of the act, the pertinent language of which is as follows (38 Stat. 166, 167):

"A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, * * * and to every person residing in the United States, * * * a tax of 1 per centum per annum upon such income, except as hereinafter provided. * * *

"B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service, * * * also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever."

Among the deductions allowed for the purpose of the normal tax is:

"Seventh, the amount received as dividends upon the stock or from the net earnings of any corporation, * * * which is taxable upon its net income as hereinafter provided."

There is a graduated additional tax, commonly known as a "surtax," upon net income in excess of $20,000, including income from dividends, and for the purpose of this additional tax—

"the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not, of all corporations * * * formed or fraudulently availed of for the purpose of preventing the imposition of such tax through the medium of *343

permitting such gains and profits to accumulate instead of being divided or distributed."

It is evident that Congress intended to draw and did draw a distinction between a stockholder's undivided share or interest in the gains and profits of a corporation, prior to the declaration of a dividend, and his participation in the dividends declared and paid; treating the latter, in ordinary circumstances, as a part of his income for the purposes of the surtax, and not regarding the former as taxable income unless fraudulently accumulated for the purpose of evading the tax.

This treatment of undivided profits applies only to profits permitted to accumulate after the taking effect of the act, since only with respect to these is a fraudulent purpose of evading the tax predicable. Corporate profits that accumulated before the act took effect stand on a different footing. As to these, however, just as we deem the legislative intent manifest to tax the stockholder with respect to such accumulations only if and when, and to the extent that, his interest in them comes to fruition as income, that is, in dividends declared, so we can perceive no constitutional obstacle that stands in the way of carrying out this intent when dividends are declared out of a pre-existing surplus. The act took effect on March 1, 1913, a few days after the requisite number of states had given approval to the Sixteenth Amendment, under which for the first time Congress was empowered to tax income from property without apportioning the tax among the states according to population. Southern Pacific Co. v. Lowe, supra. That the retroactivity of the act from the date of its passage (October 3, 1913) to a date not prior to the adoption of the amendment was permissible is settled by Brushaber v. Union Pacific R. R., 240 U. S. 1, 20, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414. And *344 we deem it equally clear that*Congress was at liberty under the amendment to tax as income, without apportionment, everything that became income, in the ordinary sense of the word, after the adoption of the amendment, including dividends received in the ordinary course by a stockholder from a corporation, even though they were extraordinary in amount and might appear upon analysis to be a mere realization in possession of an inchoate and contingent interest that the stockholder had in a surplus of corporate assets previously existing. Dividends are the appropriate fruit of stock ownership, are commonly reckoned as income, and are expended as such by the stockholder without regard to whether they are declared from the most recent earnings, or from a surplus accumulated from the earnings of the past, or are based upon the increased value of the property of the corporation. The stockholder is, in the ordinary case, a different entity from the corporation, and Congress was at liberty to treat the dividends as coming to him ab extra, and as constituting a part of his income when they came to hand.

Hence we construe the provision of the act that "the net income of a taxable person shall include gains, profits, and income derived from * * * interest, rent, dividends, * * * or gains or profits and income derived from any source whatever" as including (for the purposes of the additional tax) all dividends declared and paid in the ordinary course of business by a corporation to its stockholders after the taking effect of the act (March 1, 1913), whether from current earnings, or from the accumulated surplus made up of past earnings or increase in value of corporate assets, notwithstanding it accrued to the corporation in whole or in part prior to March 1, 1913. In short, the word "dividends" was employed in the act as descriptive of one kind of gain to the individual stockholder; dividends being treated as the tangible and recurrent returns upon his stock, analogous to the*interest and *345 rent received upon other forms of invested capital.

[4] In the more recent Income Tax Acts, provisions have been inserted for the purpose of excluding from the effect of the tax any dividends declared out of earnings or profits that accrued prior to March 1, 1913. This originated with the act of September 8, 1916, and has been continued in the act of October 3, 1917.[1] We are referred to the legislative

[1] In Act Sept. 8, 1916, c. 463, 39 Stat. 756, 757, which took the place of the act of 1913, the substance of what we have quoted from paragraph B of the 1913 act was embodied in section 2 (a), Comp. St. 1916, § 6336b, but with this proviso: "Provided, that the term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation * * * out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation," etc. And by Act Oct. 3, 1917, c. 63, 40 Stat. 300, 329, 337, 338, section 2 (a) of the 1916 act was amended by being repeated without the proviso (page 329), while the proviso was inserted as a new section—31 (a)—and to it was added a subsection, (b), as follows:

"(b) Any distribution made to the shareholders or members of a corporation * * * in the year nineteen hundred and seventeen, or subsequent tax years, shall be deemed to have been made from the most recently accumulated undivided profits or suplus, and shall constitute a part of the annual income of the distributee for the year in which received, and shall be taxed to the distributee at the rates prescribed by law for the years in which such profits or surplus were accumulated by the corporation, * * * but nothing herein shall be construed as taxing any earnings or profits accrued prior to March first, nineteen hundred and thirteen, but such earnings or profits may be distributed in stock dividends or otherwise, exempt from the tax, after the distribution of earnings and profits accrued since March first, nineteen hundred and thirteen, has been made. This subdivision shall not apply to any distribution made prior to August sixth, nineteen hundred and seventeen, out of earnings or profits accrued prior to March first, nineteen hundred and thirteen."

history of the act of 1916, which it is contended indicates that the new definition of the term "dividends" was intended to be declaratory of the meaning of the term as used in the 1913 act. We cannot accept this suggestion, deeming it more reasonable to regard the change as a concession to the equity of stockholders granted in the 1916 act, in view of constitutional questions that had been raised in this case, in the companion case of Lynch, Collector, v. Turrish, and perhaps in other cases. These two cases were commenced in October, 1915; and decisions adverse to the tax were rendered in the District Court in January, 1916, and in the Circuit Court of Appeals September 4, 1916.

We repeat that under the 1913 act dividends declared and paid in the ordinary course by a corporation to its stockholders after March 1, 1913, whether from current earnings or from a surplus accumulated prior to that date, were taxable as income to the stockholder.

We do not overlook the fact that every dividend distribution diminishes by just so much the assets of the corporation, and in a theoretical sense reduces the intrinsic value of the stock. But, at the same time, it demonstrates the capacity of the corporation to pay dividends, holds out a promise of further dividends in the future, and quite probably increases the market value of the shares. In our opinion, Congress laid hold of dividends paid in the ordinary course as de facto income of the stockholder, without regard to the ultimate effect upon the corporation resulting from their payment.

Of course we are dealing here with the ordinary stockholder receiving dividends declared in the ordinary way of business. Lynch, Collector, v. Turrish and Southern Pacific Co. v. Lowe, Collector, this day decided, rest upon their special facts and are plainly distinguishable.

It results from what we have said that it was erroneous to award a return of the tax collected from the respondent, and that the judgment should be

Reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

(247 U. S. 347)

PEABODY v. EISNER, Collector of Internal Revenue.

(Argued March 4, 5, and 6, 1918. Decided June 3, 1918.)

No. 705.

INTERNAL REVENUE ⇐7—INCOME TAX LAW —"GAIN"—"PROFIT"—"INCOME."

An extra dividend, declared by a railroad company after Income Tax Act Oct. 3, 1913, c. 16, 38 Stat. 114, became effective, though paid in property acquired and surplus accumulated prior to the effective date of the act, is as to ordinary shareholders a gain, profit, or income, taxable within the act, for until declaration of the dividend the rights of the shareholders were merely to have the accumulated earnings and surplus of the company devoted to the proper business, and to receive from current earnings or accumulated surplus such dividends as the directors in their discretion might declare, without any right on their part to control the directors' discretion.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gain; Income; Profit.]

In Error to the District Court of the United States for the Southern District of New York.

Action by Charles A. Peabody against Mark Eisner, Collector of Internal Revenue. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Mr. Henry W. Clark, of New York City, for plaintiff in error.

Mr. Solicitor General Davis, for defendant in error.

Mr. Justice PITNEY delivered the opinion of the Court.

This case arose under the federal Income Tax Act of October 3, 1913 (38 Stat. 114, 166, c. 16). The controversy is over the first cause of action set up by plaintiff in error in a suit against the collector for the recovery of an additional tax exacted in respect of a certain dividend received by plaintiff in the year 1914 the facts being as follows: On and prior to March 1, 1913, and thenceforward until payment of the dividend in question, petitioner was owner of 1,100 shares (out of a total of 2,000,000 shares outstanding) of common stock of the Union Pacific Railroad Company, of the par value of $100 each, and during the same period the company had large holdings of the common and preferred stocks of the Baltimore & Ohio Railroad Company. On March 2, 1914, the Union Pacific declared and paid an extra dividend upon each share of its common stock, amounting to $3 in cash, $12 in par value of preferred stock of the Baltimore & Ohio, and $22.50 in par value of the common stock of the same company; the result being that petitioner received as his dividend upon his holding of Union Pacific common stock $3,300 in cash, 132 shares of Baltimore & Ohio preferred and 247½ shares of Baltimore & Ohio common stock. In his income return for 1914 he included as taxable income $4.12 per share of this dividend, or $4,532 in all, and paid his tax upon the basis of this return. Afterwards he was subjected to an additional assessment upon a valuation of the balance of his dividend, and this, having been paid under protest, is the subject of the present suit, the theory of which is that the entire earnings, income, gains, and profits from all sources realized by the Union Pacific Railroad Company from March

1, 1913, to March 2, 1914, remaining after the payment of prior charges, did not exceed $4.12 per share of the Union Pacific common stock, and that the cash and Baltimore & Ohio stock disposed of in the extra dividend (so far as they exceeded the value of $4.12 per share of Union Pacific) did not constitute a gain, profit, or income of the Union Pacific, and therefore did not constitute a gain, profit, or income of the plaintiff arising or accruing either in or for the year 1914 or for any period subsequent to March 1, 1913, the date when the Income Tax Law took effect. The District Court overruled this contention upon the authority of Southern Pacific Co. v. Lowe, Collector, 238 Fed. 847, and Towne v. Eisner, Collector, 242 Fed. 702. The latter case has since been reversed (245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. ——), but only upon the ground that it related to a stock dividend which in fact took nothing from the property of the corporation and added nothing to the interest of the shareholder, but merely changed the evidence which represented that interest. Southern Pacific Co. v. Lowe, Collector, 247 U. S. 330, 38 Sup. Ct. 540, 62 L. Ed. ——, has been reversed this day, but only upon the ground that the Central Pacific Railway Company, which paid the dividend, and the Southern Pacific Company, which received it, were in substance identical corporations because of the complete ownership and control which the latter possessed over the former as stockholder and in other capacities, so that while the two companies were separate legal entities, yet in fact and for all practical purposes the former was but a part of the latter, acting merely as its agent and subject in all things to its direction and control, and for the further reason that the funds represented by the dividend were in the actual possession and control of the Southern Pacific Company as well before as after the declaration of the dividend. In this case the plaintiff in error stands in the position of the ordinary stockholder, whose interest in the accumulated earnings and surplus of the company are not the same before as after the declaration of a dividend; his right being merely to have the assets devoted to the proper business of the corporation and to receive from the current earnings or accumulated surplus such dividends as the directors in their discretion may declare, and without right or power on his part to control that discretion.

It hardly is necessary to say that this case is not ruled by our decision in Towne v. Eisner, since the dividend of Baltimore & Ohio shares was not a stock dividend but a distribution in specie of a portion of the assets of the Union Pacific, and is to be governed for all present purposes by the same rule applicable to the distribution of a like value in money. It is controlled by Lynch, Collector, v. Hornby, 247 U. S. 339, 38 Sup. Ct. 543, 62 L. Ed. ——, this day decided.

Judgment affirmed.

(247 U. S. 426)

GRINNELL WASHING MACH. CO. v. E. E. JOHNSON CO.

(Argued April 26 and 29, 1918. Decided June 10, 1918.)

No. 272.

1. PATENTS ⟸26(1)—INVENTION—COMBINATION OF OLD ELEMENTS — "PATENTABLE COMBINATION."

Generally speaking, a combination of old elements, in order to be patentable, must produce by their joint action a novel and useful result, or an old result in a more advantageous way.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Patentable Combination.]

2. PATENTS ⟸328—VALIDITY—GEARING FOR WASHING MACHINE.

The Phillips patent, No. 950,402, for a gearing device especially adapted to the operation by power of washing machines and wringers, by means of which the washing and wringing are carried on simultaneously, *held* void, as merely an aggregation of old elements.

3. PATENTS ⟸26(1)—AGGREGATION OF OLD ELEMENTS—SUPERIORITY.

Mere superiority does not make an aggregation or combination of old elements patentable.

Mr. Justice McKenna dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Suit by the Grinnell Washing Machine Company against the E. E. Johnson Company. A decree for complainant was, on defendant's appeal, reversed by the Circuit Court of Appeals (231 Fed. 988), and complainant brings certiorari. Affirmed.

Messrs. Melville Church, of Washington, D. C., and Ralph Orwig, of Des Moines, Iowa, for petitioner.

Mr. Clarence E. Mehlhope, of Chicago, Ill., for respondent.

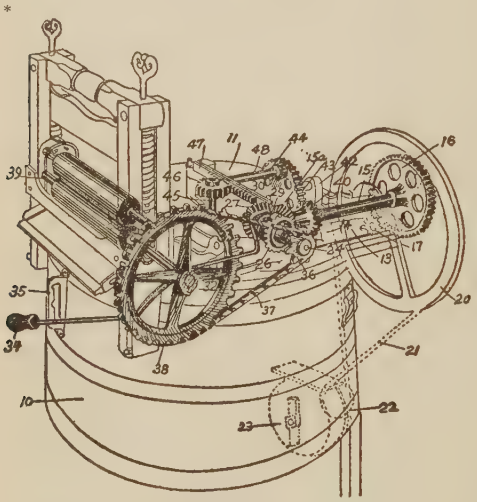
Mr. Justice DAY delivered the opinion of the Court.

This suit was brought by the Grinnell Washing Machine Company against the E. E. Johnson Company for infringement of letters patent No. 950,402 granted to W. F. Phillips February 22, 1910. The patentee states the object of the invention to be "to provide a gearing device of simple, durable, and inexpensive construction, especially designed for use in operating washing machines and wringers, by means of power supplied by an electric motor or other source of power."

The patent has been several times in litigation. In the United States District Court for

the Southern District of Iowa it was held valid and infringed. 209 Fed. 621. It was again sued upon in the same District Court, and upon appeal to the Circuit Court of Appeals for the Eighth Circuit a decree holding the patent valid and infringed was sustained. 222 Fed. 512, 138 C. C. A. 112. In the case at bar the patent was sustained in the District Court for the Southern District of Illinois, where it was held valid and infringed, and a decree entered accordingly. *428 From this decree an appeal was taken to the Circuit Court of Appeals for the Seventh Circuit, and that court reversed the decree below, and held the patent invalid. 231 Fed. 988, 146 C. C. A. 184. A writ of certiorari brings the last-named case here.

The gearing device, which is the subject-matter of the Phillips patent, will sufficiently appear, reference being had to the annexed drawing and description.



While the invention is for a gearing device, the washing machine to which it is said to be especially designed, is what is known as the "dolly type." As the drawing shows, in that type of machine there is a tub (*10*) on which is hinged a cover (*11*). Journaled in the cover is a vertical shaft (*45*), known as the dolly shaft. Mounted to slide up and down this shaft is the dolly, which consists of a block of wood with pins projecting downward, so that when the cover is down, the pins extend into the clothes in the water in the tub. In operation the dolly shaft, and with it the dolly, is swung back and forth from ½ to ¾ of a turn. A wringer is mounted on the side of the tub, and this wringer consists of two rolls which rotate towards each other and carry the clothes into another tub which contains rinse water. The clothes may be carried by the wringer rolls in either direction. The power commonly used is a small electric motor. This motor (*23*) is fastened on the bottom of the tub and the armature shaft of the motor is secured to a small pulley (*22*) connected by a belt (*21*) with a balance wheel (*20*) journaled on a stub shaft supported from the bracket (*13*). This large pulley wheel or belt wheel has secured on the hub a small spur gear pinion (*17*) which meshes with a large spur gear wheel (*16*) which is secured on the outer end of the horizontal power shaft (*15*) which is journaled in two bearings (*14*) projecting upward from the bracket or bearing. When the motor is running the train of gearing keeps the power shaft (*15*) running always in the same direction at an average slower rate of speed than the armature shaft of the motor. *429 The power shaft swings and rotates the vertical dolly shaft back and forth. A spur gear pinion (*40*), secured on the shaft (*15*), which meshes with the larger spur gear wheel (*44*) secured on the shaft (*43*) journaled in bearings (*42*). The spur gear wheel (*44*) carries an eccentric gear which is connected by a pitman (*48*) with a pin on the horizontal reciprocating rack bar (*47*). This rack bar is in mesh with a spur gear pinion (*46*) secured on the top of the dolly shaft so that the power shaft being continuously rotated in one direction, the dolly shaft (*45*) is swung back and forth in alternate directions.

From the power shaft (*15*) a train of gearing to the wringer rolls has secured on it a small bevel gear (*15a*) which meshes with two miter gears (*26* and *27*) mounted on a shaft (*24*) extending at right angles to the power shaft. The shaft (*24*) has secured on it, so that it can slide back and forth on the shaft, but must always rotate with the shaft, a clutch sleeve (*30*) which has on its ends clutch teeth shaped to be engaged with similar clutch teeth on the inner ends of the hubs of the miter gears (*26* and *27*). The clutch sleeve is engaged with only one miter gear at a time, and if it engages with one miter gear, the wringer rolls are rotated in one direction; if it engages with the other, the wringer rolls are rotated in the opposite direction, so that the shifting of the clutch sleeve reverses the direction of the rotation of the wringer rolls. To do this shifting there is an operating handle (*34*) which extends beneath the wringer to a position where it can be readily operated by the person doing the washing. The handle (*34*) is secured on the end of a rock shaft (*32*) which has an upwardly projecting arm (*33*) that fits into an annular groove (*30*), into the clutch sleeve (*39*), so that as you swing the handle the clutch sleeve is moved from one position to another. *430 The connection between shaft (*24*) and shaft (*39*) on which the wringer roll is secured, consists of a sprocket pinion (*36*) secured on the outer end of the shaft (*24*) connected by a sprocket chain (*37*) with a large sprocket wheel (*38*) secured on the outer end of the shaft (*39*).

The method of operation is to place a batch of clothing in soapy water in the tub, and when the electric motor is started, the

driving shaft and the spur gear pinion, secured thereon, are put into rotation, when the hinged cover of the machine is brought down it has the effect of causing the spur gear wheel to go into mesh with the spur gear pinion and to set the dolly shaft and its head into reciprocating motion, thus scrubbing the clothes in the tub. When the cover of the washer is swung up, the gear of the dolly is automatically thrown out of gear with the pinion, the main driving shaft still continuously rotating. The operating handle is shifted so as to cause the clutch sleeve to engage with the hub of the bevel pinion, thereby causing the bevel pinion secured to the end of the main drive shaft, to drive the shaft (*24*) and through the latter the sprocket wheel (*36*) chain (*37*), the sprocket wheel (*38*) and the shaft of the lower wringer roll, causing the wringer rolls to rotate so that a garment placed between them will be carried outwardly. When the first batch of clothes has been washed, and passed through the wringer, a second batch of clothes is inserted in the soapy water in the washer, and the cover of the washer again swung down, thereby, in the manner described, putting the dolly into action again. While the second batch of clothes is being washed, the operator shifts the handle which controls the wringing mechanism, so as to reverse the motion of the wringer rolls, so that the garments in the rinse water tub may be passed back through the rolls of the wringer, and cast into a hamper. The second action of the wringer rolls takes place simultaneously with the washing of the second batch of clothes.

*431 * The net result, it is contended, of the Phillips patent is that the washing and wringing are carried on simultaneously and the operations of the wringer rolls are controlled by the handle described.

The claims alleged to be infringed are numbers 5 to 8 inclusive. Number 6 was selected by the petitioner as typical in character, and is as follows:

"6. A gearing device of the class described, comprising a support, a power shaft mounted on the support, means for imparting a continuous rotary motion to the power shaft, an upright shaft *45* mounted in the support, a driving device for the upright shaft operatively connected with the power shaft and capable of imparting an alternating rotary motion to the upright shaft, a horizontal shaft *39*, a driving mechanism for the said shaft *39* connected with the power shaft and capable of imparting a rotary motion to the shaft *39*, and a controlling means applied to the driving device for the shaft *39*, for reversing the movement thereof and also for operatively disconnecting the shaft *39* from the driving shaft.

Confessedly all the elements of the Phillips patent are old. The merits of the combination, which it is contended, involve invention and validate the patent, are that this gearing device, applied and operated as specified, enables the washing of a part of the clothes to be performed at the same time that the wringing process is being applied to other clothes. Thus, it is said, saving time in doing the washing, and, furthermore, by the operation of the control handle the rolls may be reversed or instantly stopped as the needs, convenience and safety of the operator may require. These things, the simultaneous washing and wringing, with the operation of the control handle, for the purposes stated, embrace the advances alleged to have been accomplished upon the prior art. In this view it is unnecessary to particularize the prior patents disclosed in the art. The question is, does this* bringing together of old *432 elements accomplishing the purposes stated amount to that combination which is invention within the meaning of the patent law; or does the gearing device, thus applied and used, show only an aggregation of old elements performing well-known functions, producing no novel and useful result entitling the aggregation to the protection of a patent?

[1] It is not always easy to decide this question, as the difference of opinion in the Circuit Courts of Appeals in this case illustrates. Generally speaking, a combination of old elements in order to be patentable must produce by their joint action a novel and useful result, or an old result in a more advantageous way. To arrive at the distinctions between combinations and aggregations definite reference must be had to the decisions of this court. The subject was fully discussed in Palmer v. Corning, 156 U. S. 342, 15 Sup. Ct. 381, 39 L. Ed. 445, wherein the previous decisions were reviewed. The rule stated in Hailes v. Van Wormer, 20 Wall. 353, 368, 22 L. Ed. 241, was quoted with approval, wherein the court said:

"It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. No one by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others *433 from using the same devices, either singly or in* other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in combination." Hailes v. Van Wormer, 20 Wall. 353, 368, 22 L. Ed. 241.

In Richards v. Chase Elevator Co., 158 U. S. 299, 302, 15 Sup. Ct. 831, 833 [39 L. Ed. 991], the rule was stated as follows:

"Unless the combination accomplishes some new result, the mere multiplicity of elements does not make it patentable. So long as each

element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements."

In Specialty Manufacturing Company v. Fenton Metallic Manufacturing Co., 174 U. S. 492, 498, 19 Sup. Ct. 641, 643 [43 L. Ed. 1058], the rule was again tersely stated:

"Where a combination of old devices produces a new result such combination is doubtless patentable, but where the combination is not only of old elements, but of old results, and no new function is evolved from such combination, it falls within the ruling of this court in Hailes v. Van Wormer, 20 Wall. 353, 368 [22 L. Ed. 241]; Reckendorfer v. Faber, 92 U. S. 347, 356 [23 L. Ed. 719]; Phillips v. Detroit, 111 U. S. 604 [4 Sup. Ct. 580, 28 L. Ed. 532]; Brinkerhoff v. Aloe, 146 U. S. 515, 517 [13 Sup. Ct. 221, 36 L. Ed. 1068]; Palmer v. Corning, 156 U. S. 342, 345 [15 Sup. Ct. 381, 39 L. Ed. 445]; Richards v. Chase Elevator Co., 158 U. S. 299 [15 Sup. Ct. 831, 39 L. Ed. 991]."

[2, 3] Applying the rule thus authoritatively settled by this court, we think no invention is shown in assembling these old elements for the purposes declared. No new function is "evolved from this combination"; the new result, so far as one is achieved, is only that which arises from the well-known operation of each one of the elements.

In the gearing specified every element is old. The operations of the wringer and the washing machine, although simultaneous, are independent one of the other. The control of the operation of the wringer is by an old and well-known method. From the co-operation of the *elements, here brought together, no new result, involving the exercise of the creative faculty which is invention is achieved. Phillips may have produced a more convenient and economical mechanism than others who preceded him, but superiority does not make an aggregation patentable. Specialty Manufacturing Co. v. Fenton Metallic Manufacturing Co., supra. The assemblage of the old elements, and their operation in the manner indicated may save time, and the mechanism may meet with a readier sale than other similar devices, but these things may result from mechanical skill and commercial enterprise, and do not necessarily involve invention.

*434

To borrow an illustration made at the argument, we think the Phillips aggregation of elements may be likened to the operation of a number of different machines in a factory by power applied from the same line shaft, each operation contributing its separate part to the production of a given result. So in this instance we think the combination accomplished by Phillips fails to show that exercise of invention, producing a novel and useful result from the co-operating action of the elements, which is essential to distinguish patentable combination from an aggregation of old elements so placed by mechanical skill as to do work more rapidly and economically.

We agree with the conclusion reached by the court below.

Affirmed.

Mr. Justice McKENNA dissents.

(247 U. S. 477)

NORTHERN PAC. RY. CO. v. SOLUM. SAME v. MONARCH ELEVATOR CO. SAME v. DULUTH ELEVATOR CO.

(Argued March 19, 1918. Decided June 10, 1918.)

Nos. 205, 206, 526.

1. COURTS ⟸396(4)—ERROR TO STATE COURT —PRESENTATION OF OBJECTIONS.

Objections that, in advance of a determination by the Interstate Commerce Commission as to whether the routing was reasonable, the state courts assumed jurisdiction of an action to recover an amount equal to that by which the freight for shipments carried on an interstate route between intrastate points exceeded the intrastate rate, are available in the federal Supreme Court, though first urged in the state Supreme Court, where they were considered and overruled.

2. COURTS ⟸391(3)—ERROR TO STATE COURT —JURISDICTION—SCOPE OF WRIT.

Prior to Act Sept. 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. 1916, § 1214), amending Judicial Code (Act March 3, 1911, c. 231) § 237, 36 Stat. 1156, a judgment of the state court, allowing recovery of the amount by which freight for a shipment carried over an interstate route between intrastate points exceeded the intrastate rate, may be reviewed on writ of error, a federal question being raised by assignments of error that the state court erred in holding the cause of action was not affected by the federal statutes regulating interstate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379), and that the state court erred in assuming jurisdiction in advance of a determination by the Interstate Commerce Commission as to whether the routing was reasonable, but after the act of 1916 went into effect, such a judgment could not be reviewed on writ of error, as the question of the validity of a statute or treaty, or the validity of any authority exercised under the state, was not drawn in question.

3. COURTS ⟸380—ERROR TO STATE COURT— WANT OF JURISDICTION—FAILURE TO RAISE QUESTION.

Where a writ of error was not available under Judicial Code, § 237, as amended by Act Sept. 6, 1916, to review a judgment of the state court, it must be dismissed, though the defendant in error does not raise the jurisdictional question.

4. CARRIERS ⟸79—CARRIAGE OF GOODS—DUTY OF CARRIER.

Where a railroad company operates two lines between the same point, and the freight rate over one is less than the rate over the other, it is ordinarily the duty of the carrier to ship by the cheaper route; but the duty is not absolute, the carrier being bound to consider, not only the shipper's interest, but its own and that of the public, and if, all things considered, it would be unreasonable to ship by the cheaper route, the carrier need not do so.

5. COMMERCE ⟸89 — INTERSTATE COMMERCE COMMISSION—AUTHORITY—JURISDICTION OF COURTS.

Where the question whether a carrier's practice of routing intrastate shipments over its interstate line, instead of its intrastate line, for which a lower rate had been prescribed, was

reasonable, was an administrative one of perhaps considerable complexity, the state court should not, in advance of the Interstate Commerce Commission's determination of the question, assume jurisdiction of actions to recover the amount by which the freight for shipments carried over the interstate line exceeded the intrastate rate.

6. COMMERCE ⟸85 — INTERSTATE COMMERCE COMMISSION—AUTHORITY.

The authority of the Interstate Commerce Commission to make a preliminary determination of administrative questions is not limited to those cases where the question involved is whether a particular rate is reasonable, or a particular practice is discriminatory, but applies to any practice of a carrier which gives rise to the application of a rate, such as the practice of routing intrastate shipments over the carrier's interstate line.

7. COMMERCE ⟸89 — INTERSTATE COMMERCE COMMISSION—AUTHORITY.

The rule that the courts cannot be resorted to until administrative questions have been determined by the Interstate Commerce Commission, applies, though the question, which was one of routing shipments, involved an intrastate, as well as an interstate, route.

In Error to the Supreme Court of Minnesota.

Actions by M. J. Solum by the Monarch Elevator Company, and by the Duluth Elevator Company against the Northern Pacific Railway Company. Judgments for the several plaintiffs were in each instance affirmed by the Supreme Court of Minnesota (133 Minn. 93, 461, 157 N. W. 996, 998; 136 Minn. 468, 162 N. W. 1087), and defendant brings error in each case. Judgments in the two actions first mentioned reversed, and writ of error in the third dismissed.

Messrs. Charles Donnelly and C. W. Bunn, both of St. Paul, Minn., for plaintiff in error.

Messrs. Henry C. Flannery, of Minneapolis, Minn., and Lyndon A. Smith, of St. Paul, Minn., for defendant in error Solum.

Mr. Ernest E. Watson, of St. Paul, Minn., for other defendants in error.

*478 * Mr. Justice BRANDEIS delivered the opinion of the Court.

These three cases were heard together. In each of them the plaintiff below sought to recover from the Northern Pacific Railway Company, in a state district court of Minnesota, an amount equal to that by which the freight collected for coal carried on an interstate route from Duluth to some other city in the state, exceeded the rate prescribed by the Minnesota law for carriage between those points on another route, wholly within the state. In each case judgment was entered in the trial court for the plaintiff for such amount; and the judgments were affirmed by the Supreme Court of Minnesota. Each case comes here on writ of error.

Carlton is situated on the Northern Pacific Railway, west of Duluth. Between these Minnesota cities that company operates two lines of railroad, each mainly single track. The northerly line, about 20.9 miles in length, lies wholly within Minnesota; the southerly line, 27.5 miles in length, extends for 11.7 miles through Wisconsin. The southerly is the original Northern Pacific line which was built in 1885. It has relatively light grades. The northerly line was built by the St. Paul & Duluth Railroad Company and came under the management of the Northern Pacific in 1900. It has a heavy upgrade from Duluth to Carlton. Since 1900 both lines have been operated continuously by the Northern *479 *Pacific. Because of these grades, the northerly route has been used almost exclusively for such Duluth shipments as are in-bound and the southerly route has been used for such as are out-bound. Until June, 1907, the rates were the same over the two routes They were duly filed with the Minnesota Railroad and Warehouse Commission and with the Interstate Commerce Commission.

In 1907 the Legislature of Minnesota fixed for intrastate carriage of coal, maximum rates which were lower than the published rates theretofore charged. The rates so fixed were to take effect June 1, 1907; but before that date their enforcement was enjoined by the proceedings which were reviewed in the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. This injunction remained in effect until July, 1913, when it was dissolved pursuant to that decision. Until then the Northern Pacific continued to charge the published rates (and therefore the same rates) on all shipments of coal from Duluth to Minnesota points, whether moving via the interstate route or the intrastate route. After dissolution of the injunction, the company refunded on the few shipments which had moved over the intrastate route, the amount by which the charges actually collected exceeded the charges which would have been collected had the rates fixed by the Legislature been observed. It refused, however, to make refunds on shipments made over the interstate route, on the ground that the state statute did not affect them.

Among such shipments were those involved in these cases, from Duluth by the interstate route to three Minnesota points, Hitterdal, Battle Lake, and Hawley, cities on the Northern Pacific lying west of Carlton. The shipment in each case was delivered to the Railway without any instruction as to how it should be routed; but the plaintiffs contended that, in the absence of instructions, it was the duty of the carrier to select that *480 *route which was for the interest of the shipper, namely the intrastate route, because it would prove to be the cheaper, if the rates prescribed by the state were upheld. The several shippers claimed that they were entitled to the same refunds which would have been made if the coal had been carried on the

intrastate route; and the suits were brought to recover these amounts.

The railway answered, in the first two cases, that, at the time of the shipments, the rates published were (because of the injunction in effect) identical on the two routes; that "in the ordinary and proper and economical operation of its property, it was necessary to move, and this defendant in general did and does now, move all out-bound shipments from Duluth via the interstate line and all in-bound shipments into Duluth via the intrastate line, and that to have carried the shipments referred to in the complaint to their destination * * * via said intrastate line instead of via the interstate line, over which they were actually carried, would have entailed great additional expense upon this defendant," and that these rates were just and reasonable for the service performed and were collected pursuant to the tariffs published and filed with the Interstate Commerce Commission. In the third case the answer alleged, in addition, that on December 24, 1915, and prior to the commencement of that action, the Interstate Commerce Commission had, in Holmes & Hallowell Company v. Great Northern Railway Company, 37 Interst. Com. Com'n, 627, decided that the practice of defendant in routing its westbound shipments from Duluth over its interstate line was a proper and reasonable practice and had denied the application for reparation on shipments of coal made over that route.

[1-3] The judgments entered were upon demurrers to the answers. That in No. 205 was entered May 28, 1916; that in No. 206 on May 23, 1916; that in No. 526 on May 2, 1917. 133 Minn. 93, 157 N. W. 996; 133 Minn. 461, 157 N. W. 998; 136 Minn. 468, 162 N. W. 1087. * In each case it is assigned as error that the state court held that the cause of action therein is not affected by the federal statute regulating interstate commerce, and also that the state court assumed jurisdiction in advance of a determination by the Interstate Commerce Commission as to whether the practice of the Northern Pacific Railway, in sending via its interstate route all shipments of the character involved in these cases, was reasonable. In the third case the additional error is assigned that the court held that the intrastate rate should be applied, although the Interstate Commerce Commission had found that the practice of routing out-bound shipments from Duluth via the interstate route was proper and reasonable. The objection that the court lacked jurisdiction to entertain the proceeding was not made in the answers in the trial court; but it was insisted upon before the Supreme Court of Minnesota, was considered and overruled by that court (133 Minn. 93, 97, 157 N. W. 996), and is available here. In numbers 205 and 206 judgment was entered before the Act of September 6, 1916. A federal question is involved; and the cases are properly here under section 237 of the Judicial Code. In No. 526 the judgment was entered after the Act of September 6, 1916, c. 448 (39 Stat. 726), took effect. In that case there was not drawn in question the validity of a statute or treaty nor the validity of any authority exercised under the state. Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245 U. S. 162, 38 Sup. Ct. 58, 62 L. Ed. —; Ireland v. Woods, 246 U. S. 323, 38 Sup. Ct. 319, 62 L. Ed. —; Stadelman v. Miner, 246 U. S. 544, 38 Sup. Ct. 359, 62 L. Ed. —. The writ of error in No. 526 must therefore be dismissed, although the defendant in error has not objected to the jurisdiction of this court.

[4-6] We proceed to consider Nos. 205 and 206. In those cases the Supreme Court of Minnesota declared that the carrier's duty was governed by the common law and it stated the applicable principle as follows (133 Minn. 96, 157 N. W. 997): 482

* "Where a railroad company operates two* lines of railroad between the same points, and the freight rate over one line is less than such rate over the other line, if other conditions are reasonably equal, it is the duty of the company to transport shipments between those points over the line which will give the shipper the benefit of the cheaper rate. To justify transporting such shipments over the other line, and thereby compel the shipper to pay the higher rate, the company must show that such line was chosen by the shipper, or that the circumstances or exigencies were such that a proper regard for the interests of the shipper precluded the use of the cheaper line."

In the absence of shipping instructions it is ordinarily the duty of the carrier to ship by the cheaper route. But the duty is not an absolute one. The obligation of the carrier is to deal justly with the shipper, not to consider only his interests and to disregard wholly its own and those of the general public. If, all things considered, it would be unreasonable to ship by the cheaper route, the carrier is not compelled to do so. The duty is upon the carrier to select the cheaper route only "if other conditions are reasonably equal." Resort to the more expensive route may be justified. And the justification may rest either upon the peculiar circumstances of a particular case or upon a general practice. In the cases before us the justification is rested upon a general practice. The answers allege that, because of the grades of the two lines, all outbound shipments were and are in general moved over the southerly route on account of the very great expense which another arrangement would entail. It may well be, under such circumstances, that carriage over the interstate route would be justified, even if it appeared that it was feasible to haul freight out of Duluth over the intrastate line. Whether the practice of the carrier of shipping over the interstate route was reasonable, when a lower* intra-* state route was open to it, presents an administrative question, one of perhaps considerable complexity. 483

The railway contends that, since the administrative question upon which its liability depends involves the reasonableness of a practice in interstate commerce and the traffic actually moved in interstate commerce, the court had no jurisdiction to adjudicate the controversy until that administrative question had been determined by the Interstate Commerce Commission. The shipper, on the other hand, urges that the rule which requires such preliminary determination of administrative questions by the Commission applies only to those cases where the question involved is whether a particular rate is unreasonable or whether a particular practice is discriminatory. But the rule is not so limited. It applies, likewise, to any practice of the carrier which gives rise to the application of a rate. Texas & Pacific Ry. Co. v. American Tie & Timber Co., Ltd., 234 U. S. 138, 147, 34 Sup. Ct. 885, 58 L. Ed. 1255; Pennsylvania Railroad Co. v. Puritan Coal Co., 237 U. S. 121, 131, 35 Sup. Ct. 484, 59 L. Ed. 867; Pennsylvania Railroad Co. v. Clark Brothers Coal Mining Co., 238 U. S. 456, 469, 35 Sup. Ct. 896, 59 L. Ed. 1406. The Interstate Commerce Commission has frequently entertained proceedings for refunds for misrouting under such circumstances.[1] Indeed, long before these suits were filed, proceedings had been begun before the Interstate Commerce Commission against this and other railroad companies to secure the refunds of amounts paid for shipment over the interstate routes between Minnesota points in excess of that which would have been payable, if shipment had been made over the intrastate routes. Holmes & Hallowell Co. v. Great Northern Ry. Co., 37 Interst. Com. Com'n, 627, *630, 645, 649. And before the judgments were entered by the Supreme Court of Minnesota in these cases the Interstate Commerce Commission had determined that, under the circumstances, "the carrier was not required by law to change its methods of operation and abandon the use of its more favorable interstate line," and had refused to grant refunds in respect to the shipment of other commodities, under circumstances precisely like those presented here.

[7] The fact that the administrative question presented involves an intrastate as well as interstate route does not prevent the application of the rule, that the courts may not be resorted to until the administrative question has been determined by the Commission. It is sufficient that one of the routes is interstate. Compare the Minnesota Rates Cases, 230 U. S. 352, 419–420, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; Houston, E. & W. Texas Ry. Co. v. United States, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341.

In Nos. 205 and 206 judgments reversed.

In No. 526 writ of error dismissed.

[1] Willman & Company v. St. Louis, Iron Mountain & Southern Railway Co., 22 Interst. Com. Com'n, 405; Lathrop Lumber Co. v. Alabama Great Southern Railroad Co., 27 Interst. Com. Com'n, 250; Texarkana Pipe Works v. Beaumont, Sour Lake & Western Railway Co., 38 Interst. Com. Com'n, 341; McCaull-Dinsmore Co. v. Great Northern Railway Co., 41 Interst. Com. Com'n, 178; Cardwell v. Chicago, Rock Island & Pacific Railway Co., 42 Interst. Com. Com'n, 730.

(247 U. S. 490)

CHICAGO, M. & ST. P. RY. CO. et al. v. MINNEAPOLIS CIVIC & COMMERCE ASS'N.

(Argued May 1 and 2, 1918. Decided June 10, 1918.)

No. 283.

1. CARRIERS ⟸201 — TERMINAL CHARGES — EVIDENCE.

The lines of a railroad company owning less than three miles of track *held* part of the terminal facilities of two trunk line companies, which owned all its stocks and bonds.

2. CARRIERS ⟸199 — CHARGES — STOCK CONTROL—EFFECT.

Where trunk lines companies owned all of the stock and controlled a railway company whose entire mileage was part of their terminal facilities, they cannot, on the theory of its separate corporate entity, impose on shippers and industries, reached by such company's line, charges in excess of their ordinary rates to the terminal point, for, despite the rule that ownership of capital stock in one corporation by another does not create an identity of corporate interest, or render the stockholding company the owner of the property of the other, the courts, where stock ownership is resorted to for the purpose of controlling a subsidiary company, so that it may be used as a mere instrumentality of the owning company or companies, will disregard the separate corporate identity of the subsidiary company.

In Error to the Supreme Court of the State of Minnesota.

Proceeding by the Minneapolis Civic & Commerce Association against the Chicago, Milwaukee & St Paul Railway Company and others, which was begun before the Minnesota Railroad and Warehouse Commission. An order of the Commission, which was affirmed by the district court, having been affirmed by the Supreme Court of the state of Minnesota (134 Minn. 169, 158 N. W. 817), the Railway Companies bring error. Affirmed.

Messrs. James B. Sheean, of St. Paul, Minn., O. W. Dynes, of Chicago, Ill., F. W. Root, of Minneapolis, Minn., and Edward M. Hyzer, of Chicago, Ill., for plaintiffs in error.

Mr. Frank J. Morley, of Minneapolis, Minn., for defendant in error.

*491 *Mr. Justice CLARKE delivered the opinion of the Court.

We shall adopt the designation of the parties which is used in the record: The Chicago, Milwaukee & St. Paul Railway Company as the "Milwaukee Company"; the Chicago, St. Paul, Minneapolis & Omaha Railway Company as the "Omaha Company"; the Minneapolis Eastern Railway Company as the "East-

ern Company"; the Minneapolis Civic and Commerce Association as the "Civic Association," and the Railroad and Warehouse Commission of the State of Minnesota as the "Commission."

This proceeding originated in a petition filed by the Civic Association with the Commission against the three railway corporations plaintiffs in error, in which it is alleged that the tracks of the Eastern Company are mere switching or terminal facilities, in the city of Minneapolis, of the Milwaukee and Omaha Companies, and that an unreasonable extra charge is made for the receipt and delivery of cars over them. The prayer is that the plaintiffs in error be required to treat the tracks of the Eastern Company as if they were a part of the terminal systems of the Milwaukee and Omaha Companies, and that they be required to publish and maintain fair and reasonable tariffs applicable to traffic moving over them.

A hearing upon this petition resulted in findings of fact by the Commission, among others: that the Eastern Company was then operating only one mile of main track and one mile and a half of yard track and sidings in the city of Minneapolis; that the Milwaukee and Omaha Companies each owned one-half of its capital stock and were in control of its operations; and that, assuming to be an independent railroad company, the Eastern Company had filed tariffs with the Interstate Commerce Commission and with the Minnesota Commission, pursuant to which it was charging and collecting, in addition to the line rate from point of origin, an extra charge of $1.50 per car for inbound loaded cars and 10 cents per ton, with a minimum of $1.50 per car, for outbound loaded cars, moving over its tracks. *492

As conclusions of law the Commission found that the tracks of the Eastern Company were a part of the terminal property of the Milwaukee and Omaha Companies; that it was the legal duty of these companies to deliver cars to and to receive them from industries on the tracks of the Eastern Company without charge other than that made for the line haul; and that the extra charge which the Eastern Company was making resulted in discrimination against inbound shippers of grain to industries located upon its tracks.

Upon these findings of fact and conclusions of law the Commission entered an order, requiring that the three companies cease charging $1.50 per car for inbound shipments over either the Milwaukee or Omaha lines which are delivered over the Eastern Company's tracks to industries located upon them or to connecting carriers; that the Eastern Company cease from charging any sum for delivering carload shipments of freight moving from connecting carriers to the Milwaukee or Omaha Companies, or moving from mills and elevators located on the Eastern Company's tracks to the Milwaukee or Omaha Companies; and that the Omaha and Milwaukee companies in the future shall operate the tracks of the Eastern Company as a part of the terminal property of each of them in the city of Minneapolis. The order is made applicable only to intrastate shipments of freight.

On appeal to a state district court the order of the Commission was affirmed and adopted as the order of the court, and the decision of the Supreme Court of Minnesota affirming this judgment is now before us for review. *493

The contention of the railway companies in this court is stated by them "to be reduced to the single proposition": That the Supreme Court of Minnesota erred in affirming the judgment of the district court in finding, as did the Commission that "the tracks operated by the Eastern Company are important, convenient and necessary terminal facilities of the Milwaukee and Omaha Companies, and that these companies directly control and operate the Eastern Company;" and in adjudging, "that the Milwaukee and Omaha Companies be required to operate the Eastern Company's tracks as a part of their terminal property at Minneapolis, without making any extra charge for moving traffic over them."

Review by this court is prayed for on the ground that to give effect to the judgment and order of the Minnesota court will deprive each of the three railroad companies of its property without compensation and without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and earnestly insisting that the findings of fact upon which the judgment proceeds are without support in the evidence, the plaintiffs in error urge that it be determined from the entire record before us whether substantial evidence was introduced to sustain the denial of their claimed federal right. Interstate Amusement Co. v. Albert, 239 U. S. 560, 566, 36 Sup. Ct. 168, 60 L. Ed. 439; Jones National Bank v. Yates, 240 U. S. 541, 552, 36 Sup. Ct. 429, 60 L. Ed. 788.

Thus, the question presented for our decision is whether the Eastern Company, in form a corporate entity, separate and distinct from the Milwaukee and Omaha Companies, is in reality an independent carrier, exercising an independent control over the railroad to which it holds the legal title and over the conduct of its business affairs, or whether it is a mere agency or instrumentality of the two corporations, which own all of its capital stock, through which they collect an extra charge from the public for rendering by indirection a service which as common carriers they are legally required to render without such charge under the conditions of operation which prevail at Minneapolis. *494

[1] It is obvious that this is a mixed question of fact and of law, and from the findings of fact made by the Commission and by

the district court, which differ only in unimportant details, and from evidence undisputed in the record, we derive the following statement, which we think embraces all that is essential to a decision of the case:

The Eastern Company is a Minnesota corporation, with an authorized capital stock of $1,000,000, organized in 1878 for the declared purpose of building and operating a railroad from the city of Minneapolis to the city of St. Paul, with branches connecting with all railroads now built or hereafter to be built to or into said cities, and with branches to the mills and manufacturing establishments located therein.

The formal organization of the company was by a group of millowners, but before any right of way was acquired or construction work done the Milwaukee and Omaha Companies came into exclusive control of the corporation and a board of directors satisfactory to them was elected, with the result that the only road which the company ever built or operated (omitting small fractions) was one mile of main track and one mile and a half of yard track and sidings in the city of Minneapolis. At the time of the trial the Eastern Company served several mills and warehouses and one elevator, it had no stations or freight depots, its only rolling stock was two engines, and the average number of its employés varied from 20 to 30 men. Its tracks are used for interchange by the Milwaukee and Omaha lines, but other companies use them for this purpose to such a limited extent, that the part
*495 of the Commission's order relating to such use is neglected in the evidence and arguments and in the decisions of the state courts.

Almost immediately after the organization of the Eastern Company, the three companies entered into a written contract, effective for over 39 years, until May 1, 1918, which is of much significance in determining the decisive fact in the case, as we have stated it.

This contract provides:

(1) That only 300 shares of the authorized 10,000 shares of capital stock of the Eastern Company shall be issued, and, of these, 75 shares each must be issued to the Omaha and Milwaukee Companies, 145 shares to a trustee for the Eastern Company, and the remaining 5 shares shall be issued as qualifying shares to directors. The 145 trust shares "shall not be transferable, except by the written consent of all (three) of the said parties hereto, and any transfer thereof without such consent shall be void and of no effect."

(2) The Eastern Company shall execute in proper form 150 bonds of $1,000 each and a mortgage on all property and franchises of the company to secure their payment. The Milwaukee and Omaha Companies agree each to purchase, at 80 per cent. of their par value, one-half the amount of such of these bonds as it may be necessary to issue to pay for the right of way, construction and equipment of the railroad;

(3) That the Milwaukee and Omaha Companies shall have "equal and the same rights in and to said railway * * * in all respects," that they shall pay the same charge for switching their respective cars by said railway, and that no partiality or favor shall be shown to either;

(4) That the superintendent having charge of the operation of the railroad, shall be appointed "by the consent and mutual agreement of all parties to these presents";
*496 * (5) That the Eastern Company shall charge all parties one dollar for switching each loaded car, but a rebate of fifty per cent. of this charge shall be made to the Milwaukee and Omaha Companies;

(6) If any other company having equal facilities with the Eastern Company for reaching mills in Minneapolis shall promptly and satisfactorily do the switching for the second and third parties (the Milwaukee and Omaha Companies) then the Eastern Company with the written consent of the Omaha and Milwaukee Companies, will do switching for such railroad companies over the said railroad of the Eastern Company on the same terms that switching is done for the said second and third parties (the Milwaukee and Omaha Companies) over such other railroad but without rebate to any company.

It is quite true, as is argued, that some of the provisions of this contract have been departed from, and that others have been rendered unlawful and void by statutes enacted, and by decisions of courts rendered, since its date. But this does not lessen its evidential value in determining whether the interest of the Milwaukee and Omaha Companies in the Eastern Company was that of mere stockholders in an independent public service corporation or whether they intended to and did exercise the power which they possessed as stockholders to immediately and directly control the property and the conduct of the business of the Eastern Company.

Whether because the Milwaukee and Omaha Companies distrusted each other or for other cause, it is plain that this contract was designed to take away from the board of directors of the Eastern Company, the usual and lawful governing body of a corporation, the normal legal control of the company's affairs in several most important respects. It deprived the board of the power: To issue the capital stock of the company and to finance its affairs; to select a superintendent *497
to operate the company's two and one-half miles of track, by requiring that such selection be made only with the consent and mutual agreement of the three companies; to make mutual agreements for the interchange of business with any other company except with the mutual consent of the Milwaukee and Omaha Companies; and it renders one-

half (save five shares) of the stock which it permits to be issued, transferable only with the written consent of the Milwaukee and Omaha Companies. Thus, the making of this contract was an obvious surrender by the Eastern Company of substantially all freedom of corporate action and an assumption of control over that company by the Milwaukee and Omaha Companies, which converted it largely into a mere agency or instrumentality for doing their bidding.

That this preliminary program of control was carried forward to realization is abundantly shown by the record.

An accumulated surplus of $95,000 was distributed by the Eastern Company in the form of stock dividends in 1906, by dividing it equally between the Milwaukee and Omaha Companies, and when the original seven per cent. loan of $150,000 was refunded into a four and one-half per cent. loan the new bonds were taken equally by the two companies. Thus the equal interest of the two owning companies and the financial dependence of the Eastern Company were maintained.

The management and control of all the operations of the Eastern Company has always been kept in charge of a "managing committee" of two members, one of whom for many years before the evidence was taken was the general manager of the Omaha Company and the other the general superintendent of the Milwaukee Company. The Eastern Company did not pay either of these men any salary for their services.

The auditor of the Omaha Company has been the auditor of the Eastern Company, which paid no part of his salary, and the established practice has long been for the one bookkeeper of the Eastern Company to take his journal and ledger to the auditor of the Omaha Company monthly for verification.

Seven of the nine directors of the Eastern Company at the time the evidence was taken were officers either of the Milwaukee or Omaha Company; the eighth, the attorney of the Eastern, had desk room in the Milwaukee Company's legal department, of which he had recently been a member; and the ninth director, the president, was not an employé of either of the two owning companies.

With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is and it is sheer sophistry to argue that, because it is technically a separate legal entity, the Eastern Company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it and therefore free to impose separate carrying charges upon the public.

The record further shows that the Milwaukee and Omaha Companies separately own many tracks in Minneapolis, on which large mills and elevators are located, and that they render to such industries "substantially the same service" as is required in delivering and receiving cars to and from like industries on the Eastern Company's track for which they make no charge whatever in addition to the line-haul rate. The general manager of the Omaha Company, who was one of the two members of the "managing committee" of the Eastern Company, testifies that the line-haul rate to Minneapolis on the Omaha line "includes switching to any industry on its tracks" in that city regardless of the relative distance or expense of such delivery; that this rule prevails at all points on the Omaha line; that, generally speaking, this is the custom of all railroads, and that if the Eastern tracks were exclusively owned by the Omaha Company deliveries to and from industries located upon them would be made without any switching charge additional to the line-haul rate. The Milwaukee Company also delivers on tracks exclusively owned by it at Minneapolis, with charge additional to the line-haul rate.

The Eastern Company, assuming the character of an independent common carrier, pursuant to tariffs filed, collects the switching charge, which is objected to, of $1.50 per car on inbound loaded cars and a charge of 10 cents per ton, with a minimum charge of $1.50 per car, on outbound loaded cars, which move over its tracks, in addition to the line-haul rate. But the practice of the Milwaukee and Omaha Companies (with negligible exceptions) is to "absorb" this extra charge made against outbound cars, so that, as both the Commission and the court find, "from a practical standpoint shippers on inbound grain are the only persons who have to pay the charge" of the Eastern Company.

The Eastern Company does not issue bills of lading and does not make any collection from shippers, but charges its switching rate against the Omaha and Milwaukee Companies, and it is paid by them from the line-haul rate on outbound traffic, and from the line-haul rate plus the switching charge, which they also collect, on inbound grain. Under such a system of doing business, the controversy in the case really relates only to the charge of the Eastern Company on inbound grain, for as to all other traffic the charge by the Eastern Company is simply a bookkeeping one which does not involve any extra switching charge to the shipper. Thus, the charge of the Eastern Company, when paid by the shipper in addition to the line-haul rate, is obviously a discrimination against industries located on the Eastern Company's tracks when compared with those similarly situated on other industrial spur delivery tracks which are wholly owned by either company.

This discussion of the evidence in the case renders it very clear that the purpose of the Milwaukee and Omaha Companies from the beginning was to construct and operate but

one track to the group of industries to be served, instead of each building and maintaining its own track, and to construct and use that track in common so that each might have the benefit of it as fully as if it were the sole owner. To accomplish this end they resorted to the familiar device of incorporating the Eastern Company, and in order that their purpose might not be defeated in the future, by the design or business necessity of either company, the contract between them which we have discussed, was entered into to prevent the corporate organization of the Eastern Company and the control of its operations from being changed by either owning company without the consent of the other, and the evidence makes it very clear that all through its corporate life the Eastern organization has been consistently used as a mere agency of the two owning companies to accomplish their original purpose.

[2] Much emphasis is laid upon statements made in various decisions of this court that ownership, alone, of capital stock in one corporation by another, does not create an identity of corporate interest between the two companies, or render the stockholding company the owner of the property of the other, or create the relation of principal and agent or representative between the two. Pullman's Palace Car Co. v. Missouri Pacific Railway Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; Peterson v. Chicago, Rock Island & Pacific Railway Co., 205 U. S. 364, 391, 27 Sup. Ct. 513, 51 L. Ed. 841; United States v. Delaware & Hudson Co., 213 U. S. 366, 413, 29 Sup. Ct. 527, 53 L. Ed. 836; Interstate Commerce Commission v. Stickney, 215 U. S. 98, 108, 30 Sup. Ct. 66, 54 L. Ed. 112; United States v. D., L. & W. R. R. Co., 238 U. S. 516, 529, 530, 35 Sup. Ct. 873, 59 L. Ed. 1438. And it is argued that since the order of the Commission requires that the tracks, the title to which is in the Eastern Company, be treated as the property of the stock owning companies, the effect of it, if enforced, will be to deprive the Eastern Company of its property without compensation and to render valueless its capital stock owned by the Milwaukee and Omaha Companies.

While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. United States v. Lehigh Valley R. R. Co., 220 U. S. 257, 273, 31 Sup. Ct. 387, 55 L. Ed. 458; United States v. D. L. & W. R. R. Co., 238 U. S. 516, 35 Sup. Ct. 873, 59 L. Ed. 1438. In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.

Satisfied as we are by the evidence that the Eastern Company is a completely controlled agency of the two companies which own its capital stock, we agree with the Supreme Court of Minnesota that the fact that the legal title to what are obviously terminal or spur delivery tracks is in the Eastern Company should not be permitted to become the warrant for permitting a charge upon shippers greater than they would be required to pay if that title were in the owning companies. The order of the Commission, affirmed by the Supreme Court of Minnesota, so far from being arbitrary, is plainly just, and clearly it does not deprive the plaintiffs in error of their property without compensation or without due process of law, by requiring, as it does, that for rate-making purposes the Milwaukee and Omaha Companies shall extend to shippers over their tracks the legal title to which is in the Eastern Company, equality of treatment with that which they give to shippers over their separately owned tracks, where similar service is rendered.

The claim that an unlawful burden is imposed upon interstate commerce by requiring that the one delivery track here involved shall be treated with respect to intrastate traffic precisely as many other similarly used and situated tracks have always been treated by the owning companies is too unsound to merit consideration.

The judgment of the Supreme Court of Minnesota is

Affirmed.

(247 U. S. 461)

STATE OF ARKANSAS v. STATE OF TENNESSEE.

(Argued Oct. 9, 1917. Decided June 10, 1918.)

No. 4, Original.

Original suit by the State of Arkansas against the State of Tennessee to determine the boundary line between the states. Interlocutory decree rendered in accordance with opinion delivered March 4, 1918.

See, also, 246 U. S. 158, 38 Sup. Ct. 301, 62 L. Ed. —.

Mr. Caruthers Ewing, of Memphis, Tenn., for complainant.

Messrs. G. T. Fitzhugh, of Memphis, Tenn., Chas. T. Cates, Jr., of Knoxville, Tenn., and Albert W. Biggs, of Memphis, Tenn., for defendant.

Mr. Justice PITNEY delivered the opinion of the court.

This cause came on to be heard at this term and was argued by counsel; and thereupon and on consideration thereof, it was ordered, adjudged and decreed as follows viz.:

1. The true boundary line between the states of Arkansas and Tennessee, aside from the question of the avulsion of 1876, hereinafter mentioned, is the middle of the main channel of navigation of the Mississippi river as it existed at the Treaty of Peace concluded between the

United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.

2. By the avulsion of March 7, 1876, which resulted in the formation of a new channel known as the Centennial Cut-Off, the boundary line between said states was unaffected, and remained in the middle of the former main channel of navigation as above defined.

3. The boundary line between the said states should now be located along that portion of the bed of said river that was left dry as the result of said avulsion, according to the middle of the main navigable channel as it existed at the time the current ceased to flow therein as the result of said avulsion.

*462 4. A commission consisting of C. B. Bailey, of Wynne, *Arkansas, Horace Vandeventer, of Knoxville, Tennessee, and Charles A. Barton, of Memphis, Tennessee, competent persons, is here and now named by the court, upon the suggestion of counsel, to run, locate, and designate the boundary line between said states along that portion of the bed of said river that was left dry as the result of said avulsion, in accordance with the above principles: Commencing at the upper end of the abandoned portion of the river bed at or about the beginning or head of said Centennial Cut-Off, and thence following along the middle of the former main channel of navigation by its several courses and windings to the lower end of the abandoned portion of said river bed at or about the terminus or outlet of said Centennial Cut-Off.

5. In the event the said commission cannot now locate with reasonable certainty the line of the river as it then ran, that is, at or immediately before the avulsion of 1876, it shall report the nature and extent of the erosions and accretions that occurred in the old channel prior to its abandonment by the current as the result of said avulsion, and in said report, if necessary to be made in obedience to this paragraph of the decree, said commission shall give its findings of fact and the evidence on which the same are based.

6. Before entering upon the discharge of their duties, each of said commissioners shall be duly sworn to perform faithfully, impartially, and without prejudice or bias the duties herein imposed; said oaths to be taken before the clerk of this court, or before the clerk of any District Court of the United States, or before an officer authorized by law to administer an oath in the state of Arkansas or of Tennessee, and returned with their report; that said commission is authorized and empowered to make examination of the territory in question, and to adopt all ordinary and legitimate methods in *463 the ascertainment of the true location of said boundary line; to summon witnesses and take evidence under oath; to compel the attendance of witnesses and require them to testify; to call for and require the production of papers and other documentary evidence; such evidence, however, to be taken upon notice to the parties, with permission to attend by counsel and cross-examine the witnesses; and all evidence taken and all exceptions thereto and rulings thereon shall be preserved and certified and returned with the report of said commissioners; and said commissioners are also at liberty to refer to and consult the printed record in the cause and the opinion of this court delivered on March 4, 1918, and to do all other matters necessary to enable them to discharge their duties and attain the end to be accomplished conformably to this decree.

7. It is further ordered that should any vacancy or vacancies occur in said board of commissioners by reason of death, refusal to act, or inability to perform the duties required by this decree, the Chief Justice of this court is hereby authorized and empowered to appoint another commissioner or commissioners to supply such vacancy or vacancies, the Chief Justice acting upon such information in the premises as may be satisfactory to him.

8. It is further ordered that said commissioners do proceed with all convenient dispatch to discharge their duties conformably to this decree, and they are authorized, if they deem it necessary, to request the co-operation and assistance of the state authorities of Arkansas and Tennessee, or either of those states, in the performance of the duties hereby imposed.

9. It is further ordered that the clerk of this court shall forward at once to the Governor of each of said states of Arkansas and Tennessee and to each of the commissioners hereby appointed a copy of this decree and of the opinion of this court delivered herein March 4, 1918, duly authenticated.

*464 *10. The said commissioners shall make a report of their proceedings under this decree as soon as practicable and on or before such date as hereafter shall be fixed by the court, and shall return with their report an itemized statement of services performed and expenses incurred by them in the performance of their duties.

11. All other matters are reserved until the coming in of said report.

(247 U. S. 484)

AIKINS v. KINGSBURY, Register of State Land Office.

(Submitted April 25, 1918. Decided June 10, 1918.)

No. 265.

1. Constitutional Law ⇐123 — Public Lands ⇐54(7)—Impairment of Obligation of Contract.

Where a contract for the sale of school lands, in accordance with the California statute authorizing the sales, provided for foreclosure to collect unpaid purchase money and for redemption by the purchaser, those provisions related to the remedy, as distinguished from the right; so the act of 1889 (St. 1889, p. 428), providing for forfeiture of all rights under the contract in event of the purchaser's failure to pay unpaid interest within six months after the passage of the act, was not invalid, as impairing the obligation of the contract, particularly as the modifications in the remedy were within the power of the state, and the change deprived the purchaser of no substantial rights.

2. Constitutional Law ⇐42—Due Process of Law—Persons Entitled to Urge.

A purchaser of California school lands, who was so long in default that he could not have taken advantage of provisions in the earlier law for redemption, cannot attack the act of 1889, providing for the forfeiture of the rights of such purchasers in event of their failure to pay all unpaid interest within six months after the passage of the act, on the ground that it deprived him of his property without due process of law, because failing to allow a period for redemption.

3. Constitutional Law ⇐42 — Persons Entitled to Raise Question.

One assailing a law as unconstitutional must show that it deprives him of some constitutional right.

In Error to the Supreme Court of the State of California.

Petition by B. M. Aikins for writ of mandate against W. S. Kingsbury as Register of the State Land Office. A judgment of the superior court granting the petition was af-

firmed by the District Court of Appeals, and this in turn was reversed by a decision of the Supreme Court of the State of California (170 Cal. 674, 151 Pac. 145), and petitioner brings error. Affirmed.

Mr. R. P. Henshall, of San Francisco, Cal., for plaintiff in error.

Mr. U. S. Webb, of San Francisco, Cal., for defendant in error.

*485 * Mr. Justice CLARKE delivered the opinion of the Court.

On June 3, 1869, the state of California sold to Charles A. B. Brackett three hundred and twenty acres of school land, and delivered to him a "certificate of purchase" for it. Twenty per cent. of the purchase money was payable at the time of the purchase and the remainder "within one year after the passage of any act of the Legislature requiring such payment, or before, if desired by the purchaser."

The unpaid purchase money was to bear interest at the rate of ten per cent. per annum, payable in advance.

The purchaser paid interest to January 1, 1873, and nothing further for thirty-eight years, when, on October 26,*1911, a state official, without authority to waive the default, accepted the amount of the unpaid purchase money and interest from the plaintiff in error, as transferee of the certificate, who thereupon demanded a patent for the land, which was refused for the reason that on December 29, 1886, a certificate of purchase for the same land had been issued by the state to Michael Phillips, on which the principal and interest was paid in full on August 28, 1911.

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Upon this refusal by the state, the plaintiff in error filed the petition in this case "for a writ of mandate" to compel the defendant in error, as Commissioner of the Land Office of the state to prepare a patent for the land in controversy and to send the same to the Governor of the state, together with a certificate that the laws had been complied with, and that he as transferee of Charles A. B. Brackett was entitled thereto. Such a suit is said by the Supreme Court of California to be "in effect an action to require specific performance on the part of the state" of the contract evidenced by the certificate of purchase.

A judgment of the superior court granting the prayer of the petition was affirmed by the District Court of Appeals, and this in turn was reversed by the decision of the Supreme Court of the state which is now before us for review.

[1] In 1889 (St. 1889, p. 428) the Legislature of California passed an act providing that in all cases in which a certificate of purchase of public land had been issued prior to March 27, 1872, on which arrears of principal and interest had remained due and unpaid for five years, and in which, prior to the passage of the act, the state had issued to a subsequent purchaser another certificate for the same land, the owner of the first issued certificate should be deemed to have lost the right to the land or to complete the contract for the purchase of it, unless he should pay all unpaid interest within six months from the passage of the act.

*487 * If this act is a valid law it is obvious that it cut off the plaintiff in error's transferror from all interest in the land in controversy, for the Brackett certificate was issued prior to March 27, 1872, interest on it had been due and unpaid for sixteen years, and another certificate had been issued to Phillips, when the act was passed, and nothing further was paid until 1911.

But the plaintiff in error claims that this act of 1889 is invalid because it impairs the obligation of his contract of 1869 and deprives him of his property without due process of law.

These are large claims, made in impressive terms, but in reality the only obligations of this simple contract were, that the state on the one hand, should furnish a patent to the land when it should be paid for at the times and in the manner stipulated, and that the purchaser, on the other hand, should make payment as he had agreed to make it.

For the enforcement of the contract the law gave to the state a remedy by foreclosure, in a court proceeding, for default of the purchaser, and to the purchaser or his assigns was given the privilege to redeem at any time before the expiration of twenty days from entry of judgment of foreclosure against him.

And now, after having neglected, if not repudiated, his obligation under the contract, by failing to pay the interest due upon it for 16 years before the act was passed and for 22 years thereafter, the plaintiff in error comes complaining that the state by the act of 1889 impaired his right under it by taking away the twenty-day period of redemption, which the prior law allowed, even though a six months' period of redemption, from the passage of the act, was substituted for it.

It is sufficient answer to this contention to say that:

The right of the state to foreclose such a contract for default in payment, and the right of the purchaser to *redeem after a* default decree, relate to the remedy as distinguished from the obligation of the contract, and both of these rights are constitutionally subject to modification by the state, within limits which were not exceeded in the act before us, as is decided in Wilson v. Standefer, 184 U. S. 399, 22 Sup. Ct. 384, 46 L. Ed. 612, and in Waggoner v. Flack, 188 U. S. 595, 23 Sup. Ct. 345, 47 L. Ed. 609, which are strikingly similar in their facts and in their applicable law to the case we are considering. The right of the purchaser to redeem under the prior law was limited to paying before the expiration of twenty days

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from entry of default "the amount due the state and the costs of suit" and this right was modified by the act of 1889 so as to permit redemption by "paying the interest remaining unpaid for such purchase within six months from and after the passage of this act." The notice to defendants in a suit for default under the prior law was of such a summary character that we cannot doubt that the privilege of the purchaser to redeem under the act of 1889 is as liberal as it was before the act was passed and the change, therefore, did not deprive him of any substantial right or benefit.

[2] It is, however, pressed upon our attention as an important difference between the Texas act involved in these cited cases and the California act before us, that the former, in terms, gives to the purchaser of public land the privilege for six months after a decree of forfeiture has been entered against him, by a designated state officer, of resorting to a court proceeding to set aside such default on the ground that it was not authorized, while no such provision is contained in the latter. It is asserted that this distinguishes the two acts, and that the absence of authority for such a court proceeding renders the California act invalid, by depriving the plaintiff in error of his property without due process of law.

*489 It would be sufficient reply to this to say that the right to redeem after default decreed, which the purchaser had under the California statute when his contract was made, was limited to payment of "the amount due the state and costs of suit," and that, therefore, the act of 1889 did not deprive him of such a privilege as the Texas act gave, of setting aside the decree in a court proceeding on the ground that it was not authorized.

[3] But it is not important for us to consider such a question, for it is not presented in the record before us. The plaintiff in error comes admitting that for thirty-eight years he and the persons through whom he claims were in default, and, since he does not offer any excuse for such abandonment of the contract, even if the California act had contained the provision of the Texas act allowing a court review of the default defined in it, such remedy could not have been of any avail to the plaintiff in error for he makes no case upon which he could possibly have made use of it, and he is, therefore, not in any position to attack the constitutionality of the act involved for an omission which does not injure him, and which, if supplied, would not benefit him. He who would successfully assail a law as unconstitutional must come showing that the feature of the act complained of operates to deprive him of some constitutional right. Tyler v. Judges, 179 U. S. 405, 21 Sup. Ct. 206, 45 L. Ed. 252; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 34 Sup. Ct. 359, 58 L. Ed. 713; Lehon v. City of Atlanta, 242 U. S. 53, 56, 37 Sup. Ct. 70, 61 L. Ed. 145.

We quite agree with the Supreme Court of California that this case is ruled in all essentials by the Waggoner Case, supra, and this renders unnecessary the consideration of the applicability of the doctrine of laches.

The judgment of the Supreme Court of California must be

Affirmed.

(247 U. S. 402)

TOLEDO NEWSPAPER CO. et al. v. UNITED STATES.

(Argued March 7 and 8, 1918. Decided June 10, 1918.)

No. 371.

1. CONTEMPT ⟸66(1) — REVIEW — FORM OF REMEDY—WRIT OF ERROR—CERTIORARI.

A conviction for a criminal, although a summary, contempt, is a matter of criminal law, not reviewable on error; but the matter may be reviewed on certiorari, issuable in the discretion of the court.

2. CONTEMPT ⟸9—CRIMINAL "CONTEMPT"—OBSTRUCTION OF JUSTICE.

Judicial Code (Act March 3, 1911, c. 231) § 268, 36 Stat. 1163 (Comp. St. 1916, § 1245), first enacted as Act March 2, 1831, c. 99, 4 Stat. 487, which declares that courts shall have the power to punish contempts of their authority, provided that such power shall not be construed to extend to any cases, except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, confers no power not already granted, and imposes no limitations not already existing, but merely marks the boundaries of existing authority and, conformably to the whole history of the country, recognized and sanctioned the existence of the power of federal courts to restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power; so the publication of newspaper articles which tend to obstruct the administration of justice may be treated as a "contempt."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contempt.]

3. CONSTITUTIONAL LAW ⟸90—FREEDOM OF PRESS—CONTEMPT.

The constitutional freedom of the press will not protect a publisher of newspaper articles concerning a pending case, though of public interest, from contempt proceedings, under Judicial Code, § 268, where the articles tend to obstruct the administration of justice.

4. CONTEMPT ⟸66(7) — REVIEW — FINDINGS OF FACT.

Where defendants, who had been convicted of criminal contempt, contended in the Supreme Court that there was no evidence that the newspaper articles furnishing the basis for the prosecution tended to obstruct the administration of justice, the Supreme Court will not consider the weight of the evidence, but simply whether the evidentiary facts found by the courts below had any reasonable tendency to sustain the general conclusions of fact based thereon.

5. CONTEMPT ⟸28(1) — CRIMINAL CONTEMPT — NEWSPAPER PUBLICATIONS — "OBSTRUCTING ADMINISTRATION OF JUSTICE."

Newspaper articles, referring to a suit in the federal court to enjoin municipal ordi-

nances regulating street car fares, which held the federal judge up to ridicule and hatred in case he should grant an injunction, and in advance impeached his motives in so doing, and practically urged noncompliance with any such order, must be deemed acts tending to obstruct the administration of justice, within Judicial Code, § 268, and punishment for contempt cannot be avoided on the ground that it did not appear the judge saw the articles or that he was unaffected by them.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Obstruct.]

Mr. Justice Holmes and Mr. Justice Brandeis dissenting.

In Error to and on Application for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

The Toledo Newspaper Company and another were convicted of criminal contempt (220 Fed. 458), and, the judgment being affirmed by the Circuit Court of Appeals (237 Fed. 986, 150 C. C. A. 636), defendants bring error and apply for writ of certiorari. Writ of error dismissed, and, application for certiorari having been granted, the judgments were affirmed.

Mr. Lawrence Maxwell, of Cincinnati, Ohio, for plaintiff in error.

Mr. William L. Day, of Cleveland, Ohio, and Mr. Assistant Attorney General Fitts, for the United States.

*410 *Mr. Chief Justice WHITE delivered the opinion of the Court.

This case is before us on error to review the action of the court below affirming a judgment of the trial court holding the defendants guilty of a summary contempt and imposing a fine upon them both. There is also pending an application for certiorari made upon the assumption that if jurisdiction on error was wanting the case involved questions of such importance as to justify our interposition.

[1] We are of opinion that a motion to dismiss the writ of error must prevail since it is settled that a conviction for a criminal, although summary, contempt is for the purposes of our reviewing power a matter of criminal law not within our jurisdiction on error. Cary Manufacturing Co. v. Acme Flexible Clasp Co., 187 U. S. 427, 428, 23 Sup. Ct. 211, 47 L. Ed. 244; O'Neal v. United *411 States, 190 U. S. 36, 38, 23 Sup. Ct. 776, 47 * L. Ed. 945; Bessette v. W. B. Conkey Co., 194 U. S. 324, 335, 24 Sup. Ct. 665, 48 L. Ed. 997; Re Merchants' Stock Co., Petitioner, 223 U. S. 639, 32 Sup. Ct. 339, 56 L. Ed. 584; Gompers v. United States, 233 U. S. 604, 606, 34 Sup. Ct. 693, 58 L. Ed. 1115, Ann. Cas. 1915D, 1044. But this does not relieve us from the duty of exerting jurisdiction, as we are of opinion that the case calls for the exertion of the discretionary power with which we are vested. The writ of certiorari is therefore granted and we proceed to examine and dispose of the case to the extent rendered necessary by that conclusion.

The case is this: The Toledo Railways & Light Company in 1913 controlled and operated practically all the street railways in Toledo. The franchises under which it did so, however, it was generally considered, expired on the 27th of March, 1914. In anticipation of this fact negotiations as to the terms upon which they should be renewed were broached between the city and the company and pronounced differences were manifested. This gave rise to public agitation and discussion over the question which had become acute in November, 1913. In that month, evidently in order to enable the city to secure from the company such terms of agreement as it might impose, an ordinance was passed without giving any new franchise or in terms making any new contract with the company, providing that on and after the 27th of March, 1914, the assumed day of the expiration of the franchises, three-cent fares should be charged from day to day. Complaint alleging the injustice of this provision and the wrong which the railroad asserted would be produced by giving it effect increased the agitation.

In January, 1914, creditors of the company filed in the District Court of the United States their bill against the company to enjoin it from obeying the ordinance on the ground that to do so would confiscate the property which they held in the company and would destroy the franchises which the company enjoyed and which, it was asserted, only expired in the following October. On *412 March 24th the creditors filed a supplemental bill making the city a party to the suit and asking preliminary and permanent injunctions against the city. On the same day the company also filed its bill against the city seeking to restrain the enforcement of the ordinance both by preliminary and final injunctions.

At this juncture and before action had been taken by the court, the Toledo News-Bee, a daily paper published in Toledo by the Toledo Newspaper Company, began publications adverse to the rights asserted against the city by the creditors and the railway company and in no uncertain terms avouched the right of the city to have enacted the ordinance which the suits assailed and challenged the right of the court to grant the relief prayed. On March 30th the court after hearing on the applications for preliminary injunctions denied them on the ground that the assailed ordinance was not self-enforcing, that it required an application for judicial power to put it into effect and that it would be time enough when the city invoked such relief by such power to assert by way of defense the matters which were made the basis of the prayer for affirmative relief in the pending controversies.

In September following under a new prayer

the court reconsidered its action and awarded the preliminary injunction prayed on the ground that as the city had in the meanwhile treated the ordinance as enforceable without resort to judicial process and was acting against the company and the creditors and their alleged rights on that assumption, the duty was cast upon the court of protecting such rights pending the decision of the causes. In the meanwhile, however, the agitation over the questions which the suits involved had unremittingly continued and was beyond doubt fanned by continuous publications on the subject in the *413 stated newspaper into a more exaggerated—not to use a stronger word—and *vociferous expression which embraced the whole field; that is, not only the relative rights of the city and the corporation, but also at least by indirection the duty and power of the court and its right to afford any relief in the matters before it.

Immediately preceding the action of the court taken on September 12th granting the preliminary injunction and while that subject was before it for consideration, an attachment for contempt was issued against one Quinlivan for words spoken by him at a meeting of a labor union concerning the court and the matter which it was then engaged in considering. And a few days following, on September 15th, a similar process was issued against the managing editor of the Toledo News-Bee for publications written by him in the paper concerning the action of the court in the Quinlivan case.

On September 29th following the court directed the district attorney to present an information for contempt against the newspaper company and its editor for the publications which had been made concerning the controversy and on October 28th, giving effect to this order, an information was filed charging the newspaper company and the editor with contempt. The charges were stated in three counts. The first embraced matters published during the pendency of the suit from the time, March 24th, when the action was taken to make the city a party and the respective preliminary injunctions were prayed, up to and including the time when the ultimate action of the court on the subject in September was taken. The two other counts related, the one to publications made at the time of and concerning the attachment for contempt against Quinlivan, and the other to publications concerning the attachment against the managing editor. The defendants demurred on the ground that *414 the information stated no act within the power of the court to *punish for contempt and on the overruling of the demurrer they answered, not disputing the publications charged, but challenging the innuendoes by which in the information they were interpreted and reiterating the denial of all power in the court to punish.

Coming to dispose of the information the court found both of the defendants guilty under all the counts and imposed upon both a punishment by way of fine. The court sustained its authority to so act by an elaborate opinion, which after stating the evidentiary facts—the publications and their environment—drew from them ultimate conclusions of fact and held that from such conclusions it clearly resulted that the publications complained of constituted a contempt within the power of the court to punish because by their terms they manifestly tended to interfere with and obstruct the court in the discharge of its duty in a matter pending before it. Condensing for the sake of brevity and looking at the substance of things, these conclusions of the court embraced four grounds: (a) Because, leaving aside the attempted ridicule, not to say vituperation, concerning the court which was expressly or impliedly contained in the publications, their manifest purpose was to create the impression on the mind of the court that it could not decide in the matter before it in any but the one way without giving rise to such a state of suspicion as to the integrity or fairness of its purpose and motives as might engender a shrinking from so doing. (b) Because the publications directly tended to incite to such a condition of the public mind as would leave no room for doubt that if the court acting according to its convictions awarded relief, it would be subject to such odium and hatred as to restrain it from doing so. (c) Because the publications also obviously were intended to produce the impression that any order which might be rendered by the court in the discharge of its duty if not in accord *415 with the *conceptions which the publications were sustaining, would be disregarded and cause a shrinking from performing duty to avoid the turmoil and violence which the publications, it may be only by covert insinuation, but none the less assuredly invited. And (d) because the publications were of a character, not merely because of their intemperance but because of their general tendency, to produce in the popular mind a condition which would give rise to a purpose in practice to refuse to respect any order which the court might render if it conflicted with the supposed rights of the city espoused by the publications. 220 Fed. 458.

The affirmance by the court below of the action of the trial court thus stated, is the matter now before us for review. That court, not asserting the right or attempting to exert the power to review the merely evidentiary facts found by the trial court, but accepting them, in express terms sanctioned the inferences of ultimate fact drawn from them by the trial court. The court said:

"The publications had reference to pending judicial action, and there is a finding of fact ('as alleged in the information') that they tended and were intended to provoke public resistance to an injunctional order, if one should be made,

and there is a finding that they constituted an attempt to intimidate—at least unduly to influence—the District Judge with reference to his decision in the matter pending before him. That each of these findings is supported by competent evidence and for that reason binding upon this court is too clear for dispute; but we may rightly go further and say that it is difficult to see how any other findings could have been made."

This view, however, was restricted to the matters embraced by the first count since it was decided that it was irrelevant to consider whether the same view would obtain as to the subject-matters of the second and third counts because it was held that in any *416 event the finding of guilt under the first * count was adequate to justify the penalty imposed, thus rendering a consideration of the other two counts unnecessary. 237 Fed. 986, 150 C. C. A. 636.

Under the case and the action of the courts below concerning it, nothing further would seem to be required to establish the correctness of that action since no other course under the statement is possible compatibly with the sacred obligation of courts to preserve their right to discharge their duties free from unlawful and unworthy influences and in doing so, if needs be, to clear from the pathway leading to the performance of this great duty all unwarranted attempts to pervert, obstruct or distort judgment. Nevertheless in view of the gravity of the subject we proceed to consider and dispose of the elaborate arguments pressed to the contrary. They are all embraced by the three following propositions: First, that there was a total want of power in the court to treat the matters charged in the information as a contempt and punish it accordingly as a result of the provisions of section 268 of the Judicial Code (embodying the text of the Act of March 2, 1831, c. 99, 4 Stat. 487); second, that irrespective of the prohibitions of that act there was a want of power to abridge the freedom of the press by punishing as for a summary contempt comments made by a newspaper upon matters of public concern; and third, that whatever be the view of the two former propositions as there was an entire absence of proof sustaining the ultimate inferences of fact upon which the court based its conclusion, such conclusion was wholly erroneous as a matter of law. We dispose of these propositions under separate headings.

[2] 1. *Section 268 of the Judicial Code and its forerunner, the Act of 1831.*

It is essential to recall the situation existing at the time of the adoption of the Act of 1831 in order to elucidate its provisions. In Marshall v. Gordon, 243 U. S. 521, 37 Sup. Ct. 448, 61 L. Ed. 881, L. R. A. 1917F, 279, *417 the power of Congress to summarily punish * for contempt came under consideration and it was there pointed out that the enlarged legislative power on that subject which prevailed in England prior to the separation, whether based upon the commingling of legislative and judicial authority or upon any other cause, was necessarily in this country greatly restricted and changed by the effect of the adoption of the Constitution and the operation of the division of powers and the guaranties and limitations which that instrument embodied. Considering this condition in the light of the colonial legislation on the subject and the previous state constitutions, it was pointed out that it had come to be established, either by express constitutional or legislative provisions or by inevitable implications resting upon the very existence of government, that while the limitations as to mode of accusation of crime and methods of trial had fundamentally changed the situation which had previously existed, such change had not deprived the legislative power of the right, irrespective of its authority by legislation to provide for the trial and punishment of criminal acts, in addition to summarily deal by way of contempt proceedings with wrongful acts obstructing the legislative power in the performance of its duty. This authority, it was held, was but an incident of the powers conferred and indeed that its exertion in ultimate analysis was a means of securing the effective operation of the constitutional limitations as to mode of accusation and methods of trial. It was pointed out that the authority thus recognized automatically inhered in the government created by the Constitution, was sanctioned by a long line of judicial decisions and by state and federal practice, although the legislative power, doubtless as a mere consequence of a reminiscence of what had gone before and momentarily forgetful of the limitations resulting from the Constitution, had sometimes exerted authority in excess of that which it was decided was really possessed.

*418 * While the Marshall Case concerned the exercise of legislative power to deal with contempt, the fundamental principles which its solution involved are here applicable to the extent that they may not be inapposite because of the distinction between legislative and judicial power. Indeed the identity of the constitutional principles applicable to the two cases subject to the differences referred to was pointed out (243 U. S. on pages 542 and 543, 37 Sup. Ct. on page 454, 61 L. Ed. 881, L. R. A. 1917F, 279), where it was said:

"So also when the difference between the judicial and legislative powers are considered and the divergent elements which in the nature of things enter into the determination of what is self-preservation in the two cases, the same result is established by the statutory provisions dealing with the judicial authority to summarily punish for contempt, that is, without resorting to the modes of trial required by constitutional limitations or otherwise for substantive offenses under the criminal law. Act of March 2, 1831, 4 Stat. 487."

The pertinent provision of section 268 of the Judicial Code is as follows:

"The said courts [United States courts] shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, that such

power to punish for contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice. * * *"

Clarified by the matters expounded and the ruling made in the Marshall Case, there can be no doubt that the provision conferred no power not already granted and imposed no limitations not already existing. In other words, it served but to plainly mark the boundaries of the existing authority resulting from and controlled by the grants which the Constitution made and the limitations which it imposed. And this is not at all modified by conceding that the provision was intended to prevent the danger by reminiscence of what had gone before of attempts to exercise a power not possessed which, as pointed out in the Marshall Case, had been sometimes done in the exercise of legislative power. The provision therefore, conformably to the whole history of the country, not minimizing the constitutional limitations nor restricting or qualifying the powers granted, by necessary implication recognized and sanctioned the existence of the right of self-preservation, that is, the power to restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power given by summarily treating such acts as a contempt and punishing accordingly. The test therefore is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty—a conclusion which necessarily sustains the view of the statute taken by the courts below and brings us to the second question, which is:

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[3] 2. *The asserted inapplicability of the statute under the assumption that the publications complained of related to a matter of public concern and were safeguarded from being made the basis of contempt proceedings by the assuredly secured freedom of the press.*

We might well pass the proposition by because to state it is to answer it, since it involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests and that freedom therefore does not and cannot be held to include the right virtually to destroy such institutions. It suffices to say that however complete is the right of the press to state public things and discuss them, that right as every other right enjoyed in human society is subject to the restraints which separate right from wrongdoing.

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The contention so earnestly pressed that the express provision found in a statute enacted in Pennsylvania in 1809 following the impeachment proceedings against Judge Peck dealing with the extent of the power to base a contempt proceeding upon a newspaper publication should be by implication read into the Act of 1831 and by filtration implied in section 268, Judicial Code, we think is answered by its mere statement since if it be conceded for argument's sake only that the provision in the Pennsylvania statute relied upon had the significance now attributed to it and that the Pennsylvania statute was the model of the Act of 1831, the omission from that act of the provision referred to as it existed in the Pennsylvania law is the strongest possible evidence of the purpose not to enact such provision. And thus we come to the third and final subject, which is:

[4, 5] 3. *The contention that there was no evidence whatever to justify attributing to the publications the consequence of obstruction and therefore no legal basis for the conclusion of guilt and resulting right to impose penalties.*

It is to be observed that our power in disposing of this objection is not to test divergent contentions as to the weight of the evidence but simply to consider the legal question whether the evidentiary facts found had any reasonable tendency to sustain the general conclusions of fact based upon them by the courts below. Considering the subject in this aspect again we are constrained to say that the contention on the face of the record is too plainly devoid of merit to require any detailed review. Indeed we are of opinion that the court below was right in saying concerning the ultimate conclusions of fact upon which its action was based that it was "difficult to see how any other findings could have been made." True, it is urged that although the matters which were made the basis of the findings were published at the place where the proceedings were pending and under the circumstances which we have stated in a daily paper having a large circulation, as it was not shown that they had been seen by the presiding judge or had been circulated in the courtroom, they did and could form no basis for an inference of guilt. But the situation is controlled by the reasonable tendencies of the acts done and not by extreme and substantially impossible assumptions on the subject. Again it is said there is no proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by the publications and therefore there was no proof tending to show the wrong complained of. But here again not the influence upon the mind of the particular judge is the criterion but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of

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society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts.

This disposes of the case for although the court below we think mistakenly considered that it was not under the duty to determine how far the facts sustained the charges under counts 2 and 3 because the conviction might be referred wholly to the first count (Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 440, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. [N. S.] 874), we are of opinion *422 after examining the facts as to both of those counts that they also sustain the conviction within the principles which we have just previously stated.

Affirmed.

Mr. Justice DAY and Mr. Justice CLARKE took no part in the decision of this cause.

Mr. Justice HOLMES, dissenting.

One of the usual controversies between a street railroad and the city that it served had been going on for years and had culminated in an ordinance establishing three cent fares that was to go into effect on March 28, 1914. In January of that year the people who were operating the road began a suit for an injunction on the ground that the ordinance was confiscatory. The plaintiffs in error, a newspaper and its editor, had long been on the popular side and had furnished news and comment to sustain it; and when, on March 24, a motion was made for a temporary injunction in the suit, they published a cartoon representing the road as a moribund man in bed with his friends at the bedside and one of them saying "Guess we'd better call in Doc Killits." Thereafter pending the controversy they published news, comment and cartoons as before. The injunction was issued on September 12. The Judge (Killits) who was referred to took no steps until September 29, when he directed an information to be filed covering publications from March 24 through September 17. This was done on October 28. In December the case was tried summarily without a jury by the judge who thought his authority contemned, and in the following year he imposed a considerable fine. The question is whether he acted within his powers under the statutes of the United States.

The statute in force at the time of the al- *423 leged contempts confined the power of courts in cases of this sort to where there had been "misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice." Section 268, Jud. Code, Act of March 3, 1911, c. 231, 36 Stat. 1163. Before the trial took place an act was passed giving a trial by jury upon demand of the accused in all but the above-mentioned instances. October 15, 1914, c. 323, §§ 22, 24, 38 Stat. 738, 739 (Comp. St. 1916, §§ 1245b, 1245d). In England, I believe, the usual course is to proceed in the regular way by indictment. I mention this fact and the later statute only for their bearing upon the meaning of the exception in our law. When it is considered how contrary it is to our practice and ways of thinking for the same person to be accuser and sole judge in a matter which if he be sensitive, may involve strong personal feeling, I should expect the power to be limited by the necessities of the case "to insure order and decorum in their presence" as it is stated in Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205. See Prynne, Plea for the Lords, 309, cited in McIlwain, The High Court of Parliament and its Supremacy, 191. And when the words of the statute are read it seems to me that the limit is too plain to be construed away. To my mind they point only to the present protection of the Court from actual interference, and not to postponed retribution for lack of respect for its dignity—not to moving to vindicate its independence after enduring the newspaper's attacks for nearly six months as the Court did in this case. Without invoking the rule of strict construction I think that "so near as to obstruct" means so near as actually to obstruct—and not merely near enough to threaten a possible obstruction. "So near as to" refers to an accomplished fact, and the word "misbehavior" strengthens the construction I adopt. Misbehavior means something more than adverse comment or disrespect.

But suppose that an imminent possibility of obstruction is sufficient. Still I think that only immediate and necessary action is contemplated, and that no case for summary *424 proceedings is made out if after the event publications are called to the attention of the judge that might have led to an obstruction although they did not. So far as appears that is the present case. But I will go a step farther. The order for the information recites that from time to time sundry numbers of the paper have come to the attention of the judge as a daily reader of it, and I will assume, from that and the opinion, that he read them as they came out, and I will assume further that he was entitled to rely upon his private knowledge without a statement in open court. But a judge of the United States is expected to be a man of ordinary firmness of character, and I find it impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty. I am not considering whether there was a technical contempt at common law but whether what was done falls within the words of an act intended and admitted to limit the power of the courts.

The chief thing done was to print statements of a widespread public intent to board the cars and refuse to pay more than three cents even if the judge condemned the ordinance, statements favoring the course, if you like, and mention of the city officials who intended to back it up. This popular movement was met on the part of the railroad by directing its conductors not to accept three cent fares but to carry passengers free who refused to pay more; so that all danger of violence on that score was avoided, even if it was a danger that in any way concerned the Court. The newspaper further gave one or two premature but ultimately correct intimations of what the judge was going to do, made one mistaken statement of a ruling which it criticized indirectly, uttered a few expressions that implied that the judge did not have the last word and that no doubt contained innuendoes not flattering to his personality. Later there was an *425 account of a local socialist meeting at which a member, one Quinlivan, spoke in such a way that the judge attached him for contempt and thereupon, on the same day that the decree was entered in the principal case, the paper reported as the grounds of the attachment that Quinlivan had pronounced Judge Killits to have shown from the first that he was favorable to the railroad, had criticized somewhat ignorantly a ruling said to put the burden of proof on the city, and had said that Killits and his press were unfair to the people, winding up "impeach Killits." I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words.

In the elaborate opinion that was delivered by Judge Killits to justify the judgment it is said:

"In this matter the record shows that the Court endured the News-Bee's attacks upon suitors before it and upon the Court itself, and carried all the embarrassment inevitable from these publications, for nearly six months before moving to vindicate its independence."

It appears to me that this statement is enough to show that there was no emergency, that there was nothing that warranted a finding that the administration of justice was obstructed, or a resort to this summary proceeding, but that on the contrary when the matter was over, the Judge thought that the "consistently unfriendly attitude against the Court," and the fact that the publications tended "to arouse distrust and dislike of the Court" were sufficient to justify this information and a heavy fine. They may have been, but not, I think, in this form of trial. I would go as far as any man in favor of the sharpest and most summary enforcement of order in court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as *426 the law deals with other illegal acts. Action like the present in my opinion is wholly unwarranted by even color of law.

Mr. Justice BRANDEIS concurs in this opinion.

(247 U. S. 464)

POSTAL TELEGRAPH CABLE CO. v. CITY OF NEWPORT, KY.

(Argued Jan. 18 and 21, 1918. Decided June 10, 1918.)

No. 273.

1. COURTS ⟸399(2) — UNITED STATES SUPREME COURT—SCOPE OF REVIEW.

Where the state court denied asserted federal rights on a basis of fact having no support in the record, a finding of fact by the state court is not conclusive on the national Supreme Court, and it should review and correct the error.

2. APPEAL AND ERROR ⟸916(1)—REVIEW—DECISION ON PLEADINGS.

Where a case was submitted and decided on the pleadings, every uncontradicted allegation of fact by the unsuccessful party must be taken as true.

3. JUDGMENT ⟸682(1) — CONCLUSIVENESS — PERSONS CONCLUDED—GRANTOR AND GRANTEE.

Where, after a telegraph company had conveyed its lines and property, a city recovered a judgment against it for license fees for the use of the streets, such judgment is not conclusive against the grantee, for the basis of the rule that a judgment against a grantor is binding on the grantee is that the estoppel runs with the property.

4. JUDGMENT ⟸634 — CONCLUSIVENESS — "RES JUDICATA"—NATURE OF DOCTRINE.

The doctrine of res judicata at bottom rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Res Adjudicata.]

5. CONSTITUTIONAL LAW ⟸251 — DUE PROCESS OF LAW—HEARING.

An opportunity to be heard is an essential requisite of due process in judicial proceedings.

6. CONSTITUTIONAL LAW ⟸315—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—JUDGMENT.

Where a city, after telegraph lines located in its streets had been conveyed to defendant, recovered a judgment against the grantor company for license fees for use of the streets, and defendant was in no way a party, a decision of the state court that defendant was concluded by such judgment was erroneous, depriving it of its property without the due process of law guaranteed by the Fourteenth Amendment, for a state can no more invoke the estoppel of a judgment against one who is neither a party to the action, nor in privity with a party therein, than it can enforce a judgment against a party, named in proceedings, who was not heard and had no opportunity to be heard.

In Error to the Court of Appeals of the State of Kentucky.

Action by the City of Newport, Ky., against

the Postal Telegraph Cable Company. A judgment for plaintiff was affirmed by the Court of Appeals of the State of Kentucky (160 Ky. 244, 169 S. W. 700), and defendant brings error. Reversed and remanded for further proceedings.

Messrs. John R. Schindel and Morrison R. Waite, both of Cincinnati, Ohio, for plaintiff in error.

Mr. Brent Spence, of Newport, Ky., for defendant in error.

*465 *Mr. Justice PITNEY delivered the opinion of the Court.

On December 5, 1895, the council of the city of Newport, Kentucky, passed an ordinance purporting to grant to the Postal Telegraph Cable Company and its successors, subject to certain limitations, the right and privilege of erecting poles and stretching wires over the streets and alleys of the city necessary to the establishment, operation, and maintenance of a telegraph system connecting that city with other towns and cities. Among its provisions were these: (a) That unless the company should within thirty days, and in writing, accept the grant subject to the limitations, the grant should become void; (b) that nothing in the ordinance should be construed as granting a franchise to the company; and (c) that the company should pay to the city a "special license tax" of $100 per annum. This company was a New York corporation having the same name as that of plaintiff in error, and will be referred to hereinafter as the first New York company.

On or about January 1, 1897, that company conveyed its property in the state of Kentucky, including all its rights and interests in the city of Newport, to another New York corporation known as the Commercial Cable Company; in 1898 this company conveyed
*466 the same property and privileges to another New York corporation*known as the Commercial Cable & Telegraph Company; and on or about December 31, 1900, all of said rights and property were transferred and conveyed by the latter company to the plaintiff in error, the Postal Telegraph Cable Company, which is a corporation of the state of Kentucky, and since then has owned and operated the property.

In 1908 suit was brought in a state court by the city against plaintiff in error (hereinafter referred to as defendant) to recover "license taxes" as specified in the ordinance for a series of years, and a judgment in favor of the city for the years 1903 to 1907 inclusive was sustained by the Court of Appeals of Kentucky, notwithstanding certain contentions of defendant based upon the provisions of the Constitution of the United States respecting the regulation of commerce among the states and the establishment of post offices and post roads (article 1, § 8, pars. 3 and 7), upon the Act of Congress of July 24, 1866 (chapter 230, 14 Stat. 221, Rev. Stat. U. S. § 5263 et seq. [Comp. St. 1916, § 10072 et seq.]), and upon the "equal protection" clause of the Fourteenth Amendment. 160 Ky. 244, 169 S. W. 700. A writ of error under section 237, Judicial Code (Act of March 3, 1911, ch. 231, 36 Stat. 1087, 1156 [Comp. St. 1916, § 1214]), issued before the taking effect of the Act of September 6, 1916 (chapter 448, 39 Stat. 726), brings the judgment here for review.

The case was decided upon the pleadings and exhibits, which latter included a copy of the ordinance and what was treated as a transcript of the record of a previous suit brought by the city against the first New York company in a state court of Kentucky to recover license taxes under the ordinance for two years ending December 5, 1898, resulting in a judgment in favor of the city, which was affirmed by the court of appeals, opinion reported in 76 S. W. 159, 25 Ky. Law Rep. 635; the judgment being pleaded as a bar to the defense set up in this action.

The pleadings in the present suit are so involved and*prolix that a particular recital *467 of them would be tedious. We will present a sufficient summary to show the questions raised and how they were disposed of.

The city alleged the passage of the ordinance, and averred that shortly after its passage and in pursuance of it the first New York company erected poles and strung wires in the streets, and established, operated, and maintained a telegraph system in the city, and thereby the ordinance became a binding contract between the city and the company; but that defendant had failed and refused to pay the sum of $100 per annum for the several years in question, in disregard of its contract.

Defendant's answer alleged that at the time of the enactment of the ordinance defendant was not in existence, and that the Postal Telegraph Cable Company therein referred to was the first New York company; denied that either that company or defendant in any manner or at any time accepted the ordinance, or that the same became a binding contract between plaintiff and either company; admitted that shortly after its passage the first New York company began the erection of its poles and wires and the establishment of its telegraph system, but denied that this was done under or by virtue of the ordinance; alleged on the contrary that that company did not accept but declined to accept the ordinance, as plaintiff well knew, and that the poles were erected and wires strung in and over the streets and alleys of the city by the company under another and independent claim of right, as plaintiff well knew; that that company had accepted the Act of Congress approved July 24, 1866 (chapter 230, 14 Stat. 221, Rev. Stat. U. S. § 5263 et seq. [Comp. St. 1916, § 10072 et seq.]), and acts amendatory thereof, and had complied with their terms, and thereby obtained the right to construct, maintain, and operate its lines of telegraph over and along all post roads of the United

States; that under section 3964, Rev. Stat. U. S. (Comp. St. 1916, § 7456), and the Act of *468 Congress of March 1, 1884 (chapter 9, 23 Stat. 3 [Comp. St. 1916, § 7457]), all the streets and alleys of the city of Newport were such post roads, and by virtue of these provisions of the laws of the United States said New York company was entitled to erect its poles and string its wires over and along the streets and alleys of the city, and did so under that authority and not in pursuance of any acceptance of the ordinance, nor under any contract with the city.

Partly in an amendment to the answer, and partly in a rejoinder filed at the same time in response to plaintiff's reply, defendant set up the conveyance by said New York company on or about January 1, 1897, of all its property, rights, and lines of telegraph in the state of Kentucky and elsewhere, including its rights over the roads, streets and alleys in said state and in the various cities and municipalities thereof, to the Commercial Cable Company, a corporation of the state of New York; set up the subsequent conveyances of the same property as we have recited them, terminating with the conveyance to the defendant on or about December 31, 1900; alleged that from January 2, 1897, until June 30, 1898, the Commercial Cable Company of New York operated the Kentucky lines in the name of the Postal Telegraph Cable Company of New York; that from June 30, 1898, until December 31, 1900, the Commercial Cable & Telegraph Company of New York did the same; and that since the last mentioned date defendant had owned and operated and still owned and operated said lines, and was entirely separate and distinct from the first New York company and had no relations with it; that since the last mentioned date defendant had been engaged in operating and maintaining a system of telegraphy in the state of Kentucky between cities and towns in that state and, in connection with other companies, between various other cities and towns in other states; that before the last mentioned date defendant had accepted the Act of Congress of July 24, 1866, and had complied with *469 its terms and ever since had been subject thereto, and thus had obtained the right to construct, maintain, and operate its lines of telegraph over the streets and alleys of the city of Newport, and was doing so pursuant to this right and not by virtue of any contract with the city.

Defendant in its answer further set up that the payment of $100 per annum mentioned in the ordinance was not imposed as a rental but as a special license tax; and that it was not a reasonable rental or a reasonable or lawful exaction as a license tax; also that the ordinance was void and inoperative because said right and privilege was not conferred in accordance with section 164 of the Constitution of the commonwealth of Kentucky then in force, and section 3068, Kentucky Statutes; and also that the alleged contract was beyond the powers of the city, ultra vires, and void.

Defendant further alleged that other telegraph companies and telephone companies were using the streets and alleys of the city for poles and wires in a manner substantially similar to their use by the first New York company and by defendant; that none of these companies was subject to the payment of any license tax or was required to pay or agreed to pay any compensation to the city by way of rental, license, or otherwise; that the attempted exaction from defendant of $100 per annum was an unreasonable discrimination between defendant and other telegraph and telephone companies, contrary to the laws of the state of Kentucky and in violation of the Constitution of that state, and also in violation of the first section of the Fourteenth Amendment to the Constitution of the United States; and also that it was an unreasonable, excessive, and unlawful exaction in violation of those provisions of the Constitution of the United States conferring upon Congress the power to regulate commerce among the states and to establish post offices and post roads (article 1, § 8, pars. 3 and 7), and the laws enacted in pursuance thereof, and was therefore null and void. *470

In what was entitled a "second amended petition," but was ordered by the court to be taken as a reply to defendant's answer, plaintiff set up in substance that in a suit brought by it against the first New York company on September 8, 1899, the city alleged that the ordinance of December 5, 1895, was a contract consented to by that company and under which it derived and enjoyed its privilege to erect poles and string wires in the streets and alleys of the city and establish and maintain a telegraph system therein, that in consideration of this right and privilege the company agreed to pay to the city the sum of $100 per year as specified in the ordinance, and that under its terms $200 was due to the city for two years ending December 5, 1898, for which recovery was prayed; and that in this action a judgment was rendered in the trial court in favor of the city for the amount claimed, which was affirmed by the Court of Appeals of Kentucky, its opinion being reported in 76 S. W. 159, 25 Ky. Law Rep. 635. The same pleading alleged that the Postal Telegraph Cable Company of Kentucky, defendant in the present action, was the same Postal Telegraph Cable Company that was organized under the laws of the State of New York and was defendant in the former action, or that defendant was the lessee or successor, and succeeded to all the rights, privileges, and duties, of the defendant in the former action, and was using, operating, and controlling the same poles, wires, and equipment as those used, operated, and controlled by the defendant in the former action; and plaintiff pleaded said proceedings

and judgment as a bar to the defense set up in the present action.

By way of rejoinder, defendant denied its identity with the Postal Telegraph Cable *471 Company of New York, defendant in the former action, denied that defendant in the present action was the lessee or successor of said company or had succeeded to all its rights, or to any of its rights under the ordinance, and denied that it had succeeded to any of the duties of said New York company. In the same pleading were the averments respecting its acquisition of title to the property, its operation thereof, and its want of relation with the New York company, which we have recited.

The Court of Appeals, in disposing of the case (160 Ky. 244, 169 S. W. 700), laid aside the questions that were raised under both state and federal law as to the validity and effect of the ordinance, including the authority of the city to grant the privilege or exact the tax, upon the ground that the first New York company had agreed to the ordinance, and it and its successors, including defendant, had since been in possession of the streets under and by virtue of it, and would not be heard to dispute its validity while thus occupying the streets. Referring to the statement in the ordinance that it was not to be construed as granting a franchise, the court said:

"Doubtless it was well known that a franchise such as is contemplated and required by the [state] Constitution could not be secured in this way. In accepting the use of the streets under this ordinance, the company merely obtained the right, for the stipulated compensation, to occupy the streets until such time as the city might see proper to revoke the license. But so long as the company occupies the streets under the license it must pay the agreed price. The compensation provided by the ordinance is not a license tax upon the right of the company to do business in the city, but merely a charge against the company for the use of the streets with its poles and wires."

The contention that the exaction of $100 per annum for the use of the streets was unreasonable was passed by a reference to the previous decision, where it was held (76 S. W. 159, 25 Ky. Law Rep. 637) that the *472 question of the reasonableness of the grant and what was a fair compensation for the servitude was a question for the parties to decide. Finally, the contention that the enforcement of the ordinance denied to defendant the equal protection of the laws was rejected upon the ground that it did not appear that any other telegraph company was occupying the streets of Newport under a grant like the one conferred by the ordinance in question; the court declaring that a corporation accepting a privilege under one grant cannot complain that other corporations are occupying the streets under different grants imposing other conditions, and that cities may make reasonable classifications of grants and privileges, and attach dissimilar conditions and impose dissimilar burdens upon each class, without violating the equal protection feature of the federal Constitution.

It will be observed that every point raised by defendant, whether of fact or of state or federal law, was held immaterial upon the ground that (a) the first New York company had accepted the grant subject to the payment of the charge of $100 per annum; (b) its liability to pay the same had been adjudicated in the former suit; and (c) defendant, as successor to the rights and privileges of that company, was concluded by the former judgment against it.

It is true that, in answer to the assertion of a right under the Act of Congress of July 24, 1866, to erect poles and string wires in the streets without the consent of the city, the court declared that the act did not take from the city the right to charge a telegraph company for using its streets a reasonable compensation in the way of a license fee or occupation tax, citing St. Louis v. Western Union Telegraph Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, and Western Union Telegraph Co. v. Richmond, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710. In each of these cases, however, it was assumed, in the absence of anything to the contrary, that under the state Constitution and laws the municipality represented the public in the *473 control of the streets (148 U. S. 100, 13 Sup. Ct. 485, 37 L. Ed. 380; 224 U. S. 171, 32 Sup. Ct. 449, 56 L. Ed. 710); in the St. Louis Case it was so held upon rehearing (149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810); in both cases it was held that the question of reasonable compensation was a question of fact, to be determined in the usual way (148 U. S. 104, 105, 13 Sup. Ct. 485, 37 L. Ed. 380; 224 U. S. 171, 172, 32 Sup. Ct. 449, 56 L. Ed. 710); and in the St. Louis Case, upon a retrial, the ordinance charge was found to be unreasonable in fact (166 U. S. 388, 391, 17 Sup. Ct. 608, 41 L. Ed. 1044). But in the present case, both the power of the city under the Constitution and laws of the state, and the reasonableness in fact of the charge of $100 per annum, were denied by defendant, and the court declined to pass upon either question, deeming that defendant was concluded upon both points by the consent of its predecessor.

We assume that if the first New York company did at the outset accept the ordinance, either in writing according to its terms or by erecting poles and wires and occupying the streets thereunder or in any other manner satisfactory to the city, that company and its successors in the ownership of the telegraph system, including defendant, were bound to comply with the terms of the ordinance as to the "special license tax" (which evidently in that case would be regarded as an agreed rental), so long as they continued to retain and enjoy the privileges conferred; that in that event every claim of federal right here asserted would be without

foundation; and that, if the fact of acceptance had been conclusively adjudged in a former proceeding against defendant or its privy, the same result would follow.

[1] But the question arises whether the basis of fact upon which the state court rested its decision denying the asserted federal rights has any support in the record; for, if not, it is our duty to review and correct the error. Southern Pacific Co. v. Schuyler, 227 U. S. 601, 611, 33 Sup. Ct. 277, 57 L. Ed. 662, 43 L. R. A. (N. S.) 901; North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 259, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; Carlson v. Curtiss, 234 U. S. 103, 106, 34 Sup. Ct. 717, 58 L. Ed. 1237; Norfolk & Western Ry. v. West Virginia, 236 U. S. 605, 610, 35 Sup. Ct. 437, 59 L. Ed. 745; Interstate Amusement Co. v. Albert, 239 U. S. 560, 567, 36 Sup. Ct. 168, 60 L. Ed. 439.

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[2] Since the case proceeded to judgment upon the pleadings, it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true. This applies to the denial by defendant that either it or the first New York company accepted the ordinance, the averment that the latter company declined to accept it and erected its poles and strung its wires in the streets of the city under another and independent claim of right as plaintiff well knew, and other averments bearing upon the question of acceptance in fact.

[3] There remains only the adjudication in the former suit against the first New York company, which we assume to have been sufficiently pleaded, and to have substantially involved the points that are now material so as to make them res judicata in a subsequent suit between the parties and their privies although based on a different demand (Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195; Wilson's Executor v. Deen, 121 U. S. 525, 534, 7 Sup. Ct. 1004, 30 L. Ed. 980; Nesbitt v. Riverside Independent District, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562), and which the Court of Appeals regarded as concluding defendant upon matters of fact as well as law. But there is nothing in the record to make this judgment conclusive as against defendant except upon the theory of a privity of estate between it and the first New York company. And, as to this, it appears from the averments in defendant's pleadings—indeed, it is stated as a fact in the opinion of the court—that the suit against that company was brought in the year 1899, two years after it had conveyed its property in the state of Kentucky, including all its rights and interests in the city of Newport, to another corporation through which defendant afterwards acquired title.

The ground upon which, and upon which alone, a judgment against a prior owner is held conclusive against his successor in interest, is that the estoppel runs with the property, that the grantor can transfer no better right or title than he himself has, and that the grantee takes cum onere. From this it follows that nothing which the grantor can do or suffer after he has parted with the title can affect rights previously vested in the grantee, for there is no longer privity between them. This doctrine is universally accepted, and was applied by this court in Keokuk & Western Railroad v. Missouri, 152 U. S. 301, 314, 14 Sup. Ct. 605, 38 L. Ed. 457; Keokuk Railroad v. Scotland County, 152 U. S. 318, 322, 14 Sup. Ct. 605, 38 L. Ed. 457; Dull v. Blackman, 169 U. S. 243, 248, 18 Sup. Ct. 333, 42 L. Ed. 733; Old Colony Trust Co. v. Omaha, 230 U. S. 100, 122, 33 Sup. Ct. 967, 57 L. Ed. 1410. We infer that its obvious application to the facts of this case was inadvertently overlooked by the Court of Appeals, because the general principle is recognized in previous decisions of that court as a limitation upon the doctrine of lis pendens. Clarkson v. Morgan's Devisees, 6 B. Mon. (45 Ky.) 441, 446, 453; Parks v. Smoot, 105 Ky. 63, 67, 48 S. W. 146.

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[4-6] Res judicata, like other kinds of estoppel, ordinarily is a matter of state law, and as the decision of the state court in this case in effect rests upon that ground, this of itself would be sufficient to sustain the judgment against reversal in this court, except for two queries that must first be answered: (a) Is the question of state law, in this case, independent of the federal questions? And (b) is the decision reached upon that point sufficiently well founded to furnish adequate support for the judgment? Eustis v. Bolles, 150 U. S. 361, 366, 14 Sup. Ct. 131, 37 L. Ed. 1111; Southern Pacific Co. v. Schuyler, 227 U. S. 601, 610, 33 Sup. Ct. 277, 57 L. Ed. 662, 43 L. R. A. (N. S.) 901; Enterprise Irrigation District v. Canal Co., 243 U. S. 157, 164, 37 Sup. Ct. 318, 61 L. Ed. 644.

Waiving the doubt whether, under the particular facts of this case, the question of res judicata can be regarded as independent of the federal questions that were raised, we are of the opinion that the decision reached upon it is so clearly ill founded that it cannot sustain the judgment; and this for the reason that it is inconsistent with another federal right of defendant, fundamental in character.

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The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. Southern Pacific R. R. v. United States, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355; Greenl. Ev. §§ 522, 523. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. Windsor v. McVeigh, 93 U. S. 274, 277, 23 L. Ed. 914; Louisville & Nashville R. R. Co. v. Schmidt, 177 U. S. 230, 236, 20 Sup. Ct. 620,

44 L. Ed. 747; Simon v. Craft, 182 U. S. 427, 436, 21 Sup. Ct. 836, 45 L. Ed. 1165. And as a state may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. Ed. 565; Scott v. McNeal, 154 U. S. 34, 46, 14 Sup. Ct. 1108, 38 L. Ed. 896; Coe v. Armour Fertilizer Works, 237 U. S. 413, 423, 35 Sup. Ct. 625, 59 L. Ed. 1027), so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.

It follows that in this case res judicata cannot be regarded as an adequate support for the judgment; and since, without that, we have not the materials necessary for a proper disposition of the federal questions that were raised, we express no opinion upon them.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

(247 U. S. 435)

EXPLORATION CO., Limited, et al. v. UNITED STATES.

(Argued May 1, 1918. Decided June 10, 1918.)

No. 277.

LIMITATION OF ACTIONS ⊂⊃100(10)—SUITS TO CANCEL PATENT — CONSTRUCTION OF STATUTE.

Where patents to public lands were obtained through fraud, and the fraud was concealed until more than six years after issuance, suit may be maintained thereafter, notwithstanding Act March 3, 1891, c. 561, 26 Stat. 1099 (Comp. St. 1916, § 5114), declaring that suits by the United States to cancel patents hereafter issued shall only be brought within six years after the date of issuance, for such statute is subject to the long-established equitable rule that in suits for fraud, where the fraud has been concealed, limitations do not begin to run until its discovery by the party defrauded.

Mr. Justice McKenna and Mr. Justice Van Devanter, dissenting.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States against the Exploration Company, Limited, and Philip L. Foster. A decree for the United States (225 Fed. 854), was affirmed by the Circuit Court of Appeals (235 Fed. 110, 148 C. C. A. 604), and defendants appeal. Affirmed.

This suit was brought in the United States District Court for the District of Colorado to cancel nine coal land patents embracing 1,120 acres of land in Colorado which, it was charged, had been procured from the United States by fraud. A further purpose of the suit was to cancel deeds of the same land from various persons to one Philip L. Foster alleged to be in secret trust for the Exploration Company, a foreign corporation, for whose benefit it is alleged the frauds were committed. Six of the patents were of date of October 16, 1902, and three of date of September 6, 1902. The suit was brought March 3, 1911, about eight and a half years after the dates of the patents, the bill alleging that the fraud by which the patents were obtained was self-concealing in its nature, was concealed from the government by the wrongdoers and was not discovered until 1909. The defendants demurred on the ground that the suit was barred by the statute of limitations, and the demurrer was sustained by the District Court. 190 Fed. 405. The Circuit Court of Appeals for the Eighth Circuit reversed this decision, and the *case* was sent back to the District Court. 203 Fed. 387, 121 C. C. A. 491. After trial a decree was rendered against the defendants, the present plaintiffs in error. 225 Fed. 854. This decree was affirmed by the Circuit Court of Appeals (235 Fed. 110, 148 C. C. A. 604), and the case comes here.

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The District Court found the following facts:

The Exploration Company, defendant herein, is a corporation of Great Britian, authorized to purchase, own, and operate mines, and to purchase and own shares of stock in mines in all parts of the world. It was the owner of mines and mining lands in different parts of the world, and also of shares of stock of corporations engaged in mining in the United States and other countries. In 1901, and for several years thereafter, its representative in this country was Charles A. Molson, to whom it had executed a general power of attorney to represent it in all matters in the United States. The Exploration Company desired to acquire certain coal lands in the state of Colorado, which were a part of the public domain of the United States, but was unable to do so because it was a foreign corporation, and desired more of these coal lands than a domestic coroporation could obtain under the laws of the United States. It therefore conceived and carried into effect the following scheme for the purpose of acquiring them: Mr. Molson employed one Henry Burrell to obtain title to the lands. Burrell employed other agents, who were sent to residents of Colorado, legally entitled to acquire public coal lands from the United States, and induced them to make entry of such lands as were pointed out to them by the Exploration Company's agents, and which were supposed to contain valuable veins of coal. A large number of such entries were made on lands situated in the counties of Gunnison and Delta, the parties having filed declaratory statements as required by law. Many of these lands were abandoned and no patents applied for, but the filings on the lands herein involved were paid for and *patents* therefor secured. Henry Burrell was a wit-

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ness in most, if not all, of these entries. The parties who made the entries were promised the sum of twenty-five dollars for their services in so doing. Burrell was to pay all fees, as well as the purchase money, with funds furnished by the Exploration Company. The entry men and women executed deeds of conveyance for their respective tracts of land and delivered them to Burrell as soon as the final proofs were made and the money paid by the Exploration Company's agent to the respective officers of the land offices within whose jurisdiction the lands were situated. Henry Burrell caused these deeds to be made to Alexander Burrell, his brother, and Alexander Burrell later conveyed the lands to Alberta L. Smith, a resident of Montana, the only consideration for the conveyance being that Smith promised to hold them in trust for and to convey them to any person designated by the agent of the Exploration Company. The agent Charles A. Molson having died, the Exploration Company appointed Philip L. Foster to succeed him as its duly authorized general agent in the United States, and Smith conveyed these lands to Foster, without any other consideration, who holds the legal title in secret trust for the Exploration Company. In 1902 patents to these lands were issued by the United States, but the fact that they were secured by false affidavits, and not for the benefit of the entry men and women, but for the sole benefit of the Exploration Company, who in reality paid the government the purchase money, was kept secret, and did not become known to any of the officers of the government, nor did any facts become known to them which could arouse the suspicion of one reasonably diligent that the patents had been obtained by false affidavits for the sole benefit of the Exploration Company until 1909, more than six years after issuance of the patents, and then it only became known to the officers of the government by reason of the fact that a Utah corporation had acquired a great many of the public lands in the same manner that these lands were obtained, and this being discovered in 1909, the Secretary of the Interior directed in that year an examination of all coal-land entries made in the states of Utah and Colorado. The facts were for the first time discovered in this investigation. There was nothing in the records, or on file in the General Land Office of the United States or the Department of the Interior which could possibly have aroused a suspicion that these lands had been obtained for the sole benefit of the Exploration Company until the reports of the special agents of the General Land Office were made in the latter part of 1909. As soon as the facts were ascertained, the Secretary of the Interior transmitted them to the Department of Justice, with the request to institute suits to set aside the patents to the lands, and this suit was accordingly instituted on March 3, 1911, several months less than two years after the discovery of the alleged fraudulent acts.

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The District Court found that the defendants did not actively conceal the facts which constitute fraud in this case by enjoining silence on the entrymen and patentees, or by directing them or the agents who acted for it to refuse to give any information relating to the entries, if asked by the officers of the government, but were guilty of a passive concealment. When the investigation was made by the agents of the General Land Office, in 1909, in relation to these entries, the patentees, as well as the company's agents stated the facts truthfully, but until that time the fact that the entries were all made for the benefit of the Exploration Company, and that the legal title held by the defendant Foster was for the benefit of the company, was concealed. There were no facts or circumstances within the knowledge of any official of the government prior to the investigation in 1909 which could arouse even a bare suspicion that the entries were made in the manner hereinbefore described and for the benefit of the Exploration Company.

Messrs. Henry McAllister, Jr., and George E. Tralles, both of Denver, Colo., for appellants.

Mr. Assistant Attorney General Kearful, for the United States.

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* Mr. Justice DAY, after making the foregoing statement, delivered the opinion of the Court.

The Circuit Court of Appeals found that the evidence fully supported the findings of the trial court. We find no occasion to disturb the findings of fact by two courts. The question presented for our consideration is whether the suit was barred by the statute of limitations under the Act of March 3, 1891, c. 561, 26 Stat. 1099 (Comp. St. 1916, § 5114), which provides:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

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* As averred in the bill, and found by the courts, the frauds were concealed until after six years had elapsed from the issuance of the patents. "After it was supposed the statute of limitations had barred any action, the participants in the fraud talked very freely, telling the truth when it was thought it would do no harm." It is the contention of the appellants that the statute was intended to bar all actions after six years from the date of the issuance of the patent, that if for six years the government has failed to discover the fraud, no matter what its diligence in that respect may be, its action against the guilty parties is forever barred, and they may hold in security the lands thus

obtained by grant from the United States by means of fraud perpetrated in defiance of its laws enacted for the disposition of the public domain. We are unable to agree with this contention. We think the true rule is established in federal jurisprudence by the decision of this court in Bailey v. Glover, 21 Wall. 342, 22 L. Ed. 636. In that case a question was presented under the Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), which provided that no suit at law or in equity should be maintained by or against an assignee in bankruptcy, or by or against any person claiming an adverse interest, touching the property or rights of property of the bankrupt, in any court whatever, unless the same should be brought within two years from the time the cause of action accrued for or against the assignee. The action was brought to set aside a conveyance on the ground of fraud. Among other things it was charged that the bankrupt, his wife, son and father-in-law being defendants in the case, kept secret their fraudulent acts and endeavored to conceal them from the knowledge both of the assignee and of Winston & Company, a creditor proving a debt, whereby both were prevented from obtaining any sufficient knowledge or information thereof until within the previous two years, and that even up to the time suit was instituted they had not been *447 able to obtain *full and particular information as to the fraudulent disposition made by the bankrupt of a large part of his property. A general demurrer was filed to the bill on the ground that the suit was not brought within two years as required by the statute. It is thus apparent that no attempt was made to prosecute the action within two years from the time the same accrued. It was contended that the statute was imperative, that it made no exceptions, and that the action was consequently barred by limitation. This court, after a full review of decisions English and American, decided that notwithstanding the positive terms of the statute, it did not begin to run until after the discovery of the fraud. In the course of the opinion Mr. Justice Miller said:

"They [statutes of limitation] were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."

It will be observed in that statute, as in the one now under consideration, there was no provision that the cause of action should not be deemed to have accrued until the discovery of the fraud. But it was held that for the purpose of such statutes the cause of action did not accrue until the discovery of the fraud; that such was the undisputed doctrine of courts of equity, and that the weight of authority, English and American, applied the same rule to actions at law.

Among other cases cited by Mr. Justice Miller is the decision of Mr. Justice Story at the circuit in Sherwood v. Sutton, 5 Mason, 143, 21 Fed. Cas. p. 1303, No. 12,782. That case involved a statute of the state of New Hampshire which provided that actions for fraud and deceit should be brought within six years. It contained no exception as to actions founded on fraud where the same had been concealed during the period of limitation, and the question was whether such exception was implied. The cases were very fully reviewed by Mr. Justice Story, and in holding that the statute did not begin to run until the discovery of the fraud, he said (21 Fed. Cas. 1307):

"What, then, is the reason, upon which this exception has been established? It is, that every statute is to be expounded reasonably, so as to suppress, and not to extend, the mischiefs, which it was designed to cure. The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from starting up at great distances of time, when the evidence might no longer be within the reach of the other party, by which they could be repelled. It ought not, then, to be so construed, as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation; and cases of fraud, therefore, form an implied exception, to be acted upon by courts of law and equity, according to the nature of their respective jurisdictions. Such, it seems to me, is the reason on which the exception is built, and not merely that there is an equity binding upon the conscience of the party which the statute does not reach or control."

Bailey v. Glover has never been overruled nor modified in this court and has been approved and followed. Rosenthal v. Walker, 111 U. S. 185, 190, 4 Sup. Ct. 382, 28 L. Ed. 395; Traer v. Clews, 115 U. S. 528, 537, 538, 6 Sup. Ct. 155, 29 L. Ed. 467; Kirby v. Lake Shore, etc., R. R. Co., 120 U. S. 130, 136, 7 Sup. Ct. 430, 30 L. Ed. 569; Avery v. Cleary, 132 U. S. 604, 609, 10 Sup. Ct. 220, 33 L. Ed. 469. It was also applied in the Court of Appeals for the Ninth Circuit in the case of Linn & Lane Timber Co. v. United States, 196 Fed. 593, 116 C. C. A. 267; 203 Fed. 394, 121 C. C. A. 498.

*448 *It is true that Mr. Justice Brewer, in delivering the opinion of the court, in United States v. Winona, etc., R. R. Co., 165 U. S. 463, 476, 17 Sup. Ct. 368, 41 L. Ed. 789, said that no matter what the mistake or error of the Land Department was, or what the frauds of the patentee, the patent would become conclusive as a transfer of title after the lapse of six years. But the learned justice said in the same opinion that this limitation could not be availed of because the suit was commenced before the expiration of the time prescribed, and that it was referred to as showing the purpose of Congress to up-

hold titles arising under certification or patent after the lapse of a certain time. It therefore appears that the question was not involved in that case. Nor does it contain any discussion of the doctrine previously laid down in Bailey v. Glover, supra.

In United States v. Chandler-Dunbar Co., 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881, cited by appellants, no question was made as to the effect of concealment of fraud until after the running of the statute. The same is true of Louisiana v. Garfield, 211 U. S. 70, 29 Sup. Ct. 31, 53 L. Ed. 92, also relied upon by appellants.

When Congress passed the act in question the rule of Bailey v. Glover was the established doctrine of this court. It was presumably enacted with the ruling of that case in mind. We cannot believe that Congress intended to give immunity to those who for the period named in the statute might be able to conceal their fraudulent action from the knowledge of the agents of the government. We are aware of no good reason why the rule, now almost universal, that statutes of limitations to set aside fraudulent transactions shall not begin to run until the discovery of the fraud, should not apply in favor of the government as well as a private individual. It is not our belief that Congress intended that the government should be deprived of title to public lands by those who add to the fraud by which they were obtained artifices which enabled them to conceal the fraudulent manner in which they were secured until the action was supposed to be barred by the lapse of six years.

The decree of the Circuit Court of Appeals is affirmed.

Mr. Justice McKENNA and Mr. Justice VAN DEVANTER dissent.

Mr. Justice McREYNOLDS took no part in this decision.

(247 U. S. 450)

JIM BUTLER TONOPAH MINING CO. v. WEST END CONSOLIDATED MINING CO.

(Argued March 26 and 27, 1918. Decided June 10, 1918.)

No. 249.

1. MINES AND MINERALS ⟸31(2)—LOCATION —EXTRALATERAL RIGHTS—LINES.
While, under Rev. St. §§ 2320, 2322 (Comp. St. 1916, §§ 4615, 4618), end lines of a mine location must be parallel and straight to entitle the locator to extralateral rights, that is not true with the side lines, and they may be converging or diverging, so long as their general course is along the vein, and the statutory restriction on the width of claims is respected.

2. MINES AND MINERALS ⟸31(2) — EXTRALATERAL RIGHTS—"END LINES."
Where a mining claim was in the form of a parallelogram, except for the exclusion of triangular pieces at opposite corners, the remainder of what would have been the end lines, which were parallel and straight, must be deemed the end lines for the purpose of asserting extralateral rights, under Rev. St. § 2322 (Comp. St. 1916, § 4618), and the interior line of the excluded triangle, which ran diagonally to the end lines, should be deemed part of the side lines.

[Ed. Note.—For other definitions, see Words and Phrases, End Line.]

3. MINES AND MINERALS ⟸31(1) — EXTRALATERAL RIGHTS—OPPOSITE DIRECTIONS.
Under Rev. St. § 2322 (Comp. St. 1916, § 4618), limiting extralateral rights to the part of a vein between vertical planes drawn downward through the end lines continued in their own direction, extralateral rights in a vein apexing within a claim may be asserted beyond either or both side lines, depending on the direction which the departing vein or veins take in their downward course.

4. MINES AND MINERALS ⟸31(1) — EXTRALATERAL RIGHTS—"APEX."
The juncture of two dipping limbs of a fissure vein must be deemed the apex of the vein, within Rev. St. § 2322 (Comp. St. 1916, § 4618) giving extralateral rights as to veins the apexes of which are within the surface lines of the located claim, where at the juncture point the ore body extended upward from 20 or 30 to more than 100 feet.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Apex.]

In Error to the Supreme Court of the State of Nevada.

Action by the Jim Butler Tonopah Mining Company against the West End Consolidated Mining Company. A judgment for defendant was affirmed by the Supreme Court of Nevada (39 Nev. 375, 158 Pac. 876), and plaintiff brings error. Affirmed.

Messrs. Curtis H. Lindley, of San Francisco, Cal., and Hugh H. Brown, of Tonopah, Nev., for plaintiff in error.

Messrs. W. H. Dickson, of Salt Lake City, Utah, S. S. Downer, of Reno, Nev., A. C. Ellis, Jr., of Salt Lake City, Utah, Peck, Bunker & Cole, of Oakland, Cal., and H. H. Atkinson, of Tonopah, Nev., for defendant in error.

* Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit by the owner of two lode mining claims, the Eureka and the Curtis, to enjoin the owner of an adjoining lode claim, the West End, from exercising an asserted extralateral right in respect of a vein extending beneath the surface from the latter claim into the others. All the claims are patented and their ownership is conceded. The Eureka adjoins the West End on the south and the Curtis lies immediately south of the Eureka. The state courts, both trial and appellate, upheld the defendant's asserted right to follow the vein extralaterally (39 Nev. 375, 158 Pac. 876), and the plaintiff seeks a reversal of that decision on the theory that it is in contravention of the mining laws of Congress, in that (a) the end lines of the West End claim are not parallel and straight, and therefore an essential element of the right to follow the vein extralaterally is wanting; (b) this right can be exercised only in one direction, that is, beyond one side line, not

*453 both, and as the discovery vein[1] dips to the north the*right can be exercised only in that direction; and (c) the facts specially found do not show that the top or apex of the vein is within the vertical limits of the West End claim.

[1, 2] For present purposes the West End claim may be described as having the form of a parallelogram 1,500 feet in length from east to west and 600 feet in width from north to south, but with a small portion of the northeast corner cut off by a diagonal line and a somewhat larger portion of the southwest corner similarly cut off. See diagram, 39 Nev. 375, 158 Pac. 876. Thus what would be the end lines of the parallelogram, if it were complete, are substantially shortened, but the major part of each remains. These shortened lines are not only parallel, but straight. Are they the end lines of the claim in the sense of the statute? Or do its end lines consist of the shortened lines and the diagonal lines? End lines in the sense of the statute are those which are laid across the vein to show how much of it, in point of length, is appropriated and claimed by the miner. All other lines are side lines. True, the end lines must be both parallel and straight. Rev. Stat. §§ 2320, 2322 (Comp. St. 1916, §§ 4615, 4618); Walrath v. Champion Mining Co., 171 U. S. 293, 311, 18 Sup. Ct. 909, 43 L. Ed. 170. But it is not so with the side lines. They may have angles and elbows and be converging or diverging, so long as their general course is along the vein and the statutory restriction on the width of claims is respected. Del Monte Mining Co. v. Last Chance Mining Co., 171 U. S. 55, 84, 18 Sup. Ct. 895, 43 L. Ed. 72. Applying these tests to the bounding lines of the West End claim, we regard it as plain that the diagonal lines at the two corners are part of its side lines, and not of its end lines. In this respect the case is like Walrath v. Champion Mining Co., supra, where in determining what was the northerly end line of the Providence claim (see diagram, 171 U. S. 298, 18 Sup. Ct. 909, 43 L. Ed. 170), the line *g*, *h*, was held to be the true end line and the diagonal line *f*, *g*, to be no part of it. Thus the objection that*the end lines of the West End claim are not parallel and straight is untenable.

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[3] What in mining cases is termed the extralateral right is a creation of the mining laws of Congress, and to learn what it is we must look to them rather than to some system of law to which it is a stranger. Besides, as Congress has plenary power over the disposal of the mineral-bearing public lands, it rests with it to say to what extent, if at all, the right to pursue veins on their downward course into the earth shall pass to and be reserved for those to whom it grants possessory or other titles in such lands. What it has said is this (Rev. Stat. § 2322 [Comp. St. 1916, § 4618]):

"The locators of all mining locations * * * on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

It will be seen that the extralateral right so created is subject to three limitations. One conditions it on the presence of the top or apex inside the boundaries of the claim. Another restricts it to the dip or course downward, and so excludes the strike or onward course along the top or apex. And the last confines it to such outside parts as lie between the end lines continued outwardly in their own*direction and extended vertically downward. But otherwise it is without limitation or exception and broadly includes "all veins, lodes and ledges throughout their entire depth"—one as much as another, and all whether they depart through one side line or the other. Given two veins which in their descent pass, one through one side line and the other through the other side line, how could it be held that the right applies to one vein and not to the other, when the statute says "all veins * * * throughout their entire depth"? By what rule would a court be guided in making a selection between the two when the statute makes none? And where a single vein in its descent separates into two limbs which depart through the opposite side lines, on what theory could the right be sustained as to one limb and rejected as to the other? The terms of the statute, as we think, do not lend themselves to any such distinctions, but, on the contrary, show that none such is intended.

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In Mining Co. v. Tarbet, 98 U. S. 463, 467 (25 L. Ed. 253), this court in pointing out the intent of the statute said that "the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally." And in Del Monte Mining Co. v. Last Chance Mining Co., 171 U. S. 55, 88, 18 Sup. Ct. 895, 908 (43 L. Ed. 72), a case in which the statute was much considered, it was said:

"Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is

[1] The discovery was on the northerly limb hereinafter described.

entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, 'although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' In other words, given a vein whose apex is within his surface limits he can pursue that vein as far as he pleases in its downward course outside the vertical side lines."

And again (171 U. S. 89, 18 Sup. Ct. 908, 43 L. Ed. 72):

"The locator is given a right to pursue any vein, whose apex is within his surface limits, on its dip outside the vertical side lines, but may not in such pursuit go beyond the vertical end lines."

In Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U. S. 499, at page 508, 21 Sup. Ct. 885, 890 (45 L. Ed. 1200), it was added:

"There are no exceptions to its language. The locators 'of any mineral veins, lode or ledge' are given not only 'an exclusive right of possession and enjoyment' of all the surface included within the lines of their locations, but 'of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically.' A locator therefore is not confined to the vein upon which he based his location and upon which the discovery was made."

And also (182 U. S. 509, 21 Sup. Ct. 890, 45 L. Ed. 1200):

"Blind veins are not excepted, and we cannot except them. They are included in the description 'all veins' and belong to the surface location."

We conclude therefore that, when the other elements of the extralateral right are present, it may be exercised beyond either or both side lines depending on the direction which the departing vein or veins take in their downward course.

[4] So much of the special finding as bears on the character of the vein and the presence of its top or apex inside the vertical lines of the West End claim is as follows:

"The said vein does not on its upward course, or at its top or apex, outcrop or reach the present surface, but is covered or buried to a considerable depth by lava, locally known as and called 'midway' andesite, which, after the formation of the vein, flowed over the then surface of the territory in which the vein exists; that at and for a distance of 360 feet westerly from where said vein or lode crosses the easterly end line of said West End claim, which crossing is at a distance of 135 feet northerly from the southeast corner of said West End claim, there is a juncture or union between two limbs or sides of said vein, and from the summit of said juncture or union the downward course of one limb or side thereof is in a northerly direction, and the downward course of the other limb or side thereof is in a southerly direction; that there is a continuation upward from the summit of said juncture or union of said northerly and southerly dipping limbs or sides of said vein of ore and silver-bearing quartz or rock in place for a distance from 20 or 30 to more than 100 feet, and to what was the surface before the same was buried beneath the said lava flow; that such ore and silver-bearing quartz were deposited where the same are now found at the same time and during the same period that the main vein below was created, and from mineral-bearing solutions having the same source; that the dip is fairly conformable, and the strike or course of such upward continuation of ore and silver-bearing quartz is conformable, to the dip and strike or course of said northerly-dipping limb or side of said vein from the summit of said juncture downward, and the court finds that said upward continuation is a part of said vein or lode; that thence westerly, and for a distance of 360 feet, the northerly and southerly dipping limbs, sides, or slopes of said vein do not unite or form a union or juncture in their upward course, but for that distance each of said limbs or sides has a separate and independent top or apex; that thence westerly, for a distance of 40 feet, the northerly and southerly dipping limbs, sides, or slopes of said vein are again found in conjunction, as in the said most easterly 360 feet; that thence westerly, and until said northerly and southerly dipping limbs, sides, or slopes of said vein intersect with and cross said northerly side line of said mining claim, they do not unite or form a union or juncture in their upward course, but for that distance [2] each of said limbs or sides has a separate and independent top or apex; that between said distance of 40 feet, where said northerly and southerly dipping limbs, sides, or slopes of said vein, as aforesaid, unite or form a union or juncture in their course upward, and said points on said northerly side line of said mining claim where, as aforesaid, said contra-dipping limbs, sides or slopes of said vein respectively intersect said side line and cross the same and so depart from said mining claim, there are two points at which it appears that said contra-dipping limbs, sides or slopes of said vein on their upward course approach closely to a juncture or union, but as to said contra-dipping limbs, sides, or slopes of said vein at said two points actually forming a juncture or union on their upward course, the evidence is meager and unsatisfactory; that the point where the said northerly dipping limb or side of said vein departs from the said mining claim through the northerly side line thereof is 1,120 feet westerly from the northeast corner of said claim, measured along the northerly side line thereof; that the point where said southerly dipping limb or side of said vein departs from said mining claim through the northerly side line thereof is 1,142½ feet westerly from the northeast corner of said claim, measured along the northerly side line thereof; that throughout said distance of 40 feet, where the contra-dipping limbs or sides of said vein are found in conjunction, as hereinbefore stated, there is a continuation upward from the summit of the juncture or union of said two limbs or sides of said vein of ore or vein quartz to what was the surface before the same was covered by the lava flow; that the dip or downward course of both the northerly and southerly dipping sides or limbs of the vein where the two are found in conjunction, as aforesaid, and also in the places where each, as aforesaid, has its separate and independent top or apex, is regular and practically free from undulations; that the said southerly dipping limb or side of the vein in the easterly portion of the West End claim, that is to say, the easterly 360 feet thereof, has been developed from the top or summit of said juncture of said contra-dipping limbs to and beyond the southerly side line of said claim, or for a distance, measured on the slope or downward course of said southerly dipping limb or side, of 800 feet or thereabouts, the average dip there being 17 degrees from the horizontal; that the westerly portion, that is to say, the westerly 300 feet of said southerly dipping limb or side of said vein found in the West End claim, has been developed from its top to and beyond the southerly side line of said claim, or for a distance, measured on its slope

[2] Approaching 400 feet.

or downward course, of 1,000 feet or thereabouts, the average dip there being 30 degrees from the horizontal; that the average dip of said northerly dipping limb or side of said vein, so far as the same has been developed in its downward course, is 17 degrees from the horizontal; that said vein is a fissure vein; that there is a difference in the strikes or courses of said northerly and southerly dipping limbs of said vein of about 40 degrees; that at said places and throughout said distances, where said contra-dipping limbs of said vein are found to intersect and form a juncture, as aforesaid, there has been a mingling of the mineralizations of said two limbs of said vein within the angle beneath the juncture of the said two limbs; that at such places and throughout said distances the footwall of said two limbs of said vein, within the angle beneath their said juncture, by the process of replacement has been converted into mineralized quartz for considerable distances below said juncture, said replacement quartz extending from limb to limb."

Giving due effect to the finding, it is manifest that the vein in controversy is not a flat or horizontal vein or one which would be practically horizontal but for a succession of rolls or waves in its elevation. On the contrary, it is shown to be a fissure vein with two dipping limbs whose course downward is substantial, regular and practically free from undulations. For 750 feet out of its total length of 1,150 feet within the West End claim each limb is practically a separate vein with a distinct summit or terminal edge. For the remaining 400 feet the two limbs are united and from the point of union the mineralized quartz or rock continues upward for from 20 or 30 to more than 100 feet, and this seems to answer all the calls of a summit or terminal edge. In these circumstances we hardly would be warranted in saying as matter of law that the vein has no top or apex within the claim in the sense of the statute. See Stewart Mining Co. v. Ontario Mining Co., 237 U. S. 350, 35 Sup. Ct. 610, 59 L. Ed. 989.

It is well to remember, as this court has indicated in other mining cases, that to take from the discoverer a portion of that which he has discovered and give it to one who may have been led to make an adjoining location by a knowledge of the discovery is unreasonable.

The contention is not that the top or apex of this vein has been found elsewhere, but only that what is found in the West End claim is not such in the sense of the statute. "The law," as has been truly said, "assumes that the lode has a top, or apex, and provides for the acquisition of title by location upon this apex." Probably this assumption could not be indulged where the fact appeared to be otherwise, but it serves to show that the absence of a top or apex ought not to be adjudged in the presence of such a finding as we have here.

Judgment affirmed.

MEMORANDUM DECISIONS

Disposed of at October Term, 1917

No. —, Original. Ex parte In the matter of Hyman L. SIGELSCHIFFER, petitioner. April 1, 1918. See, also, 248 Fed. 226. Motion for leave to file petition for a writ of mandamus denied.

No. 175. Lucy O. AYRES, executrix, etc., petitioner, v. Benjamin F. GRAHAM et al. May 20, 1918. For opinion below, see 224 Fed. 1019, 139 C. C. A. 662. Mr. E. F. Thompson, of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit dismissed for the want of prosecution.

No. 970. Julian H. EVRARD, claimant, etc., petitioner, v. Eugene HIGGINS. May 20, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 976. William SCHALL, Jr., et al., petitioners, v. Frederick CAMORS et al., trustees, etc. May 20, 1918. For opinion below, see 250 Fed. 6. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted.

No. 988. CAMP BIRD, Limited, petitioner, v. Frank W. HOWBERT, as collector of internal revenue, etc. May 20, 1918. For opinion below, see 249 Fed. 27. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

No. 990. CHICAGO & NORTHWESTERN RAILWAY COMPANY, petitioner, v. F. E. CURTICE. May 20, 1918. For opinion below, see 166 N. W. 444. Petition for a writ of certiorari to the Supreme Court of the State of Wisconsin denied.

No. 1007. Joseph L. LACKNEY, administrator, etc., petitioner, v. John S. MILLER et al. May 20, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 1010. Minnie A. RANKIN et al., petitioners, v. Charles Frederick GRAFF et al. May 20, 1918. For opinion below, see 250 Fed. 150. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 1054. William C. SANDBERG, plaintiff in error, v. The UNITED STATES;
No. 1055. George E. LEUSER, plaintiff in error, v. The UNITED STATES;
No. 1056. Axel C. MATTSON, plaintiff in error, v. The UNITED STATES;
No. 1057. Ben ANDERSON, plaintiff in error, v. The UNITED STATES; and
No. 1058. Alfred TIALA, plaintiff in error, v. The UNITED STATES. May 20, 1918. In error to the District Court of the United States for the District of Minnesota. Mr. Solicitor General Davis, of Washington, D. C., for the United States. Docketed and dismissed and mandates granted, on motion of Mr. Solicitor General Davis for the defendant in error.

No. 5. ATLANTIC, GULF & PACIFIC COMPANY, appellant, v. The UNITED STATES; and
No. 6. The UNITED STATES of America, appellant, v. ATLANTIC, GULF & PACIFIC COMPANY. June 3, 1918. Appeals from the Court of Claims. Mr. George A. King, of Washington, D. C., for appellant. The Attorney General, for the United States.

PER CURIAM: Judgment affirmed with costs by an equally divided court.

Mr. Justice McREYNOLDS took no part in the consideration and decision of these cases.

No. 155. MOTION PICTURE PATENTS COMPANY et al., appellants, v. The UNITED STATES. June 3, 1918. Appeal from the District Court of the United States for the Eastern District of Pennsylvania. For opinion below, see 225 Fed. 800. See, also, 230 Fed. 541. Messrs. R. O. Moon, of Philadelphia, Pa., Charles F. Kingsley and Samuel Owen Edmonds, both of New York City, Melville Church, of Washington, D. C., and Frederic R. Coudert, and Howard Thayer Kingsbury, both of New York City, for appellants. The Attorney General, for the United States. Dismissed per stipulation, on motion of Mr. Alexander S. Steuart in behalf of counsel.

No. 336. LEW YOU, appellant, v. Edward WHITE, Commissioner of Immigration etc. June 3, 1918. Appeal from the District Court of the United States for the Northern District of California. Mr. Jackson H. Ralston, of Washington, D. C., for appellant. Dismissed with costs pursuant to the tenth rule (32 Sup. Ct. viii).

No. 462. Thomas D. PALMER, as administrator, etc., plaintiff in error, v. WICHITA FALLS & NORTHWESTERN RAILWAY COMPANY et al. June 3, 1918. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 159 Pac. 1115. Mr. Charles A. Loomis, of Kansas City, Mo., for plaintiff in error. Dismissed with costs pursuant to the tenth rule (32 Sup. Ct. viii).

No. 479. George D. FARWELL et al., plaintiffs in error, v. The CITY OF SEATTLE. June 3, 1918. In error to the Supreme Court of the State of Washington. For opinion below, see 87 Wash. 218, 151 Pac. 506. Mr. Charles E. Shepard, of Seattle, Wash., for plaintiffs in error. Dismissed with costs pursuant to the tenth rule (32 Sup. Ct. viii).

No. 648. The NATIONAL CITY BANK OF CHICAGO, plaintiff in error, v. Mrs. Georgia S. BARRINGER. June 3, 1918. In error to the Court of Appeals of the Second Circuit, State of Louisiana. Dismissed with costs pursuant to the tenth rule (32 Sup. Ct. viii).

No. 763. J. A. GATES et al., appellants, v. W. O. BERRYHILL, as tax collector, etc. June 3, 1918. Appeal from the District Court of the United States for the Southern District of Florida. Dismissed with costs, on motion of counsel for the appellants.

No. 780. William SMITH and Elizabeth Smith, plaintiffs in error v. THOMAS ELEVATOR COMPANY et al. June 3, 1918. In error to the Supreme Court of the State of Illinois. For opinion below, see 278 Ill. 328, 116 N. E. 113, L. R. A. 1917E, 721. Dismissed with costs pursuant to the tenth rule (32 Sup. Ct. viii).

No. 813. Donald STEPHENS, plaintiff in error, v. The UNITED STATES of America. June 3, 1918. In error to the District Court of the United States for the District of Delaware. For opinion below, see 245 Fed. 956. Mr. Henry Budd, of Philadelphia, Pa., for plaintiff in error. Mr. John W. Davis, Sol. Gen., of Washington, D. C., for the United States.

PER CURIAM: Judgment affirmed upon the authority of Selective Draft Law Cases, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. —; Yanyar v. United States (decided March 11, 1918), 246 U. S. 649, 38 Sup. Ct. 332, 62 L. Ed. —.

No. 841. Nora HERLIHY, administratrix, etc., plaintiff in error, v. NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY. June 3, 1918. In error to the Superior Court of the State of Massachusetts. For opinion below, see 227 Mass. 168, 116 N. E. 546. Dismissed with costs pursuant to the tenth rule (32 Sup. Ct. viii).

No. 920. Ben J. TILLAR, petitioner, v. COLE MOTOR CAR COMPANY. June 3, 1918. For opinion below, see 246 Fed. 831. Messrs. M. M. Crane, of Dallas, Tex., and A. J. Clendenen, of Ft. Worth, Tex., for petitioner. Messrs. Francis Marion Etheridge and Joseph Manson McCormick, both of Dallas, Tex., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 973. ATLANTIC COAST LINE RAILROAD COMPANY, petitioner, v. W. M. STEELE. June 3, 1918. For opinion below, see 95 S. E. 180. Messrs. P. A. Willcox, of Florence, S. C., F. D. McKenney, of Washington, D. C., and H. E. Davis and F. L. Willcox, both of Florence, S. C., for petitioner. Messrs. J. W. Ragsdale, of Florence, S. C., and R. E. Whitney for respondent. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina denied.

No. 985. POSTAL TELEGRAPH-CABLE COMPANY, petitioner, v. WARREN-GODWIN LUMBER COMPANY. June 3, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Missouri granted.

No. 986. PENNSYLVANIA RAILROAD COMPANY, petitioner, v. Minnie ROSENFELD. June 3, 1918. For opinion below, see 249 Fed. 964. Messrs. Burlingham, Montgomery & Beecher, of New York City, for petitioner. Messrs. Otto A. Samuels, of New York City, and Wm. J. Hughes, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 989. Harry Wronkow KEATLEY, petitioner, v. UNITED STATES TRUST COMPANY et al. June 3, 1918. For opinion below, see 249 Fed. 296. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

No. 991. B. S. PARKER et al., petitioners, v. The STATE OF ARKANSAS ex rel. Miles THOMPSON. June 3, 1918. For opinion below, see 200 S. W. 1014. Messrs. Julian C. Wilson and Walter P. Armstrong, both of Memphis, Tenn., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied.

No. 1001. C. L. WOOD, as trustee, etc., petitioner, v. KIRK BROTHERS et al. June 3, 1918. For opinion below, see 248 Fed. 246. Mr. Allan D. Cole, of Maysville, Ky. (Mr. H. W. Cole, of Maysville, Ky., of counsel), for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 1005. John A. JESSON et al., petitioners, v. F. G. NOYES, as receiver, etc. June 3, 1918. For opinion below, see 245 Fed. 46, 157 C. C. A. 342. Messrs. W. H. Metson, Curtis Hillyer, and Metson, Drew & Mackenzie, all of San Francisco, Cal., for petitioners. Mr. Orion L. Rider, of Vinita, Okl., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 1006. R. C. WOOD, petitioner, v. F. G. NOYES, as receiver, etc. June 3, 1918. For opinion below, see 245 Fed. 742, 158 C. C. A. 144. Messrs. W. H. Metson and Curtis Hillyer, both of San Francisco, Cal., John L. McGinn, of Fairbanks, Alaska, and Metson, Drew & Mackenzie, of San Francisco, Cal., for petitioner. Mr. Orion L. Rider, of Vinita, Okl., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 1013. The FIRST NATIONAL BANK OF SAN FRANCISCO et al., petitioners, v. DETROIT TRUST COMPANY et al. June 3, 1918. For opinion below, see 248 Fed. 16. Messrs. E. C. Hughes, of Seattle, Wash., John C. Hogan, of Aberdeen, Wash., and O. K. Cushing and Charles S. Cushing, both of San Francisco, Cal. (Mr. Jackson H. Ralston, of Washington, D. C., of counsel), for petitioners. Messrs. W. Lair Thompson and Earl C. Bronaugh, both of Portland, Or., and Theo. B. Bruener and J. B. Bridges, both of Aberdeen, Wash., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 1019. W. S. RAYDURE, petitioner, v. John W. LINDLEY et al. June 3, 1918. For opinion below, see 249 Fed. 675. Messrs. Frank A. Baldwin, of Bowling Green, Ohio, and Hugh Riddell, of Irvine, Ky. (Mr. Edward C. O'Rear, of Frankfort, Ky., of counsel), for petitioner. Messrs. A. R. Burnam, Jr., of Richmond, Ky., and R. W. Smith, of Irvine, Ky., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 1020. Thomas TIPTON, petitioner, v. John W. LINDLEY et al. June 3, 1918. For opinion below, see 249 Fed. 675. Messrs. Frank A. Baldwin, of Bowling Green, Ohio, and Hugh Riddell, of Irvine, Ky. (Mr. Edward C. O'Rear, of Frankfort, Ky., of counsel), for petitioner. Messrs. A. R. Burnam, Jr., of Richmond, Ky., and R. W. Smith, of Irvine, Ky., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 1021. The EQUITABLE TRUST COMPANY OF NEW YORK, as sole trustee, etc., et al., petitioners, v. GREAT SHOSHONE & TWIN FALLS WATER POWER COMPANY et al. June 3, 1918. For opinion below, see 245 Fed. 697, 158 C. C. A. 99, which is affirmed in 249 Fed. 967. Messrs. Murray, Prentice & Howland and James H. Richards, all of New York City, Oliver O. Haga, J. L. Eberle and Wyman & Wyman, all of Boise, Idaho, and Henry H. Pierce, of New York City, for petitioners. Messrs. T. A. Walters, Paris Martin and William E. Cameron, all of Boise, Idaho, for respondents Plumer and Scull. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 1025. SUN COMPANY, petitioner, v. D. W. RYAN TOWBOAT COMPANY et al. June 3, 1918. Messrs. John F. Lewis and Lewis, Adler & Laws, all of Philadelphia, Pa., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 1027. D. W. RYAN TOWBOAT COMPANY, Inc., Claimant, etc., petitioner, v. BOWERS SOUTHERN DREDGING COMPANY et al. June 3, 1918. For opinion below, see The Mary B. Curtis, 250 Fed. 9. Mr. John Charles Harris, of Galveston, Tex., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 1030. Cornelius O'SULLIVAN, petitioner, v. The UNITED STATES of America. June 3, 1918. For opinion below, see 249 Fed. 935. Mr. E. S. B. Sutton, of Sault Ste. Marie, Mich. (Messrs. Larmonth & Goetz, of Sault Ste. Marie, Mich., of counsel), for petitioner. Mr. John W. Davis, Sol. Gen., of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 1031. CHICAGO HOUSE WRECKING COMPANY, petitioner, v. WEST INDIA STEAMSHIP COMPANY. June 3, 1918. For opinion below, see 249 Fed. 338. Mr. Henry B. Gayley, of New York City, for petitioner. Mr. Ralph James M. Bullowa, of New York City (Mr. Ferdinand E. M. Bulowa, of New York City, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 1034. SUN COMPANY et al., petitioners, v. VINTON PETROLEUM COMPANY. June 3, 1918. For opinion below, see 248 Fed. 623. Messrs. T. L. Foster, of Beaumont, Tex., Francis S. McIlhenny, of Philadelphia, Pa., and Victor Lamar Smith and Alexander W. Smith, both of Atlanta, Ga., for petitioners. Mr. William D. Gordon, of Beaumont, Tex. (Messrs. Henry G. Russell, of Beaumont, Tex., George E. Holland, of Orange, Tex., and Arsene P. Pujo, of New Orleans, La., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 1039. The UNION PACIFIC COAL COMPANY, petitioner, v. Mark A. SKINNER, collector of internal revenue, etc. June 3, 1918. For opinion below, see 249 Fed. 152. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

No. 1040. AJAX RAIL ANCHOR COMPANY, petitioner, v. The P and M COMPANY. June 3, 1918. For opinion below, see 249 Fed. 215. Messrs. Thomas F. Sheridan, of Chicago, Ill., Frederic D. McKenney, of Washington, D. C., and Glen E. Smith, of Chicago, Ill., for petitioner. Messrs. Edward Rector and Frank Parker Davis, both of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 1041. COMPAGNIE GENERALE TRANSATLANTIQUE, Owner and Claimant, etc., petitioner, v. A. J. AND J. J. McCOLLUM, Inc., et al. June 3, 1918. For opinion below, see The Californie, 250 Fed. 790. Mr. Joseph P. Nolan, of New York City, for petitioner. Messrs. Hyland & Zabriskie, of New York City, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 17. The UNITED STATES of America, appellant, v. LEHIGH VALLEY RAILROAD COMPANY et al.;

No. 37. The BUCKEYE POWDER COMPANY, plaintiff in error, v. E. I. DU PONT DE NEMOURS POWDER COMPANY et al.;

No. 68. The UNITED STATES of America, appellant, v. READING COMPANY et al.; and

No. 80. READING COMPANY et al., appellants, v. The UNITED STATES of America. June 10, 1918. The Attorney General, for the United States. Messrs. John G. Johnson, of Oneonta, N. Y., Edgar H. Boles, of New York City, Everett Warren, of Scranton, Pa., John Hampton Barnes, of Philadelphia, Pa., Allan McCulloh and Elihu Root, Jr., both of New York City, Frank W. Wheaton, of Wilkes-Barre, Pa., and Nicholas W. Hacker, of New York City, for Lehigh Valley R. Co. Mr. Twyman O. Abbott, of New York City, for Buckeye Powder Co. Messrs. Frank S. Katzenbach, Jr., of Trenton, N. J., and William H. Button, of New York City, for E. I. du Pont de Nemours Powder Co. Messrs. Henry S. Drinker, Jr., Charles Heebner, and Abraham M. Butler, all of Philadelphia, Pa., William J. Turner and

Jackson E. Reynolds, both of New York City, and John J. Beattie, of Warwick, N. Y., for Reading Co. Ordered that these cases be restored to the docket for reargument.

No. 190. Sernetta J. McCOY et al., executors, etc., plaintiffs in error, v. The UNION ELEVATED RAILROAD COMPANY et al. June 10, 1918. See, also, 247 U. S. 354, 38 Sup. Ct. 504, 62 L. Ed. —. Messrs. John S. Miller and Harry S. Mecartney, both of Chicago, Ill., for plaintiffs in error. Mr. Addison L. Gardner, of Chicago, Ill., for defendants in error. Leave granted to present a petition for rehearing within thirty days, on motion of Mr. William C. Sullivan in behalf of counsel for the plaintiffs in error.

No. 207. The UNITED STATES, appellant, v. UNITED SHOE MACHINERY COMPANY OF NEW JERSEY et al. June 10, 1918. See, also, 247 U. S. 32, 38 S. Ct. 473, 62 L. Ed. —. Mr. Solicitor General Davis, of Washington, D. C., for the United States. Mr. Charles F. Choate, Jr., of Boston, Mass., for respondents. Leave granted to present a petition for rehearing within thirty days on motion of Mr. Solicitor General Davis for the appellant.

No. 371. The TOLEDO NEWSPAPER COMPANY et al., plaintiffs in error, v. The UNITED STATES of America. June 10, 1918. See, also, 247 U. S. 402 38 Sup. Ct. 560, 62 L. Ed. —. Messrs. Joseph S. Graydon and Lawrence Maxwell, both of Cincinnati, Ohio, for plaintiffs in error. The Attorney General, for the United States. Leave granted to present a petition for rehearing within thirty days on motion of Mr. Joseph S. Graydon for the plaintiffs in error.

No. 514. Marcel AKALITIS, petitioner, v. PHILADELPHIA & READING COAL & IRON COMPANY. June 10, 1918. For opinion below, see 239 Fed. 299, 152 C. C. A. 287. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 704. W. C. HAMMER, United States attorney, etc., appellant, v. Roland H. DAGENHART et al. June 10, 1918. See, also, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. —. Mr. John W. Davis, Sol. Gen., of Washington, D. C., Mr. W. L. Frierson, Asst. Atty. Gen., and Mr. Robert Szold, of Chicago, Ill., for appellant. Messrs. Morgan J. O'Brien, of New York City, Clement Manly, of Winston-Salem, N. C., W. P. Bynum, of Greensboro, N. C., Junius Parker, of New York City, and W. M. Hendren, of Winston-Salem, N. C., for appellees. Leave granted to present a petition for rehearing within thirty days, on motion of Mr. Solicitor General Davis for the appellant.

No. 1003. BUTTE & SUPERIOR COPPER COMPANY, Limited, petitioner, v. CLARK-MONTANA REALTY COMPANY et al. June 10, 1918. For opinion below, see 248 Fed. 609. Messrs. W. H. Dickson, of Salt Lake City, Utah, J. Bruce Kremer, of Butte, Mont., and Wm. Scallon, of Helena, Mont., for petitioner. Messrs. John P. Gray, of Coeur D'Alene, Idaho, and W. A. Clark, Jr., and John L. Templeman, both of Butte, Mont., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 1008. The THOMAS MANUFACTURING COMPANY, petitioner, v. The AEOLIAN COMPANY. June 10, 1918. Mr. Howard S. Smith, of Dayton, Ohio, for petitioner. Mr. James L. Norris, of Washington, D. C., for respondent. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

No. 1026. Margaret Corwin Radcliffe GOOCH, petitioner, v. Annie Wayne SUHOR et al. June 10, 1918. For opinion below, see 244 Fed. 361, 156 C. C. A. 647. Messrs. Edward P. Buford, of Lawrenceville, Va., and John Spalding Flannery and Frederic D. McKenney, both of Washington, D. C., for petitioner. Messrs. H. M. Smith, Jr., and S. S. P. Patteson, both of Richmond, Va., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

No. 1029. The PENNSYLVANIA RAILROAD COMPANY, petitioner, v. Alice Frances BROWN et al. June 10, 1918. Mr. Frederic D. McKenney, of Washington, D. C., for petitioner. Motion for an order staying proceedings in lower court submitted by Mr. Frederic D. McKenney for the petitioners, and motion denied without prejudice.

No. 1033. AMERICAN TRADING COMPANY (Pacific Coast), petitioner, v. NORTH ALASKA SALMON COMPANY. June 10, 1918. For opinion below, see 248 Fed. 665. Mr. Samuel Knight, of San Francisco, Cal., for petitioner. Messrs. Wise & O'Connor and Otto Irving Wise, all of San Francisco, Cal. (Walter D. Mansfield, of San Francisco, Cal., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 1038. WESTERN UNION TELEGRAPH COMPANY, petitioner, v. DETROIT, TOLEDO & IRONTON RAILROAD COMPANY. June 10, 1918. For opinion below, see 200 Mich. 2, 166 N. W. 494. Messrs. John B. Corliss and Paul B. Moody, both of Detroit, Mich., for petitioner. Messrs. Elliott G. Stevenson and William L. Carpenter, both of Detroit, Mich., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied.

No. 1042. WELLS FARGO & COMPANY, petitioner, v. Oscar G. TAYLOR. June 10, 1918. For opinion below, see 249 Fed. 109. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted.

No. 1049. E. KIRBY-SMITH, petitioner, v. John O. SHEATZ, receiver, etc. June 10, 1918. For opinion below, see Sheatz v. Markley, 249 Fed. 315. Messrs. Fred H. Atwood, of Chicago, Ill., and Henry J. Scott, of Philadelphia, Pa., for petitioner. Messrs. Owen J. Roberts and Harry Reiss Axelroth, both of Philadelphia, Pa., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

No. 1050. LEE MOW LIN and Lee Bing, petitioners, v. The UNITED STATES of America. June 10, 1918. For opinion below, see

250 Fed. 694. Mr. Chester H. Krum, of St. Louis, Mo., for petitioners. Mr. Solicitor General Davis, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 1051. SOUTHERN RAILWAY COMPANY, petitioner, v. John C. WEBB, individually and for the use of Queen Insurance Company and London & Lancashire Insurance Company. June 10, 1918. For opinion below, see 248 Fed. 618 and 235 Fed. 578. Messrs. J. T. Stokely, of Birmingham, Ala., and E. W. Pettus, of Selma, Ala., for petitioner. Messrs. Alex C. King, of Atlanta, Ga., Hugh Mallory, of Selma, Ala., and A. M. Garber, of Birmingham, Ala., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 1052. O. T. PEEPLES, trustee, etc., petitioner, v. GEORGIA IRON & COAL COMPANY et al. June 10, 1918. For opinion below, see 248 Fed. 886. Messrs. S. M. Chambliss, of Chattanooga, Tenn., and O. R. Hood, of Gadsden, Ala., for petitioner. Messrs. Alex. C. King and Clifford L. Anderson, both of Atlanta, Ga., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 1059. REPUBLIC RUBBER COMPANY, petitioner, v. CONSOLIDATED RUBBER TIRE COMPANY et al. June 10, 1918. Messrs. George A. Chritton, William H. Dyrenforth, and Russell Wiles, all of Chicago, Ill., and Frances M. Phelps, of Washington, D. C. (Messrs. Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill., of counsel), for petitioner. Mr. Charles W. Stapleton, of New York City, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 1060. The CHESAPEAKE & OHIO RAILWAY COMPANY OF INDIANA, petitioner, v. NATIONAL BANK OF COMMERCE OF NORFOLK. June 10, 1918. For opinion below, see 95 S. E. 454. Messrs. David H. Leake and Walter Leake, both of Richmond, Va., for petitioner. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied.

No. 1061. Matthew T. CHAPMAN et al., petitioners, v. John A. WINTROATH. June 10, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted.

No. 1062. George T. CHARLTON and John L. Crone, local inspectors, etc., et al., petitioners, v. NEW YORK & PORTO RICO STEAMSHIP COMPANY. June 10, 1918. For opinion below, see The San Juan, 250 Fed. 93. Mr. Solicitor General Davis, of Washington, D. C., for petitioners. Mr. Roscoe H. Hupper, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 1064. SCHRAM GLASS MANUFACTURING COMPANY, petitioner, v. HOMER BROOKE GLASS COMPANY. June 10, 1918. For opinion below, see 249 Fed. 228. Messrs. James Love Hopkins, of St. Louis, Mo., and Russell Wiles and George A. Chritton, both of Chicago, Ill., for petitioner. Messrs. Charles Neave and William G. McKnight, both of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 1065. Frederick KRAFFT, petitioner, v. The UNITED STATES of America. June 10, 1918. For opinion below, see 249 Fed. 919. Mr. Walter Nelles, of New York City (Messrs. Henry Carless, of Newark, N. J., and Morris Hillquit, of New York City, of counsel), for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

No. 1066. SOUTHERN PACIFIC COMPANY, petitioner, v. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA et al. June 10, 1918. For opinion below, see 171 Pac. 1071. Petition for a writ of certiorari to the Supreme Court of the State of California granted.

No. 1067. Dud MOORE, petitioner, v. The UNITED STATES of America. June 10, 1918. Messrs. James C. Denton and Frank Lee, both of Muskogee, Okl., for petitioner. Mr. Solicitor General Davis, of Washington, D. C., and Mr. La Rue Brown, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 1081. PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY, petitioner, v. Alfred H. SMITH. June 10, 1918. Mr. Frederic D. McKenney, of Washington, D. C., for petitioner. Motion for an order staying proceedings in the lower court submitted by Mr. Frederic D. McKenney for the petitioner, and motion denied without prejudice.

No. 1082. Alexander GLADSTONE, alias William Vines, petitioner, v. The UNITED STATES of America. June 10, 1918. For opinion below, see 248 Fed. 117. Messrs. Benjamin L. McKinley, of San Francisco, Cal., and Frederick S. Tyler, of Washington, D. C., for petitioner. Mr. Solicitor General Davis, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 1083. Dan A. WARD and W. A. Greenwood, petitioners, v. Thomas W. MORGAN, Warden, etc. June 10, 1918. For opinion below, see 248 Fed. 691. Messrs. I. J. Ringolsky, M. L. Friedman and Harry L. Jacobs, all of Kansas City, Mo. (Edwin A. Krauthoff, of Washington, D. C., of counsel), for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. 1086. The B. F. GOODRICH COMPANY, petitioner, v. CONSOLIDATED RUBBER TIRE COMPANY et al. June 10, 1918.

Messrs. Charles Neave, of New York City, Samuel E. Hibben, of Chicago, Ill., and Clarence D. Kerr, of New York City, for petitioner. Mr. Chas. W. Stapleton, of New York City, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 1087. Charles A. HITCHCOCK, petitioner, v. Alfred G. SCATTERGOOD et al. June 10, 1918. For opinion below, see 249 Fed. 23. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

No. 1088. COAL & COKE RAILWAY COMPANY, petitioner, v. Oscar V. EWING. June 10, 1918. For opinion below, see 96 S. E. 73. Messrs. George E. Price, and Buckner Clay, both of Charleston, W. Va., for petitioner. Messrs. Edward M. Surber and Thomas A. Bledsoe, both of Charleston, W. Va., for respondent. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of West Virginia denied.

No. 1090. MIDLAND LINSEED PRODUCTS COMPANY, petitioner, v. THE Steamship "SATURNUS," her tackle, etc., et al. June 10, 1918. For opinion below, see The Saturnus, 250 Fed. 407. Mr. Herman S. Hertwig, of New York City, for petitioner. Mr. Chauncey I. Clark, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 1091. John W. ROBERTS, petitioner, v. The UNITED STATES of America. June 10, 1918. For opinion below, see 248 Fed. 873. Messrs. Benjamin L. McKinley, of San Francisco, Cal., and Frederick S. Tyler, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 1094. PHILADELPHIA & READING COAL & IRON COMPANY, petitioner, v. Carmine SACCRIPANTE. June 10, 1918. For opinion below, see 178 App. Div. 931, 165 N. Y. Supp. 1111. Messrs. Macklin, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel) for petitioner. Messrs. Samuel Seabury and William M. Seabury, both of New York City, for respondent. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

No. 1095. INTERNATIONAL PAPER COMPANY, petitioner, v. THE Schooner "GRACIE D. CHAMBERS," her tackle, etc., Florence G. Payne, claimant. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

No. 1096. ERIE RAILROAD COMPANY, petitioner, v. John DOWNS. June 10, 1918. For opinion below, see 250 Fed. 415. Mr. William C. Cannon, of New York City, for petitioner. Mr. Sydney A. Syme, of Mount Vernon, N. Y., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 1100. The UNITED STATES of America, petitioner, v. George W. HEIM. June 10, 1918. Mr. Solicitor General Davis, of Washington, D. C., for the United States. Mr. Matthew E. O'Brien, of Washington, D. C., for respondent. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

No. 1101. Logan BILLINGSLEY and Fred Billingsley, petitioners, v. The UNITED STATES of America. June 10, 1918. For opinion below, see 249 Fed. 331. Mr. Charles A. Spirk, of Seattle, Wash., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. —, Original. Ex parte in the matter of George O. KITZEROW, petitioner. June 3, 1918. Motion for leave to file petition for writ of mandamus denied.

END OF CASES IN VOL. 38

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